

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Insolvency) No. 1094 of 2020

IN THE MATTER OF:

Sodexo India Services Pvt. Ltd.

...Appellant

Versus

Chemizol Additives Pvt. Ltd

...Respondent

Present:

**For Appellants: Mr. Gaurav Mitra, Mr. Y. P. Dandiwala,
Ms. Khooshnum R. Daviervala, Ms. Yazdi Jijina and
Mr. Saswat Pattnaik, Advocates.**

For Respondent:

ORDER
(Through Virtual Mode)

22.02.2021: Despite awaiting appearance of Respondent, nobody has turned up to enter appearance on its behalf. Earlier, it was noticed in order dated 3rd February, 2021 that the Track Consignment Report confirmed delivery of notice upon Respondent and appearance of Respondent was awaited. Since, Respondent has not joined the proceedings even today, we proceed to hear the Appeal in ex-parte.

2. After hearing Mr. Gaurav Mitra, Advocate representing the Appellant and having waded through the impugned order, we notice that the Application of Appellant – Operational Creditor filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short the 'I&B Code') has not been admitted or rejected by the Adjudicating Authority (National Company Law Appellate

Tribunal, Bengaluru Bench), in terms of order dated 8th June, 2020 impugned in this Appeal. The Adjudicating Authority has disposed of the Application directing the Respondent - Corporate Debtor, in the first instance, to make endeavours for resolution in respect of outstanding debt, failing which the Appellant would be at liberty to invoke arbitration clause contained in Agreement dated 14th December, 2015. This finding by the Adjudicating Authority is unique and being not in conformity with the provisions embodied in Section 9(5) of the I&B code, cannot be supported. Section 9(5) of the I&B Code, 2016 is reproduced herein below: -

“9(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.”

3. On a plain reading of this provision, it emerges that the Adjudicating Authority is required either to admit the Application, if the same is complete, there is no payment of the unpaid operational debt, the invoice or notice for payment has been delivered to the Corporate Debtor and no notice of dispute has been received by the Operational Creditor or there is no record of dispute in the information utility. The Adjudicating Authority may reject the Application, if the Application is incomplete or that the operational debt stands paid, or the Creditor has not delivered the invoice or notice for payment to Corporate Debtor

or that the notice of dispute has been received by the Operational Creditor, or there is a record of dispute forthcoming from the information utility. It is abundantly clear that the Adjudicating Authority has only two options, either to admit Application or to reject the same. No third option or course is postulated by law.

4. In the instant case, Mr. Gaurav Mitra, Advocate representing the Appellant – Operational Creditor has, while taking us through the impugned order, invited our attention to the fact that the Adjudicating Authority has taken note of the fact that the Respondent – Corporate Debtor has not responded to the Demand Notice dated 18th December, 2018 demanding the outstanding amount in respect of the four invoices noticed in paragraph-5 of the impugned order. Mr. Mitra further invited our attention to paragraph-10 of the impugned order, where the Adjudicating Authority has observed that mere acceptance of the debt in question by the Respondent would not automatically entitle the Appellant to invoke the provisions of the Code, unless the debt and default is undisputed and proved to the satisfaction of the Adjudicating Authority. In view of this factual position, as noticed in the impugned order, the Adjudicating Authority should have, in absence of any dispute contemplated under Section 8(2) having been raised by the Respondent – Corporate Debtor as a pre-existing dispute or that the claim of Appellant – Operational Creditor had been satisfied, proceeded to admit the Application, as no dispute had been raised before it, justifying its disinclination to admit the Application. Instead, the Adjudicating Authority proceeded to make out a case for the Respondent-Corporate Debtor on the

premise that the Appellant-Operational Creditor has not invoked other remedies available under law. We cannot understand as to how the availability of alternate remedy would render the debt and default disputed. In absence of pre-existing dispute having been raised by the Corporate Debtor or it being demonstrated that a suit or arbitration was pending in respect of the operational debt, in respect whereof Corporate Debtor was alleged to have committed default, the Adjudicating Authority would not be justified in drawing a conclusion in respect of there being dispute as regards debt and default merely on the strength of an Agreement relied upon by the Appellant – Operational Creditor, notwithstanding the fact that such Agreement provided for reference of a dispute arising between the parties in relation to a claim through arbitration. Even otherwise, Section 238 of the I&B Code, which has an overriding effect over the existing laws or any other law or contract, would not admit of the alternative remedy being a disabling provision for Operational Creditor to seek resolution of a dispute in regard to operational debt claimed against the Corporate Debtor by triggering the Corporate Insolvency Resolution Process.

5. Our attention has also been invited to some observations made by the Adjudicating Authority in paragraph 10, which reads as under: -

“10. Therefore, the Respondent Company prima facie appears to be solvent Company so as to resolve the issue of outstanding amount in question. The NCLT is conferred power, even to refer the matter pending before it, to Mediation and Conciliation, U/s 442 of the Companies Act, 2013. The Adjudicating Authority being NCLT, U/s 60(1) of the Code, can suo motto refer the

matter to either Mediation and Conciliation or to Arbitration to settle the dispute. Since, this already Arbitration clause is available in the Agreement in question, the Petitioner can be permitted to invoke Arbitration clause in respect of the issue in question.”

6. The Adjudicating Authority appears to have made observation in regard to the Corporate Debtor being a solvent company, ignoring the fact that it was alleged to have committed default in respect of operational debt that it owed to the Appellant-Operational Creditor and which it had failed to pay, in response to admission notice served upon it by the Operational Creditor. The Adjudicating Authority was concerned with the insolvency resolution qua the operational debt, which the Corporate Debtor owed to the Operational Creditor. It was immaterial whether it was solvent or insolvent qua other creditors. The I&B Code would not permit the Adjudicating Authority to make a roving enquiry into the aspect of solvency or insolvency of the Corporate Debtor except to the extent of the Financial Creditors or the Operational Creditors, who sought triggering of Corporate Insolvency Resolution Process.

7. The Adjudicating Authority clearly landed in error by observing that the course adopted by it was warranted on the principle of ease of doing business, ignoring the fact that such course was not available to it, ease of doing business only being an objective of the legislation viz. I&B Code along with other objectives specified in the preamble, which are sought to be achieved through CIRP process.

8. For the aforesaid reasons, we are unable to persuade ourselves to go along and support the impugned order. The Appeal is allowed and impugned order is set

aside. The Adjudicating Authority is directed to pass an order of admission in respect of the Application filed by the Appellant-Operational Creditor under Section 9 of the I&B Code within two weeks of communication of this order. However, the Adjudicating Authority shall be at liberty to provide an opportunity to the Respondent-Corporate Debtor to settle the claim of Appellant-Operational Creditor.

9. A copy of this order be served upon the Adjudicating Authority forthwith.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

Ash/GC