

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 59 of 2017

IN THE MATTER OF :

M/s. Aruna Hotels Limited ... Appellant

Versus

Mr. N. Krishnan ... Respondent

WITH

Company Appeal (AT) (Insolvency) No. 87 of 2017

IN THE MATTER OF:

M/s. Aruna Hotels Limited ... Appellant

Versus

Mr. D. Ramjee ... Respondent

AND

Company Appeal (AT) (Insolvency) No. 88 of 2017

IN THE MATTER OF:

M/s. Aruna Hotels Limited ... Appellant

Versus

Mr. C. Ganapathy ... Respondent

Present: For Appellants: - Shri Mohan Parasaran and Shri Gopal Jain, Senior Advocates with Shri Vishal Gehrana, Shri Nakul Gandhi, Shri Kriti Awasthi and Shri Arvind Chari, Advocates

For Respondents : Shri Ritin Rai with Shri S. Santanam Swaminadhan and Shri Aabhas Kshetrapal, Advocate

ORDER

02.08.2017 In these three appeals, as common questions of law involved, they are heard together and are being disposed of by this common judgement.

2. The respondents, Mr. N. Krishnan (in Company Appeal (AT) (Insolvency) No. 59 of 2017), Mr. D. Ramjee (in Company Appeal (AT) (Insolvency) No. 87 of 2017) and Mr. C. Ganapathy (in Company Appeal (AT) (Insolvency) No. 88 of 2017) are ex-employees of appellant-M/s. Aruna Hotels Limited, preferred their respective applications under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for initiation of Corporate Insolvency Resolution Process against the appellant/'Corporate Debtor'-M/s. Aruna Hotels Ltd. They alleged that the arrears of salaries due to them have not been paid and thereby, there is a default of debt.

3. Learned Adjudicating Authority (National Company Law Tribunal) Division Bench, Chennai (hereinafter referred to as 'Adjudicating Authority') noticed that one of the respondent employee, Mr. D. Ramjee, claimed amount to the tune of Rs.2,13,65,565/- towards arrears of salary, and Rs. 47,03,318/- towards gratuity and leave salary, totalling Rs. 2,60,68,883/- and a demand notice was sent by the said employee on 24th March, 2017. An affidavit sworn by

Mr.D. Ramjee under Section 9 (3)(b)(c) of the I&B Code has been placed on record and thereby admitted the application.

4. In view of the fact that one of the application has been admitted, in relation to the other two applications, preferred by Mr. N. Kirshnan and Mr. C. Ganapathy, both the 'Operational Creditors', Learned Adjudicating Authority directed them to approach Interim Insolvency Professional appointed pursuant to the first case of Mr. D. Ramjee to make their claim and the Insolvency Professional has been asked to deal with the same in accordance with law by common order dated 13th June, 2017. The aforesaid common order has been passed in C.P. No. 478 of 2017 with C.P. No. 479 of 2017 and C.P. No. 480 of 2017.

5. On 7th July, 2017, when the matter was taken up, learned senior counsel for the appellant submitted that all the respective respondents/ex-employees/'Operational Creditors' served advocate notice on the appellant purported to have been issued under Section 8 of the I&B Code. It was further submitted that no notice under Section 8 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as 'Adjudicating Authority Rules') and Form-3/Form-4 thereof were served on the appellant. The appellant also raised other questions to suggest that the applications preferred by all the three respondents/'Operational Creditors' under Section 9 of the I&B Code were not complete and were fit to be rejected.

6. In view of such submission notices were issued on respondents. They have appeared. We have heard learned counsel for the parties.

7. From the record we find that an advocate notice dated 27th February, 2017 was given by one Shri G.V. Mohan Kumar, Advocate, on behalf of respondent-Mr. N. Krishnan, aged about 66 years. He retired on 30th September, 2011, i.e. about six years back.

8. In the case of Mr. D. Ramjee, similar notice was issued by Mr. G.V. Mohan Kumar, Advocate on 27th February, 2017 on behalf of Mr. D. Ramjee aged about 70 years who was relieved on 31st May, 2013 i.e. about four years back. Another similar notice dated 27th February, 2017 was issued by the same lawyer, on behalf of Mr. C. Ganapathy, aged 70 years who was also relieved on 31st May, 2011 i.e. about six years back. Thus, we find that there is delay in preferring all the applications, without going into the question of limitation or the other questions, as raised by learned senior counsel for the appellant, taking into consideration the fact that the respondents are ex-employees of the appellant, we requested the learned senior counsel for the appellant to find out whether the appellant intends to pay the arrears, if any, due to one or other employee.

Today, it is informed that though the claims of the respondents are barred by limitation, the appellant may agree to pay arrears of

three years' salary, if due to one or other respondent and post-retirement benefit, if due.

9. Learned counsel for the respondents submits that the respondents do not agree with the proposal as given on behalf of the appellant and, therefore, we heard the appeals on merit.

10. Admittedly, no demand notice under Section 8 was given by any of the individual respondent-'Operational Creditor', either in Form-3 or Form-4 of the Adjudicating Authority Rules. All the notices, which are same and similar and all dated 27th February, 2017, were issued by the same advocate, on behalf each of the respondents. Only the amount of default shown therein are varying. Learned counsel for the respondents accepts that apart from advocate notice, no separate notice under Section 8 were individually given by any of the respondents.

11. Similar issue fell for consideration before this Appellate Tribunal, in the case of "Macquarie Bank Limited Vs. Uttam Galva Metallics Limited – (Company Appeal (AT) (Insol.) No. 96 of 2017." In the said case, this Appellate Tribunal, having noticed that the notices under Section 8 of the I&B Code were issued by advocate/lawyer, by judgement & order dated 17th July, 2017 observed and held as follows:

"13. From the plain reading of sub-section (1) of Section 8 it is clear that on occurrence of default, the

*'Operational Creditor' is required to deliver a demand notice of unpaid operational debt, copy of invoice, demanding payment of amount involved in the default to the 'Corporate Debtor' **"in such form and manner as prescribed."***

14. *Sub-Rule (1) of Rule-5 of the Adjudicating Authority Rules mandates the 'Operational Creditor' to deliver the 'Corporate Debtor' the demand notice in Form-3 or invoice attached with the notice in Form-4 as quoted below:-*

"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."

15. Clause (a) & (b) of sub-Rule (1) of Rule-5 of the Adjudicating Authority Rules mandates the 'Operational Creditor' to deliver the 'Corporate Debtor' either the demand notice in Form - 3 or a copy of an invoice attached with a notice in Form - 4. If the Rule 5 is read with the demand notice Form - 3 or invoice in Form - 4, it is clear that who are persons authorized to give the notice under Section 8 of the 'I & B Code', as apparent from last portion of Form - 3 & Form - 4, as quoted below: -

"6. The undersigned request you to unconditionally repay the unpaid

operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [name of corporate debtor].

Yours sincerely,

<i>Signature of person authorised to act on behalf of the operational creditor</i>
<i>Name in block letters</i>
<i>Position with or in relation to the operational creditor</i>
<i>Address of person signing</i>

16. 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 the 'Operational Creditor' can apply himself or through a person authorized to act on behalf of the 'Operational Creditor', who hold same position with or in relation to the 'Operational Creditor'. Thereby such person(s) authorized by 'Operational Creditor', holding position with or in relation to the 'Operational Creditor' can only apply.

17. In view of such provision we hold that an advocate / lawyer or Chartered Account or a Company Secretary or any other person in absence

of any authority by the 'Operational Creditor', and if such person do not hold any position with or in relation to the 'Operational Creditor', cannot issue notice under Section 8 of 'I & B Code', which otherwise can be treated as a lawyer's notice/pleader's notice, as distinct from notice under Section 8 of 'I & B Code'.

18. The demand notice/ invoice Demanding Payment under the I& B Code required to be issued in Form-3 or Form - 4. By the said notice, 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), as claimed, is to be paid, 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 or Form - 4 is served, the 'Corporate Debtor' will understand the serious consequences of non-payment of

'Operational Debt', otherwise like any normal pleader notice/ Advocate notice or like notice under Section 80 of C.P.C. or notice for initiation of proceeding under Section 433 of the Companies Act 1956, the 'Corporate Debtor' may decide to contest the suit/ case if filed, as distinct Corporate Resolution Process, where such claim otherwise cannot be contested, except where there is an existence of dispute, prior to issuance of notice under Section 8.'

12. Learned counsel appearing on behalf of respondents tried to make a distinction between the aforesaid case of *'Macquarie Bank Limited'* and the present case on the ground that the notice in the said case was issued on behalf of the 'Operational Creditor', which was a bank, whereas respondents are individual ex-employees. But such distinction cannot be accepted, in view of the law laid down under the I&B Code. It is true that no authorisation on behalf of any Company or firm is required to be given, but the individual(s) are also required to give notice under Section 8 in Form-3 or Form-4 under their signatures with clear understanding and request to repay the unpaid 'Operational Debt' (in default) unconditionally, in full, within ten days from the receipt of the letter, with further intimation that on failure, the said employee(s)/ workmen shall initiate a Corporate Insolvency

Process in respect of the 'Corporate Debtor'. If such notice in Form-3 or Form-4 with the aforesaid stipulation is served on the 'Corporate Debtor', the 'Corporate Debtor' will understand the serious consequences of non-payment of 'Operational Debt', otherwise like any normal pleader notice/advocate notice or like notice under Section 80 of the Code of Civil Procedure, 1908 or notice for initiation of proceeding under the Industrial Disputes Act, 1947, the 'Corporate Debtor' may not take it seriously and may decide to contest the suit/case, if filed, before the appropriate forum. However, where the claim is made under Section 8 of I&B Code, in such case, the 'Corporate Debtor' will understand the seriousness that it cannot contest the claim, except in a case where a dispute has already been raised, prior to the issuance of notice under Section 8.

13. As the case of the appellant in all the appeals, is covered by the decision rendered in the case of *'Macquarie Bank Limited (supra)'*, we are not going into other aspects as to whether the respective claims made by the respondents are barred by limitation or there is a delay and laches on their part or there is any dispute in existence.

14. In view of the discussion as made above, we have no other option but to set aside the impugned order dated 13th June, 2017 passed by the Learned Adjudicating Authority, Chennai Bench in C.P. No. 478 of 2017, C.P. No. 479 of 2017 and C.P. No. 480 of 2017. The common order is accordingly set aside. .

15. In effect, order(s), if any, passed by the Learned 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 applications preferred by each of the respondents under Section 9 of the I&B Code are dismissed. Learned Adjudicating Authority will now close the proceedings. The appellant is released from all the rigour of law and is allowed to function independently through its Board of Directors with immediate effect.

16. Learned Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed and the appellant will pay the fees of the Interim Resolution Professional, for the period he has functioned. The appeals are allowed with the aforesaid observation and direction.

17. However, we make it clear that the appellant has given assurance that they will be paying the respondents three years' arrears of salary, if due, for the period prior to their retirement, taking into consideration any revision of salary, if any, and post-retirement benefits such as Provident Fund, Gratuity etc., if due to one or other

respondent. We hope and trust that the appellant will stick to its assurance given before this Appellate Tribunal and pay such admitted dues to the respondents.

18. All the appeals stand disposed of with the aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Balvinder Singh]
Member (Technical)

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