

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.577 of 2024

(Arising out of Order dated 02.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad, Special Bench, Court-2 in C.P.(IB)/310(AHM)2023)

IN THE MATTER OF:

Shiv Glitz Hotels and Resorts LLP
Having Registered Office at:
255, Sindhi Colony, Bani Park
Jaipur, Rajasthan 302016

... Appellant

Versus

Oravel Stays Limited
Having Registered Office at:
Ground Floor - 001, Mauryansh Elanza,
Shayamal Cross Road, Nr. Parekh Hospital,
Satellite Ahmedabad Gujrat 380015
Having Corporate Office at:
3rd Floor, Orchid Centre, Sector 53,
Golf Course Road, Village Haiderpur Viran,
Gurugram, Haryana 122 002

... Respondent

Present:

**For Appellant : Mr. Manish Kumar Shekhari, Ms. Anisha Mahajan,
Mr. Ashish Khatri and Ms. Sanjana Shrivastava,
Advocates.**

**For Respondent : Mr. Amit Sibal along with Ms. Adrija Mishra, Mr.
Ankit and Mr. Harsh Kaushik, Advocates.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by Operational Creditor has been filed challenging order dated 02.01.2024 passed by National Company Law Tribunal, Ahmedabad,

Special Bench, Court-2, rejecting Section 9 Application filed by the Appellant as defective. Aggrieved by the order, the Appellant has come up in this Appeal.

2. On 07.10.2017, the Appellant and the Respondent executed a Merchant Agreement wherein fixed revenue of Rs.40 lakhs per month was agreed to by the Respondent – Corporate Debtor. Pursuant to the above Agreement, the Appellant provided services of boarding & lodging, conducting social events and F&B services to the Respondent on OYO Platform. The Appellant raised various invoices in references to services provided to the Respondent. On 29.03.2023, a Demand Notice was sent by the Operational Creditor to the Corporate Debtor in Form-3, claiming total amount of Rs.1,98,09,748/-, which included principal amount of Rs.1,12,23,598/- and interest of Rs.85,86,150/- till 31.03.2023. The Demand Notice was replied by the Corporate Debtor by letter dated 13.04.2023 denying the claim. The Appellant filed Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”) on 10.12.2023, on which IB-310/AHM/2023 was registered. On 02.01.2024, which was the first date of hearing of the Application under Section 9, the Adjudicating Authority dismissed the Application as defective. Aggrieved by which order, this Appeal has been filed.

3. We have issued notice in the appeal and on advance copy of this Appeal being served on the Respondent, the Respondent has appeared when the Appeal was taken for consideration. Both the parties were heard on

14.08.2024 and orders were reserved. Both the parties have filed their short notice of written submission also.

4. We have heard Shri Manish Kumar Shekhari, learned Counsel appearing for the Appellant and Shri Amit Sibal, learned Senior Counsel appearing for the Respondent.

5. The learned Counsel for the Appellant challenging the impugned order contends that Adjudicating Authority on the first day of hearing, dismissed the Application as defective. It is submitted that in event Adjudicating Authority found the Application defective, an opportunity was required to be given to rectify the defect as required by Section 9, sub-section (5) (ii) (a) and its proviso. The Adjudicating Authority committed error in rejecting the Application as defective without giving an opportunity. It is further submitted that Application contained all relevant pleadings and materials and the Adjudicating Authority has not dismissed the Application on merits. The learned Counsel for the Appellant has relied on judgment of this Tribunal in ***Tek Travels Private Ltd. vs. Altius Travels Private Ltd. – Company Appeal (AT) (Ins.) No.172 of 2020***, where this Tribunal has held that before rejection of an Application on the ground of defect, the Adjudicating Authority ought to have provided an opportunity to rectify the defects within seven days.

6. Shri Amit Sibal, learned Senior Counsel appearing for the Respondent refuting the submissions of learned Counsel for the Appellant submits that

Adjudicating Authority has rightly dismissed the Application. In the Application there was no proper explanation on the date of invoice; no proper explanation was given on the date of default; no proper explanation was given on the limitation period to ascertain the due date; invoices had not been segregated and had been raised on two different entities. It is submitted that it is not the case of the Appellant that Application was defective, hence the Appellants are not entitled for any opportunity to clear the defects, if any. It is submitted that opportunity at this stage to the Appellant to rectify the defects is unnecessary. It is submitted that Demand Notice which is the basis of Section 9 Application being defective, the Application deserve to be rejected and no useful purpose will be served in remanding the matter for consideration by the Adjudicating Authority. It is further submitted that the Appellant's case also fall within the ambit of Section 9 (5) (ii) (d), since the Appellant has received a notice of dispute from the Respondent and there being pre-existing dispute, the Application deserves to be rejected. The Appellant has failed to establish the debt, hence, there was no question of issuing any notice by the Adjudicating Authority. The learned Counsel for the Respondent has relied on the judgment of this Tribunal in **Ramco Systems Ltd. vs. Spicejet Ltd – (2019) SCC OnLine NCLAT 354**, which judgment has also been affirmed by the Hon'ble Supreme Court vide its order dated 26.09.2023 Civil Appeal No.7217 of 2019.

(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.

10. In the present case, Application under Section 9 has been rejected by the Adjudicating Authority, we need to notice relevant provisions of Section 9, sub-section (5) (ii). When we look into the impugned order, observation made by the Adjudicating Authority is “*There was no proper explanation given on the date of invoice, default and limitation period to ascertain the due date*”. It was also observed that invoices were raised on two different entities and not segregated. The Adjudicating Authority by the impugned order, dismissed the Application as defective. It is relevant to notice that proviso to Section 9, sub-section (5) (ii) uses the expression “*shall before rejecting an Application, under sub-clause (a) of clause (ii), give a notice to the applicant **to rectify the defect in the application** within seven days of the receipt of such notice*”. Thus, before rejecting the Application as defective, proviso mandates Adjudicating Authority to provide an opportunity to Applicant to rectify the defect. In the present case, although the Adjudicating Authority made observations as noted above and ultimately dismissed the Application as defective. The rejection of the Application, thus is clearly referable to Section 9, sub-section (5) (ii) (a). The rejection of the Application under Section 9, sub-section (5) (ii)

can be on five grounds as noted above. The order of the rejection is not applicable to sub-Clause (ii), (b), (c), (d) and (e). Shri Amit Sibal, learned Counsel for the Respondent has strenuously contended that the notice of dispute having already been given to Operational Creditor by Corporate Debtor dated 13.04.2023, after receipt of the Demand Notice dated 29.03.2023 and hence there is pre-existing dispute and the Application is liable to be rejected under Section 9(5)(ii)(d). As noted above, the Adjudicating Authority has not dismissed the Application on the ground of dispute which has been raised by the Operational Creditor. The Adjudicating Authority has not even entered into the issue of pre-existing dispute between the parties. Hence, the above issue need not be gone into the present Appeal. The Adjudicating Authority has ample jurisdiction to pass an order of rejection under Section 9, sub-section (5) (ii) (d), provided the Adjudicating Authority returns a finding on the materials on record that notice of dispute has been received by the Operational Creditor and there is pre-existing dispute. Although, learned Counsel for the Respondent has contended that the issue of pre-existing dispute may be gone into in this Appeal and decided and no useful purpose will be served in sending the matter back to the Adjudicating Authority, we are of the view that Adjudicating Authority having not adverted on the said issue, it is appropriate that said issue be gone into and considered by the Adjudicating Authority in accordance with law.

11. The learned Counsel for the Respondent has also submitted that Demand Notice was itself defective, hence, the Application deserves to be dismissed on account of Demand Notice being defective. The issue of Demand Notice being defective, having not been gone into by the Adjudicating Authority, nor any finding returned that Demand Notice is defective and is not in accordance with provisions of the IBC, we see no occasion to enter into the said issue.

12. Learned Counsel for the Respondent has placed reliance on judgment of this Tribunal in **Ramco Systems Ltd. (supra)**. In the above case, Application was rejected by the Adjudicating Authority on the ground of inconsistency in the overall payments and the non-compliance with the provisions of Section 9(3)(c) of the IBC. Section 9(3)(c) of the provides as follows:

“**9(3)(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 1 [by the corporate debtor, if available;”

13. The facts in order of the Adjudicating Authority have been noticed in paragraph 1 in the judgment of the **Ramco Systems Ltd.**, which are as follows:

“1. The Appellant- ‘Ramco Systems Limited’- (‘Operational Creditor’) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (‘I&B Code’ for short) against the ‘Spicejet Limited’- (‘Corporate Debtor’). The Adjudicating Authority (National Company

Law Tribunal), Bench-III, New Delhi, by impugned order dated 14th December, 2017, dismissed the application on the ground of inconsistency in the overall payments and the non-compliance with the provisions of Section 9(3)(c) by the 'Operational Creditor', in the absence of a certificate from the financial institution maintaining accounts of the 'Operational Creditor'. The Adjudicating Authority further observed that the 'Corporate Debtor' on the other hand shown that certain payment has been made."

14. The Appeal filed by the Operational Creditor was dismissed. This Tribunal in paragraph 8 to 11 made the reasons for dismissal of the Appeal. From paragraph 10 of the judgment, it is clear that this Tribunal has dismissed the Appeal while observing "*... but in absence of specific evidence relating to invoices actually forwarded by the Appellant and there being a doubt, we hold that the Adjudicating Authority has rightly refused to entertain application under Section 9 which requires strict proof of debt and default*". This Tribunal dismissed the Appeal on the above ground. The judgment of this Tribunal in **Ramco Systems Ltd.**, does not help the Respondent in the present case, since the Application has been rejected by the Adjudicating Authority without returning any finding on the merits of the Application.

15. The learned Counsel for the Respondent has also relied on the judgment of this Tribunal in **Dheeraj Wadhawan vs. Yes Bank Ltd. & Anr. – (2022) SCC OnLine NCLAT 2395**, where this Tribunal has observed that record of information is relevant but record of information utility is not conclusive proof of any default and a Corporate Debtor is always at liberty to disapprove the

statement as contained in information utility record. In paragraph 31, following observations were made by this Tribunal:

“**31.** As noted above, there being no default by the principal borrower on 01.08.2019, all subsequent action by the Bank on the alleged default dated 01.08.2019 are unsustainable. Hence, information recorded in the information utility on the strength of loan recall notice dated 18.11.2019 in no manner can be read as material to prove that default was committed by the Bank on 01.08.2019. Under the statutory scheme, the record of information utility is relevant but record of information utility is not conclusive proof of any default and a Corporate Debtor is always at liberty to disapprove the statement as contained in the information utility record.”

16. There can be no quarrel to the proposition laid down by this Tribunal in the above case. However, the order impugned does not indicate that Adjudicating Authority has adverted to the certificate issued by the financial institutions. Hence, the said judgment has no application in the present case.

17. The learned Counsel for the Respondent has also relied on judgment of the Hon’ble Supreme Court in **Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. – (2019) 4 SCC 17**, where Hon’ble Supreme Court has laid down following:

“**87.** The aforesaid Regulations also make it clear that apart from the stringent requirements as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt. Apart from this, the utility is to expeditiously undertake the process of authentication and verification of information, which will include authentication and

verification from the debtor who has defaulted. This being the case, coupled with the fact that such evidence, as has been conceded by the learned Attorney General, is only prima facie evidence of default, which is rebuttable by the corporate debtor, makes it clear that the challenge based on this ground must also fail.”

18. The above observation of the Hon’ble Supreme Court related to stringent requirements as to registration of such utility the moment information of default is received. The observation above has no application in the facts of the present case, where Adjudicating Authority has not even adverted to the information utility certificate.

19. We are of the view that various issues raised by the learned Senior Counsel for the Respondent Shri Amit Sibal need not be gone into at this stage, when the Adjudicating Authority has not adverted to any of the above issues and has rejected the Application as defective. When the Adjudicating Authority has proceeded to dismiss the Application as defective, it was obligatory as per Proviso to Section 9, sub-section (ii) to give a notice to the Applicant to rectify the defect in the Application within seven days from the date of receipt of such notice. The Adjudicating Authority having not issued a notice under Proviso, the order impugned is unsustainable on this ground alone.

20. The judgment of this Tribunal relied by the learned Counsel for the Appellant in **Tek Travels Private Ltd. vs. Altius Travels Pvt. Ltd.** (supra) fully support the submissions of learned Counsel for the Appellant. We make

it clear that we have not entered into any of the issues regarding the Application filed by the Operational Creditor under Section 9, nor we are making any observation regarding the merits of the Application under Section 9, or on defenses, which are sought to be raised by learned Counsel for the Respondent in the present Appeal. It is for Adjudicating Authority to consider all relevant issues and take a decision in accordance with law.

21. In view of the above, we set aside the order dated 02.01.2024 and revive Section 9 Application filed by the Appellant before the Adjudicating Authority. The Adjudicating Authority may give a notice for rectifying the defect and thereafter proceed to consider the Application in accordance with law. The Appeal is disposed of accordingly. There shall be no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

9th September, 2024

Ashwani