

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insol.) No. 80 of 2017

(Arising out of Order dated 9th June, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai in Company Petition No. 484 (IB)/CB/2017]

In the matter of :

Smartcity (Kochi) Infrastructure Pvt. Ltd.

... Appellant

Versus

**Synergy Property Development
Services Private Limited and Another**

... Respondents

**Present : For Appellant : Shri Ramji Srinivasan, Senior Advocate with
Shri Tushar Bhardwaj and Shri Sohil Yadav and Ms.
Jasmine Damkewala, Advocates.**

**For Respondents: Shri Balaji Srinivasan and Ms. Pratiksha
Mishra, Advocates.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by the Appellant-M/s SmartCity (Kochi) Infrastructure Pvt. Ltd. ('Corporate Debtor') challenging the order dated 9th June, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai in CP/484 (IB)/CB/2017.

2. By the impugned order, the Adjudicating Authority entertained the application under section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") preferred by Respondent- M/s. Synergy Property Development Services Pvt. Ltd. ('Operational Creditor')

admitted the application, appointed the Interim Resolution Professional and ordered for Moratorium with further directions in terms of 'I&B Code'.

3. The appellant has challenged the impugned order dated 9th June, 2017, mainly on the following grounds: -

- (i) Notice under sub-section (1) of Section 8 was not issued by the 'Operational Creditor' but by the 'Law Firm', which is not in accordance with law.
- (ii) Notice under Rule 4(3) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 was not sent by the 'Operational Creditor', but by a 'Law Firm' and,
- (iii) There is a dispute in existence and therefore the application under Section 9 was not maintainable.

4. Learned Counsel appearing on behalf of the 'Operational Creditor' has not disputed the aforesaid facts and submitted that the parties have already reached settlement.

5. Notice under sub-section (1) of Section 8 is to be issued in Form-3 or Form-4, as prescribed under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which reads as follows:-

"5. Demand notice by operational creditor. – (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely, –

(a) a demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.”

6. From the said so-called notice dated 20th April, 2017, we also find that it has not been issued by the ‘Operational Creditor’ but by a Law Firm-‘JUSTLAW’.

7. In reply to the said notice, the appellant by its reply dated 18th May, 2017 requested the ‘Operational Creditor’ to follow the procedures as per agreement by appointing nominee arbitrator without prejudice to the right of the appellant.

8. Another notice seems to have been issued in terms of Rule 5 of the Adjudicating Authority Rules, 2016 dated 7th January, 2017. Though, it has been issued in the Form-3 but it has not been issued by the ‘Operational Creditor’ but by the same Law Firm-‘JUSTLAW’.

9. Similar issue fell for consideration before this Appellate Tribunal in **“M/s. Uttam Galva Steels Limited v. DF Deutsche Forfait AG & Anr. Company Appeal (AT) (Insolvency) No. 39 of 2017”** wherein this Appellate Tribunal by its judgment dated 28th July, 2017 held as follows: -

“30. From bare perusal of Form-3 and Form-4, read with sub-rule (1) of Rule 5 and Section 8 of the I&B Code, it is clear that an Operational Creditor can apply himself or through a person authorised to act on behalf of Operational Creditor. The person who is authorised to act on behalf of Operational Creditor is also required to state “his position with or in relation to the Operational Creditor”, meaning thereby the person authorised by Operational Creditor must hold position with or in relation to the Operational Creditor and only such person can apply.

31. The demand notice/invoice Demanding Payment under the I&B Code is required to be issued in Form-3 or Form - 4. Through the said formats, the ‘Corporate Debtor’ is to be informed of particulars of ‘Operational Debt’, with a demand of payment, with clear understanding that the ‘Operational Debt’ (in default) required to pay the debt, as claimed, unconditionally within ten days from the date of receipt of letter failing which the ‘Operational Creditor’ will initiate a Corporate Insolvency Process in respect of ‘Corporate Debtor’, as

apparent from last paragraph no. 6 of notice contained in Form – 3, and quoted above.

Only if such notice in Form-3 is served, the ‘Corporate Debtor’ will understand the serious consequences of non-payment of ‘Operational Debt’, otherwise like any normal pleader notice/Advocate notice, like notice under Section 80 of C.P.C. or for proceeding under Section 433 of the Companies Act 1956, the ‘Corporate Debtor’ may decide to contest the suit/case if filed, distinct Corporate Resolution Process, where such claim otherwise cannot be contested, except where there is an existence of dispute, prior to issue of notice under Section 8.

32. *In view of provisions of I&B Code, read with Rules, as referred to above, we hold that an ‘Advocate/Lawyer’ or ‘Chartered Accountant’ or ‘Company Secretary’ in absence of any authority of the Board of Directors, and holding no position with or in relation to the Operational Creditor cannot issue any notice under Section 8 of the I&B Code, which otherwise is a ‘lawyer’s notice’ as distinct from notice to be given by operational creditor in terms of section 8 of the I&B Code.”*

10. In the present case also the notice has been issued by a Law Firm and there is nothing on the record to suggest that the said Law Firm has been

authorised by the Board of Directors of the 'Operational Creditor'- M/s. Synergy Property Development Services Pvt. Ltd. There is nothing on the record to suggest that any Lawyer or Law Firm hold any position with or in relation with the Respondents-'Operational Creditor'.

11. In view of the aforesaid facts and the decision of this Appellate Tribunal in “**M/s. Uttam Galva Steels Limited v. DF Deutsche Forfait AG & Anr**” we hold that the notice(s) issued by the Law Firm 'JUSTLAW' on behalf of Respondents-'Operational Creditor' cannot be treated as a notice under section 8 of the 'I&B Code' and for that the petition under section 9 at the instance of the Respondents against the appellant was not maintainable.

12. The other question raised is whether there is existence of dispute, if any, in the present case?

13. From bare perusal of the record, it is clear that on 12th November, 2016, one Mr. Govindan Kutty M on behalf of the Appellant- 'Corporate Debtor' intimated the Respondent-'Operational Creditor' that the Respondent discontinued the service and abandoned the work. The relevant portion of the letter reads as follows:-

*“Synergy Property Development Services Pvt. Ltd.
Easwaravilasom Road
Vazhuthacaud, Trivandrum
Kerala – 695 014*

Attn.: Mr. Liju Eapen – Associate Director

Dear Mr. Liju Eapen

*We refer to the mail from Mr. Govindan Kutty M dated 4th
November, 2016 with copy to you on discontinuation of PMC*

services on alleged nonpayment of dues and wish to bring to your attention to the following aspects:

1. This is the third unilateral discontinuation of the PMC services by you till date. We feel that such action of you by abandoning the work and withdrawing the staff without proper notice and formal handing over of documents is unprofessional and delaying the project completion resulting in losses to SCK for which you alone will be responsible. This action of you is against the true spirit of the engagement.

2. We confirm that all our commitments for payments, those are due as per conditions of extension letter will be honored and paid on the due dates. As a gesture of goodwill, an amount of Rs. 30 lakhs was paid as advance.

3. We also wish to bring to your notice that the documents especially those related to ongoing works including bills some of which are kept in the work stations allotted to you in SCK Pavilion, have not been handed over in an orderly manner with proper index thereby putting us in difficulty to trace out the same. We also would like to bring to your notice that keeping of official documents of SCK in your office outside SCK premises is detrimental to the contract conditions and you are requested to take immediate remedial steps.

4. The delays in completion of the project has mainly resulted from you non adherence to PMC Services Contract conditions including taking over of certain responsibilities to be performed by the Lead Architect and Consultant while abandoning your own responsibilities with respect to design management and

coordination of work under your scope. There are many instances of lack or poor coordination a few of which is pointed out here.

i) Water cascading – The work was being executed without coordinated shop drawings approved by the Consultant or any coordination during work stage.

ii) Sliding doors provided by the Contractor in the reception lobbies. The installed units do not match with the BOQ or specification.

Therefore, we request you to take necessary immediate action for completing your scope of work in an orderly fashion as envisaged in the contract.

*Yours faithfully,
For SmartCity (Kochi) Infrastructure Pvt. Ltd.*

*Sd/-
Kurian Kurjan
Director Projects”*

14. Therefore, it is clear that much prior to the so-called notice under section 8 of the 'I&B Code', a dispute was raised by Appellant-‘Corporate Debtor’ regarding non-completion and abandoning of the work.

15. In view of the aforesaid reasons and findings recorded above, we hold that the impugned order dated 9th June, 2017 is illegal and set aside the said order passed by Adjudicating Authority, Chennai Bench in CP/484 (IB)/CB/2017.

16. In effect, order (s), if any, passed by Ld. Adjudicating Authority appointing any ‘Interim Resolution Professional’ or declaring moratorium, freezing of account and all other order (s) passed by Adjudicating Authority

pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The appellant company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

17. Learned Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed and the Respondent will pay the fees of the Interim Resolution Professional, for the period he has functioned. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

12th October, 2017

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