

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI

Company Appeal (AT) (Ins) No. 1507 of 2023

&

I.A. No. 5431, 5432, 5433 of 2023

IN THE MATTER OF:

Spik Enviro Management Pvt. Ltd.

...Appellant

Versus

Vision Earthcare Pvt. Ltd.

...Respondent

Present:

For Appellant: Mr. Bishwajeet Bhattacharyya, Sr. Advocate, Mr. Abhinav Prakash, Mr. Arvind Wishwabandhu, Mr. Himanshu Singh, Advocates.

For Respondent: Mr. Piyush Joshi, Advocate.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is against the order dated 06.06.2023, by which an application filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016, has been dismissed on the ground that the application does not meet the threshold of Rs. 1 Cr. provided under Section 4 of the Code.

2. Briefly put, the Appellant filed the application under Section 9 of the Code on 18.08.2020 for an amount of Rs. 2,77,68,000/- allegedly due and payable by the Corporate Debtor (CD).

3. The Appellant set the date of default as 24.01.2019 on which the payment was due from the CD against invoice raised as per the MOU/Agreement.

4. As per the case of the Appellant, it is involved and decided to extirpate environmental pollution mainly created by the industries. It is alleged that the director of the CD Mr. S Chandrasekhar met Mr. Chackravarthi D Iyengar, director of the OC and discussed regarding technologies and their applications and sought help from the OC to spread their superior and sustainable technologies in the country which was lacking due to governmental screening and regulations for new players/technologies and lack of investment both fund and non-fund based and due to the lack of support from the Bank etc. It was proposed that Mr. Iyengar, director of the OC/Appellant may come on the board of the CD as an active member of the CD but since they were not in a position to pay monthly fees/remuneration, therefore, the said director asked them to pay full fees upon acquiring each contract which was accepted by the CD and thereafter entered into one MOU on 11/15.06.2018 with the OC as per which the OC agreed to facilitate and put efforts towards acquiring the projects in favour of the CD from the contractors selected by Gujarat Water Supply & Sewerage Board. It was also agreed that the OC will compensate a facilitation fee equivalent to Sum of Rs. 2.5 lakhs per MLD exclusive of GST of the total capacity of the project in MLD. The payment terms for the aforesaid facilitation fee/compensation was 50% of the compensation payable against the mobilization advance and balance of

50% in 12 equal monthly instalments within one year from the signing of the contract agreement for the project.

5. It is further alleged that the CD and Iyenger, Director of the Appellant entered into an agreement on 25.11.2018 as per which Mr. Iyengar was appointed as wholetime director of the CD from 01.12.2018 and the said agreement stipulated payment of compensation for the services of Mr. Iyengar to the OC upon presentation of invoice by OC. It is alleged that on 25.08.2018 a contract was procured from Gujarat by RBPIL for 20 MLD at Rs. 2.17 Cr. with 10% mobilization advance, balance as per milestone events noted in the MOU. The office space was also acquired by the OC at Gurgaon on 13.12.2018 on lease to run the functions of the CD under the MOU and agreement. The CD got three work orders from three companies based in Gujarat through the OC. It is alleged that instead of making the payment to the OC, the CD sent a notice dated 18.07.2020 asking Mr. Iyengar to resign from its board. As a result of the aforesaid, it is alleged that OC served a demand notice under Section 8 of the Code claiming the principal amount of Rs. 2,77,68,000/- .The said notice was not replied by the CD. However, reply was filed by the CD to the petition filed under Section 9 on 01.04.2021 alleging that the OC's claiming amount under Agreement dated 25.11.2018 which has not been executed with the Appellant. Whereas the other objection were also raised to the application filed by the Appellant and the Tribunal dismissed the application of the Appellant by recording the following findings which are reproduced as under:-

"7. The Operational Creditor has claimed Rs. 48.95 lakhs as Facilitation Fees towards award of 19.6 MLD projects; Rs. 30 lakhs towards travel cost; Rs.57.94 as lump sum compensation being proportionate technology selling price in relation to 6 other projects ; and Rs.15 Lakhs towards remuneration of Mr. Chackravarthi D. Iyengar in terms of WhatsApp acceptance. The Corporate Debtor paid a total sum of Rs. 22.21 lakhs to the Operational Creditor which is not disputed by the applicant also. Apart from this the Operational Creditor has claimed compensation of Rs.48 lakhs towards sweat equity and Rs.100 lakhs for lost opportunities.

8. On the co-joint reading of the MOU dated 15.06.2018 and 25.11.2018, this bench finds that Mr. Chackravarthi D. Iyengar was appointed on the Board of the Corporate Debtor to mobilize additional business and the payment for the services rendered by him was to be made to the Operational Creditor. Though, the MOU dated 25.11.2018 stipulate target volume of business but the compensation clause therein is linked to technology fees to be received by the Corporate Debtor under each work order. Further the said compensation included travel, hotel, structuring the inquiry/ tender to enable participation and incidentals. It is undisputed fact that Corporate Debtor received work orders for 19.6 MLD from Mis. Rajkamal out of 18 tenders listed in Annexure I to MOU dated 11.06.2018. On reading of said MOU also this bench dose not finds that the compensation for services of the Operational Creditor was to be paid only upon award of all 18 tenders. It is pertinent to refer Clause 6 and 8 of the said MOU which inter alia provides that "the Corporate debt will compensate the Operational Creditor as a Facilitation fee equivalent to a sum of 2.5 lacs per MLD exclusive of GST of the total capacity of the 'Project' in MLD terms detailed as per Annexure I" and "50% of the Compensation value as Clause 6(a) will be payable against mobilization advance and balance 50% in twelve equal monthly

instalments within one year from the date of signing of the Contract Agreement for the 'Project' as per Annexure I.

9. Though there is no tangible dispute in relation to claim of Rs. Rs. 48.95 lakhs as Facilitation Fees towards award of 19.6 MLD projects, out of which Rs. 22.21 lakhs is already paid. This bench finds that the corporate debtor has also disputed its obligation to pay Rs.15 Lakhs towards remuneration of Mr. Chackravarthi D. Iyengar in terms of WhatsApp acceptance, but the dispute in relation thereto appears to be a feeble argument. Accordingly, this bench finds that a sum of Rs.41. 74 lakhs is due and payable. About claim of Rs. 30 lakhs towards travel cost and Rs.57.94 as lump sum compensation being proportionate technology selling price in relation to 6 other projects, this bench finds that a compensation was inclusive of all cost and payable upon occurrence of stated milestones. Whether such sums are payable in terms of MOU or not is a matter of determination which cannot be taken up in the present proceedings. Further, the claim of compensation of Rs.48 lakhs towards sweat equity and Rs. 100 lakhs for lost opportunities also requires adjudication in terms of the MOU considering that MOU is silent on these aspects.

10. In view of the above, this bench is of the considered view that out of total debt of Rs. 277.68 lakhs has claimed in default in the present application, a sum of Rs. 41.74 Lakh only can be said to be undisputed debt and the remaining amount of debt amounting to Rs. 235.98/- claimed in default requires adjudication of disputes. Since the amount of undisputed debt is less than 1 crore.

11. Considering the facts placed before us, this bench is of the view that in such circumstances, we find that the present case deserves to be dismissed under Section 9 read with Section 4 of the Insolvency and Bankruptcy Code, 2016.”

6. Aggrieved against the aforesaid order, the present appeal has been preferred and the only point raised by the Appellant, both in the oral argument as well as in the written submissions that since the Respondent did not reply to the demand notice under Section 8 of the Code, therefore, it cannot raise the defence while contesting the application filed under Section 9 of the Code.

7. On the other hand, Counsel appearing on behalf of Respondent has submitted that notice under Section 8 of the Code is provided in the statute to apprise the CD of the amount alleged to have been defaulted and also an opportunity to the CD to raise an issue as to whether there exist a dispute before the receipt of such notice or the evidence that the amount which has been claimed has already been paid or will be paid and Section 9 application cannot be filed without waiting for 10 days after delivering the notice under Section 8 of the Code. It is submitted that issuance of notice under Section 8 is an obligation on the part of the OC because he cannot maintain the application filed under Section 9 without issuing the notice under Section 8 but there is no bar for the CD to contest the application filed under Section 9 without giving reply to the notice under Section 8 of the code.

8. We have heard Counsel for the parties and perused the record with their able assistance.

9. The only issue raised by the Appellant is as to whether the CD can raise its defence at the stage of Section 9 application without giving reply to the notice issued under Section 8 of the Code?

10. In order to answer this question, it is relevant to refer to Section 8 and 9 of the Code which are reproduced as under:-

“ Section 8. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

Section 9. (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(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 subclause (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.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.”

11. As per Section 8(1) the form and manner in which notice under Section 8 has to be issued is prescribed in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short ‘Rules’) which is reproduced as under:-

“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.”

12. In this regard, reference may be had to form -3 of the Rules in which the notice under Section 8 has to be sent. Form – 3 is also reproduced as under-

FORM 3

(See clause (a) of sub-rule (1) of rule 5)

FORM OF DEMAND NOTICE / INVOICE DEMANDING PAYMENT
UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

(Under rule 5 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016) [Date]

To,

[Name and address of the registered office of the corporate debtor]

From,

[Name and address of the registered office of the operational creditor]

Subject: Demand notice/invoice demanding payment in respect of unpaid operational debt due from [corporate debtor] under the Code.

Madam/Sir,

1. This letter is a demand notice/invoice demanding payment of an unpaid operational debt due from [name of corporate debtor].
2. Please find particulars of the unpaid operational debt below:

PARTICULARS OF OPERATIONAL DEBT

1. TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE

2. AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF DEFAULT IN TABULAR FORM)

3. PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)

4. DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS

5. RECORD OF DEFAULT WITH THE INFORMATION UTILITY (IF ANY)

6. PROVISION OF LAW, CONTRACT OR
OTHER DOCUMENT UNDER WHICH
DEBT HAS BECOME DUE

7. LIST OF DOCUMENTS ATTACHED
TO THIS APPLICATION IN ORDER TO
PROVE THE EXISTENCE OF
OPERATIONAL DEBT AND THE
AMOUNT IN DEFAULT

3. If you dispute the existence or amount of unpaid operational debt (in default) please provide the undersigned, within ten days of the receipt of this letter, of the pendency of the suit or arbitration proceedings in relation to such dispute filed before the receipt of this letter/notice.

4. If you believe that the debt has been repaid before the receipt of this letter, please demonstrate such repayment by sending to us, within ten days of receipt of this letter, the following:

(a) an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(b) an attested copy of any record that [name of the operational creditor] has received the payment.

5. The undersigned, hereby, attaches a certificate from an information utility confirming that no record of a dispute raised in relation to the relevant operational debt has been filed by any person at any information utility. (if applicable)

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,

Signature of person authorised to act on behalf of the operational creditor

Name in block letters

Position with or in relation to the operational creditor

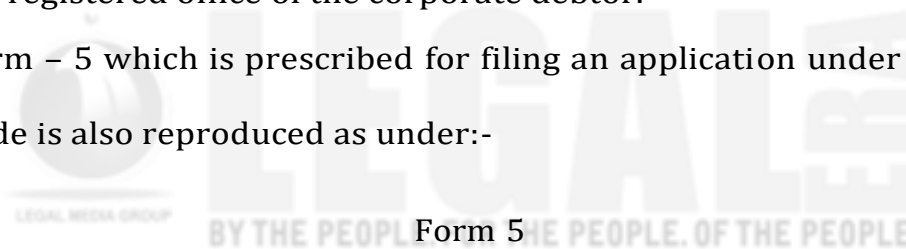
Address of person signing

Instructions

1. Please serve a copy of this form on the corporate debtor, ten days in advance of filing an application under section 9 of the Code.
 2. Please append a copy of such served notice to the application made by the operational creditor to the Adjudicating Authority.
13. Rule 6 of the Rules deals with the application by the OC. Rule 6 is also reproduced as under:-

“6. Application by operational creditor.—(1) An operational creditor, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 9 of the Code in Form 5, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. (2) The applicant under sub-rule (1) shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.”

14. Form – 5 which is prescribed for filing an application under Section 9 of the Code is also reproduced as under:-



Form 5

(See sub-rule (1) of rule 6) 4

[APPLICATION BY OPERATIONAL CREDITOR (S) TO INITIATE
CORPORATE INSOLVENCY RESOLUTION PROCESS *UNDER
CHAPTER II OF PART II/ UNDER CHAPTER IV OF PART II OF THE
CODE

[*strike out whichever is not applicable]]

(Under rule 6 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016) [Date]

To,

The National Company Law Tribunal [
Address]

From,

[Name and address for correspondence of the operational creditor]

In the matter of [name of the corporate debtor]

Subject: Application to initiate corporate insolvency resolution process in respect of [name of the corporate debtor] under the Insolvency and Bankruptcy Code, 2016.

Madam/Sir,

[Name of the operational creditor], hereby submits this application to initiate a corporate insolvency resolution process in the case of [name of corporate debtor]. The details for the purpose of this application are set out below:

Part – I

PARTICULARS OF APPLICANT

1. NAME OF OPERATIONAL CREDITOR
2. IDENTIFICATION NUMBER OF OPERATIONAL CREDITOR (IF ANY)
3. ADDRESS FOR CORRESPONDENCE OF THE OPERATIONAL CREDITOR

Part - II

PARTICULARS OF CORPORATE DEBTOR

1. NAME OF THE CORPORATE DEBTOR
2. IDENTIFICATION NUMBER OF CORPORATE DEBTOR
3. DATE OF INCORPORATION OF CORPORATE DEBTOR
4. NOMINAL SHARE CAPITAL AND THE PAIDUP SHARE CAPITAL OF THE CORPORATE DEBTOR AND/OR DETAILS OF GUARANTEE CLAUSE AS PER MEMORANDUM OF ASSOCIATION (AS APPLICABLE)
5. ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR
6. NAME, ADDRESS AND AUTHORITY OF PERSON SUBMITTING APPLICATION ON BEHALF OF OPERATIONAL CREDITOR (ENCLOSE AUTHORISATION)

7. NAME AND ADDRESS OF PERSON
RESIDENT IN INDIA AUTHORISED TO ACCEPT
THE SERVICE OF PROCESS ON ITS BEHALF
(ENCLOSE AUTHORISATION)

8. DETAILS OF THE CORPORATE DEBTOR AS
PER THE NOTIFICATION UNDER SECTION 55
(2) OF THE CODE –

(i) ASSETS AND INCOME

(ii) CLASS OF CREDITORS OR AMOUNT OF
DEBT

(iii) CATEGORY OF CORPORATE PERSON
(WHERE APPLICATION IS UNDER CHAPTER IV
OF PART II OF THE CODE)]

Part-III

PARTICULARS OF THE PROPOSED INTERIM RESOLUTION
PROFESSIONAL [IF PROPOSED]

1. NAME, ADDRESS, EMAIL ADDRESS AND THE REGISTRATION
NUMBER OF THE PROPOSED INSOLVENCY PROFESSIONAL

Part-IV PARTICULARS OF OPERATIONAL DEBT

1. TOTAL AMOUNT OF DEBT, DETAILS OF
TRANSACTIONS ON ACCOUNT OF WHICH
DEBT FELL DUE, AND THE DATE FROM
WHICH SUCH DEBT FELL DUE

2. AMOUNT CLAIMED TO BE IN DEFAULT
AND THE DATE ON WHICH THE DEFAULT
OCCURRED (ATTACH THE WORKINGS FOR
COMPUTATION OF AMOUNT AND DATES OF
DEFAULT IN TABULAR FORM)

Part-V

PARTICULARS OF OPERATIONAL DEBT [DOCUMENTS,
RECORDS AND EVIDENCE OF DEFAULT]

1. PARTICULARS OF SECURITY HELD, IF
ANY, THE DATE OF ITS CREATION, ITS
ESTIMATED VALUE AS PER THE CREDITOR.
ATTACH A COPY OF A CERTIFICATE OF
REGISTRATION OF CHARGE ISSUED BY THE

REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)

2. DETAILS OF RESERVATION / RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS

3. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)

4. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)

5. DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)

6. PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH OPERATIONAL DEBT HAS BECOME DUE

7. A STATEMENT OF BANK ACCOUNT WHERE DEPOSITS ARE MADE OR CREDITS RECEIVED NORMALLY BY THE OPERATIONAL CREDITOR IN RESPECT OF THE DEBT OF THE CORPORATE DEBTOR (ATTACH A COPY)

8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT

I, [Name of the operational creditor / person authorised to act on behalf of the operational creditor] hereby certify that, to the best of my knowledge, [name of proposed insolvency professional], is fully qualified and permitted to act as an insolvency professional in accordance with the Code and the rules and regulations made thereunder. [WHERE APPLICABLE]

[Name of the operational creditor] has paid the requisite fee for this application through [state means of payment] on [date].

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor

Name in block letters

Position with or in relation to the operational creditor

Address of person signing

Instructions

Please attach the following to this application:

Annex I Copy of the invoice / demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the corporate debtor.

Annex II Copies of all documents referred to in this application.

Annex III Copy of the relevant accounts from the banks/financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the relevant unpaid operational debt by the operational debtor, if available.

Annex IV Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Annex V Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. [WHEREAPPLICABLE]

Annex VI Proof that the specified application fee has been paid.

Annex VII Proofs of serving a copy of the application (a) to the CD, and (b) to the board.]

Note: Where workmen/employees are operational creditors, the application may be made either in an individual capacity or in a joint capacity by one of them who is duly authorised for the purpose.

15. As per the scheme of the Code and the Rules, for the purpose of filing an application under Section 9, it is an obligation on the part of the OC that

on the occurrence of the default, he should to deliver a demand notice of unpaid operational debt, copy of the invoice demanding payment of amount involved, following rule 5 and in form 3 of the Rules. The CD is given 10 days' time to react to the notice or copy of the invoice, for raising defence qua existing of a dispute between the parties before issuance of notice under Section 8 or that the CD had already paid the operational debts.

16. For the purpose of filing an application under Section 9, the OC had to wait for the period of 10 days from the date of delivery of notice or invoice demanding payment under Section 8(1) and if the OC does not receive the payment from the CD or any notice of dispute under Section 8(2) then he can file an application under Section 9 before the AA for initiation of CIRP.

17. Section 9(3) provides as to what documents the OC had to attach with the application which may be filed only on the prescribed form – 5 provided under the Rule 6 of the Rules.

18. The argument raised by the Appellant that since there was no reply to the notice issued under Section 8(1) of the Code, therefore, the CD could not have contested the application filed under Section 9 by filing a reply thereto is totally misplaced because Section 8 travels in a different direction than an application filed under Section 9. Section 8 lays an obligation upon the OC to serve the notice if he had to maintain the application under Section 9 because the language employed in Section 9 of the Code is that the OC had to wait for 10 days from the date of delivery of notice or the invoice, prescribed under Section 8 (1) of the Code and if he does not receive payment from the CD or

any notice of dispute as prescribed under Section 8(2) then only the OC can file an application otherwise the application is not maintainable.

19. Thus, notice under Section 8 is a *sine qua non* for maintaining an application under Section 9 but if the notice under Section 8 is not replied by the CD for some reason or other it does not debar the CD to contest the application filed under Section 9 of the Code by raising its defence.

20. Thus, in view of the aforesaid discussion, we do not find any substance in the argument of the Appellant who has not argued anything on the merit of the case except for raising the aforestated technical issue which is decided against it and as such the present appeal, found denuded of any merit, is hereby dismissed though without any order as to costs.

IAs, if any, pending adjudication, are hereby closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

New Delhi
13th February, 2025
Sheetal