

RAJESH SABHARWAL V. DESEIN PVT. LTD.

Rajesh Sabharwal

...Appellant

Versus

Desein Pvt. Ltd.

...Respondent

Case No: Company Appeal (AT) (Insolvency) No. 773 of 2021

Date of Judgement: 08.08.2023

Judges:

[Justice Ashok Bhushan]

Chairperson

[Mr. Barun Mitra]

Member (Technical)

For Appellant : Mr. Kunal Anand, Mr. Prakhar Dixit, Ms.

Tusharika Sharma, Advocates.

For Respondent : Mr. Ankit Shah, Mr. Varun Gupta, Ms. Lakshita

Arora, Ms. Simran Wason, Advocates.

Facts

Appellant Rajesh Sabharwal had issued a notice under Section 8 of the Insolvency and Bankruptcy Code (IBC) on 31.01.2020 to the corporate debtor Desein Pvt. Ltd. claiming an amount of Rs. 41,81,024/-. The corporate debtor replied to the notice on 17.03.2020. On 24.03.2020, the Ministry of Corporate Affairs issued a notification enhancing the minimum default threshold to trigger insolvency under IBC from Rs. 1 lakh to Rs. 1

crore. The Appellant filed an application under Section 9 of IBC on 04.08.2020 before the National Company Law Tribunal (NCLT) to initiate corporate insolvency resolution process against the corporate debtor.

Order of the NCLT

The NCLT dismissed the Section 9 application on the ground that since it was filed after the notification dated 24.03.2020, the threshold applicable is Rs. 1 crore which was not fulfilled. Aggrieved by this order, the Appellant filed the present appeal before NCLAT.

Submissions by the Appellant

Since the demand notice under Section 8 was issued on 31.01.2020 prior to the notification enhancing the threshold, the threshold applicable should be Rs. 1 lakh. The Supreme Court was considering a similar issue in Civil Appeal No. 7032/2021 – Jumbo Paper Products v. Hansraj Agrofresh Pvt. Ltd.

Submissions by the Respondent

The relevant date for examining the threshold is the date of filing the Section 9 application and not the date of issue of demand notice under Section 8. The NCLAT had already decided this issue in Hyline Mediconz Pvt. Ltd. v. Anandaloke Medical Centre Pvt. Ltd. and several other judgements holding that the date of Section 8 notice is not relevant for determining the threshold.

Findings of the NCLAT

Part II of IBC dealing with corporate insolvency applies based on the minimum default amount under Section 4(1) which was amended to Rs. 1 crore by the 24.03.2020 notification. Section 9 dealing with operational creditors initiating CIRP falls under Part II. Thus, the application under Section 9 filed on 04.08.2020 needs to fulfil the amended threshold of Rs. 1 crore. Merely issuing a notice under Section 8 prior to 24.03.2020 notification does not mean the old threshold of Rs.

1 lakh would apply. The NCLT order dismissing the Section 9 application was correct.

Decision

Appeal dismissed. However, dismissal of Section 9 application does not bar the Appellant from taking other legal remedies available.

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Full Text of Judgment:

1. Heard Shri Kunal Anand, Learned Counsel appearing for the Appellant and Shri Ankit Shah, Learned Counsel appearing for the Respondent.
2. This appeal has been filed against the order and judgement of the Adjudicating Authority dated 27.04.2021 by which order Adjudicating Authority has dismissed Section 9 application filed by the Appellant.
3. Appellant gave a notice on 31.01.2020 u/s 8 claiming an amount of Rs. 41,81,024/-. The notice was also replied by the Corporate Debtor on 17.03.2020.
4. The Ministry of Corporate Affairs exercising its powers has issued a notification dated 24.03.2020 by which the minimum threshold amount to trigger the insolvency was enhanced from Rs. One lakh to Rs. One crore. The application being CP(IB)36/PB/2021 was filed by the Appellant on 04.08.2021.
5. The Adjudicating Authority heard the application and on the ground that it does not fulfil the threshold has rejected the application.
6. Learned Counsel, Shri Anand challenging the order contends that since the Demand Notice was issued on 31.03.2020 prior to notification dated 24.03.2020, the threshold of the case ought to have Rs. One lakh only and the notification dated 24.03.2020 is not applicable

in the facts of the present case. He further submits that the Supreme Court is already considering the issue in Civil Appeal No. 7032/2021, the Jumbo Paper Products Vs. Hansraj Agrofresh Pvt. Ltd.

7. Learned Counsel for Respondent refuting the submission submits that the relevant date for examining the threshold is the date when the application was filed. He submits that the issue has been considered and decided by this Tribunal in Hyline Mediconz Pvt. Ltd. Vs. Anandaloke Medical Centre Pvt. Ltd. in Comp. App.(AT) Ins. No. 1036/2022 and several other judgements of this Tribunal. He submits that date of giving notice u/s 8 is not relevant for determining the threshold.

8. We have considered the submission of the Learned Counsel for the parties and peruse the records.

9. There is no dispute between the parties regarding the relevant dates i.e. the date of issue of Demand Notice i.e. 31.01.2020 and the date on which the application was filed i.e. 04.08.2020. The application u/s 9 has been filed on

04.08.2020 which is undisputed fact. The similar issue came for consideration in Comp. App. (AT)(Ins.) No. 1036/2022 where Demand Notice was issued on 05.03.2020 and section 8 application was filed subsequently on 18.01.2021. Arguments was addressed that since the Operational Creditor has served the Demand Notice, the application filed on 18.01.2021 was maintainable on the threshold of Rs. One lakh.

10. This Tribunal elaborately considered the submission of the Learned Counsel for the parties and laid down the following in paragraph 8 and 9:-

“8. Section 4(1) provides that “this Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees”. Part II of the Code deals

with 'Insolvency Resolution and Liquidation for Corporate Persons'. The applicability of the Part II is dependent on minimum amount of default as prescribed in Section 4(1). Minimum amount to default was Rupees One Lakh which has been subsequently amended to Rupees One Crore by Notification dated 24.03.2020.

The applicability of Part II is dependent on minimum amount of default thus.

9. Section 6 of the Code provides for persons who may initiate Corporate Insolvency Resolution Process (CIRP). Section 6 is as follows:-

"6. Persons who may initiate corporate insolvency resolution process. – Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter."

11. The above judgement fully covers the issues raised in this appeal. The application of the Appellant having been filed on 04.08.2020 i.e. subsequent to 24.03.2020 should fulfil the threshold of Rs. One crore and the Adjudicating Authority did not commit any error in rejecting Section 9 application.

We do not find any merit in the Appeal, **the Appeal is dismissed.**

12. We, however, observe that dismissal of Section 9 application shall not preclude the Appellant to take such remedy as available in law.