

Company Appeal (AT) (Insolvency) No. 371 of 2019

Synergy Property Development Service Pvt. Ltd. ...Appellant

Bellona Estate Developers Ltd. ...Respondent

For Respondent: - Ms. Surekha Raman and Mr. Dileep Poolakkot, Advocates.

28.08.2019— The Appellant- ‘Synergy Property Development Services Pvt. Ltd.’- (‘Operational Creditor’) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short) for initiation of the ‘Corporate Insolvency Resolution Process’ against ‘Bellona Estate Developers Limited’- (‘Corporate Debtor’) who committed default in making payment for the invoices raised from 1st March, 2014 to 1st September, 2014 to the extent of Rs. 1,57,70,825/-.

The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, by impugned order dated 22nd January, 2019 rejected the claim on the ground that the claim is barred by limitation.

2. Learned counsel appearing on behalf of the Appellant submits that the claim is not barred by limitation. The stand of the counsel for the Respondent is that it is barred by limitation.

3. It is submitted on behalf of the Respondent- ('Corporate Debtor') that the Demand Notice under Section 8(1) was issued on 24th May, 2017 to which the 'Corporate Debtor' replied on 5th June, 2017 disputing the debt.

4. The Adjudicating Authority having noticed the aforesaid fact and an e-mail sent by the Appellant ('Operational Creditor') dated 16th February, 2015, held that the invoices were issued in the year 2014 and the petition was filed on 22nd March, 2018 and, therefore, the claim is time barred.

5. In the present case, it is not in dispute that the Appellant- 'Operational Creditor' placed invoices between 1st March, 2014 to 1st September, 2014. The last date invoice bearing no. PRIL-46 was issued on 1st September, 2014 for Rs. 28,09,000/-.

6. The Demand Notice under Section 8(1) having been issued by the Appellant on 24th May, 2017, we hold that the claim was not barred by limitation. The Adjudicating Authority failed to calculate the period of three years which was to be calculated for ascertaining the date of cause of action i.e. the last date of Demand Notice dated 1st September, 2014. The Demand Notice was issued on 24th May, 2017 to which denial was

made by the ‘Corporate Debtor’ on 5th June, 2017. It was wrongly calculated on the basis of date of filing of application under Section 9.

7. This apart, the Adjudicating Authority failed to notice the amended agreement reached between the parties on 30th December, 2010 in terms of which the contract period was extended to February, 2015 and in such case also, it could not have been held to be a claim barred by limitation.

8. Learned counsel for the Respondent submitted that the ‘Corporate Debtor’ disputed the claim. However, such submission cannot be accepted in absence of any pre-existing dispute.

9. In **“Innoventive Industries Ltd. v. ICICI Bank and Anr.— (2018) 1 SCC 407”**, the Hon’ble Supreme Court while explaining the provisions of Section 9 observed and held:

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a

“claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services

10. It is evident that even if a claim is disputed, if the default is more than Rs. 1 lakh, the ‘Corporate Insolvency Resolution Process’ may be triggered by the ‘Corporate Debtor’ itself or a ‘Financial Creditor’ or ‘Operational Creditor’.

11. In the present case, even if the 'Corporate Debtor' has disputed certain claims, the claim of Rs. 28,09,000/- as raised by Invoice dated 1st September, 2014 is not under dispute, we hold that it is a fit case for initiation of 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'.

12. For the reasons aforesaid, we set aside the impugned order dated 22nd January, 2019 and remit the case to the Adjudicating Authority, Mumbai Bench, and direct it to admit the application under Section 9 preferred by the Appellant after notice to the Respondent- ('Corporate Debtor') so that the Respondent- ('Corporate Debtor') may get an opportunity to settle the matter prior to the admission of the application.

The appeal is allowed with aforesaid observations and direction. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member(Judicial)

(Kanthi Narahari)
Member(Technical)

Ar/g