

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI
(APPELLATE JURISDICTION)**

Company Appeal (AT) (CH) (Insolvency) No. 41 of 2021

**Under section 61(1) of the Insolvency & Bankruptcy Code 2016
(Arising out of Order dated 23.02.2021 passed in CP (IB) 79/BB/2020
by the National Company Law Tribunal, Bengaluru Bench)**

In the matter of:

SMS Integrated Facility Services Private Limited
Fair Mount, Unit No. 2201 & 2202,
Plot No. 4, 5 & 6, Sector 17,
Sanpada, Navi Mumbai,
Mumbai - 400705.

... APPELLANT

V/s.

Expat Educational Institute
CIN: U80903KA2015NPL082781
Reg. Off: Carlton Towers, A Wing,
3rd Floor, Unit No. 301-314,
No.1 Old Airport Road,
Bangalore KA - 560008

RESPONDENT

Present:

For Appellant : Mr. Amit Tungare, Advocate

**ORDER
(VIRTUAL MODE)**

Heard the Learned Counsel for the 'Appellant'.

2. According to the Learned Counsel for the 'Appellant'/Operational Creditor, the 'Appellant'/Operational Creditor has filed the instant 'Appeal' being dissatisfied against the order dated 23.02.2021 in CP (IB) No. 79/BB/2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Bengaluru bench) in disposing of the 'Application' (filed by the Appellant/Applicant under section 9 of the I & B Code, 2016) by issuing necessary directions mentioned therein.

Earlier, the Adjudicating Authority National Company Law Tribunal, Bengaluru Bench, while passing the Impugned order on 23.02.2021 at Paragraph 5 to 7 had observed the following:

5 . “Since initiation of insolvency proceedings involves various proceedings where IRP/RP is to contemplated under the supervision of IRP/RP, where IRP/RP is to be assisted by the Management/staff of the Corporate Debtor, it is CIRP necessary that Corporate Debtor should be aware of CIRP mandates that be aware of proceedings. And principles of natural justice also mandates that proceedings. concerned party should be given proper notice of proceedings. the also notice of Therefore, the Adjudicating Authority ordered notice to the notice to Respondent on 03.03.2020, and case stands posted on various dates viz., 05.01.2021, 06.01.2021 and 22.01.2021. However, none appears for the Respondent and no reply is filed.

6. It is also relevant to point out here that consideration of mere debt the and default in question, without knowing/serving notice on the information notice on Even the Corporate Debtor, would be futile exercise. Even the information furnished on behalf of the Petitioner, as stated supra, would be of no use. The Adjudicating Authority cannot come to conclusion basing on one side version of the Petitioner. And the Corporate Debtor is stated to have cleared all the invoices of the Operational Creditor till the month of February, 2017. As stated supra, claim in question relates to the year 2017, for which the Petitioner issued Demand Notice in Form 3 only on 12th June, 2019 and thereafter filed the instant Petition. Though invoices in question contemplate payment within 10 days, failing which it carries an interest @ 24% p.a, the Petitioner has not initiated any legal proceedings prior to the instant Proceedings and the Petitioner has not explained the reasons for not initiating proceedings earlier.

7. As stated supra, as per the MCA website, the Corporate Debtor Active compliance was Active Non-Compliance. Since the year of 2016, the Corporate Debtor has failed to file its statutory returns. However, it is not known whether the Company is on active rolls of the ROC or not. If the Company failed to comply with statutory compliances, the ROC can take appropriate action to strike off it. And while striking off the Company, ROC can take into consideration of interest of Petitioner herein, in terms of

extant provisions of Companies Act, 2013, and the Rules made thereunder.

8. For the aforesaid reasons and circumstances of the case, the Company petition is barred by laches and limitation, and it is filed with an intention to recover alleged debts, which is against the object of Code etc.”,

and disposed of the ‘Application’ by directing the ‘Registrar of Companies’, Bengaluru to examine whether the Corporate Debtor had complied with the Statutory Requirement(s) and to take appropriate action, and while taking action, the interest of petitioner can also be looked into and inform the petitioner about the action taken by him, within a period of three months from the date of receipt of the copy of the order.

3. Assailing the correctness, validity and legality of the impugned order dated 23.02.2021 passed by the ‘Adjudicating Authority’(National Company Law Tribunal, Bengaluru Bench) in CP (IB) 79/BB/2020, the Learned Counsel for the Appellant/Applicant/Operational Creditor submits that the ‘Appellant’/Operational Creditor, (engaged in the business of providing housekeeping services to numerous corporates across India) had agreed to provide housekeeping services at the ‘Educational Institute’ Ecole Hotelier’ and in this regard the ‘Appellant and Respondent executed various work orders and invoices for providing the housekeeping services to the Respondent at its institute.

4. According to the Learned Counsel for the ‘Appellant’ since March 2017 to December, 2017, the invoices issued by the ‘Appellant’ /Operational Creditor were still pending and due and on 15.11.2017, the Director of the Respondent through email assured the ‘Appellant’ that the Respondent would make payments in respect of the dues on monthly instalment basis, as the Respondent was passing through a financial crisis. In fact, the Respondent had failed to effect payments due and the invoices were still only partly settled till February, 2018 and that a sum of Rs. 15, 74, 803/- was still due and payable by the Respondent to the ‘Appellant’.

5. It is the stand of the ‘Appellant’ that the ‘Appellant/Operational Creditor issued a demand notice in Form 3 on 12.06.2019 and for the nine invoices beginning from 01.03.2017 till 01.12.2017, a sum of Rs. 22, 69, 777.95 rounded off to Rs. 22,69,778/- was due and payable by the ‘Corporate Debtor’ for the services rendered by the ‘Appellant/Operational Creditor’. In Part IV of the Form

5, the 'Appellant/Operational Creditor' had averred that the amount due to be paid by the Corporate Debtor along with interest calculated upto 26.05.2019 was Rs. 22, 69,778/-being the total amount.

6. As matter of fact the 'Appellant/Operational Creditor in Part IV of the Form 5 had clearly mentioned that the Principal sum was Rs. 15, 74, 803/- + Rs. 6,94,975/- being the interest sum and the total debt due was Rs. 22, 69,778/-. In fact, the copy of the email exchanged between the Appellant/Operational Creditor an the Corporate Debtor shows that the debt was acknowledged by the Corporate Debtor to an extent of Rs. 22, 69,778/-.

7. The categorical stand of the 'Appellant' is that the mandatory provisions of section 9(3) (a) (b) and (c) of the I & B Code, 2016 were duly complied with by the Operational Creditor and since the Respondent had refused to the repeated requests made by the 'Appellant' and failed to honour the commitment of repayment, the 'Appellant' had filed the Section 9 Application before the Adjudicating Authority.

8. The Learned Counsel for the Appellant submits that the Adjudicating Authority had committed an error in holding that the consideration of mere debt and default in question without knowing/service of notice on the Respondent would be futile exercise and this was held by the Adjudicating Authority despite the fact that the notices was served upon the respondent on 03.02.2020 and later on 08.01.2021 and 'Affidavit of Service' was filed before the Tribunal.

9. The Learned Counsel for the Appellant submits that the Tribunal had filed to appreciate that it cannot pass the impugned order under the Code, 2016 and further, in the impugned order it had not stated that in what capacity the Registrar of Companies, Bengaluru be entitled to protect the interest of the Appellant/Operational Creditor. In short, it is the clear cut plea of the 'Appellant' that inspite of the fact that the 'Appellant/Operational Creditor had fulfilled the criteria as specified under section 9 of the Code, 2016, still the Adjudicating Authority had passed an irrational order, which is in violation of Law of the Land.

10. The Learned Counsel for the 'Appellant/Operational Creditor brings to the notice of this Tribunal that the 'Adjudicating Authority' had failed to consider the email dated 15.07.2020 issued by the Respondent to the Appellant in admitting the debt. Further, the said authority had filed to note that the

Respondent had failed to appear before it on all occasion despite service of notice.

11. It is pertinently pointed out that the Adjudicating Authority in the impugned order dated 23.02.2021 in CP (IB) No. 79/BB/2020 at paragraph 5 had clearly mentioned that it ordered notice to the Respondent on 03.03.2020, and the case stood posted on various dates viz., 05.01. 2021, 06.01.2021, 21.01.2021 and further that none appeared for the Respondent and no reply was filed.

12. It must be borne in mind that Rule 37 of National Company Law Tribunal Rules, 2016 speaks of that Tribunal shall issue notice to the Respondent to show cause against the application or petition on a date of hearing to be specified in the notice etc., Rule 38 deals with 'service of notices and processes'. Rule 41 concerns with filing of reply and other documents by the Respondents. Rule 42 relates to filing of 'Rejoinder'. Rule 45 pertains to 'Rights of Party' to appear before the Tribunal. Rule 49 deals with 'Ex parte hearing and disposal'.

13. In the instant case, the 'Appellant' had come out with a categorical assertion that the notice was served upon the Respondent on 03.02.2020 and later 08.01.2021 and affidavit of service to that effect was filed before th Adjudicating Authority. When that be the fact situation, when the Respondent had failed to appear before the Adjudicating Authority then, it is duty bound to record the absence/ there being no representation of the Respondent, to hold that 'service was held sufficient' and to proceed further, as per Rule 49 of the NCLT Rule, 201`6 under the caption 'Ex parte hearing and disposal'.

14. In the present case the debt fell due on 01.02.2017 being the date of last invoice raised by the 'Appellant/Operational Creditor. The 'Application' was filed before the Adjudicating Authority in the year 2019 which is well within the period of Limitation. In reality, the Adjudicating Authority had committed an error in making an observation that the 'Application' suffered from ' Delay and Latches' and the same is clearly unsustainable in the eye of Law, in the considered opinion of this 'Tribunal'.

15. It cannot be brushed aside that as per section 250 of the Companies Act, 2013, 'where a company stands dissolved under section 248, it shall on and from the date mentioned in the notice under (5) of that Section ceased to operate as a Company and the certificate of incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realising the

amount due to the Company and payment of discharge of liabilities or obligations of the Company’.

16. Be that as it may, in the light of foregoing discussions, this ‘Tribunal’ taking note of the fact that the Director of the Respondent through email on 15.11.2017 had assured the ‘Appellant’ that the Respondent would making the payment towards the dues on monthly instalment basis (since the Respondent was passing through financial crisis) and further only partly settled the dues till February, 2018, and keeping in mind of the vital fact that the court notice was served upon the Respondent on 03.02.2020 and subsequently on 08.01.2021 (To that effect an Affidavit of Service was filed before the Adjudicating Authority by the ‘Appellant’) and the debt in all amounting to Rs. 22,69,778/- was acknowledged by the Corporate Debtor (as mentioned in the Part V of the Form 5), this Tribunal comes to an inevitable conclusion that the Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench) had committed an error in issuing slew of directions to the ‘Registrar of Companies’, Bengaluru to examine whether the corporate Debtor had complied with the statutory requirement and to take appropriate action etc., and suffice it for this ‘Tribunal’ to make a relevant observation in the present ‘Appeal’ that such directions issued by the Adjudicating Authority cannot be countenanced in the eye of Law. Viewed in this perspective, this ‘Tribunal’, set asides the impugned order passed by the Adjudicating Authority. Consequently the “Appeal” succeeds.

In fine, the instant ‘Appeal’ Comp App (AT) (Ch) (Ins) No. 41/2021 is allowed. No costs. The impugned order dated 23.02.2021 passed by the Adjudicating Authority in CP (IB) No. 79/BB/2019 is set aside. The Adjudicating Authority is directed to restore the CP (IB) No. 79/BB/2019 to its file and to pass an ‘order of admission’ of the petition (filed under section 9 of the I & B Code, 2016) and proceed further in accordance with Law and in the manner known to Law.

[Justice Venugopal M]
Member (Judicial)

[V. P. Singh]
Member (Technical)

23.04.2021

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