

FIT FOR INDEXING

**IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH**

(IB)-103(PB)/2018

IN THE MATTER OF:

Sky RMC Plants Pvt. Ltd.

.... APPLICANT / PETITIONER

Vs

Ahulwalia Contracts (India) Ltd.

.... RESPONDENT

SECTION:

Under Section 7 of Insolvency & Bankruptcy Code, 2016

Order delivered on 01.02.2018

Coram:

CHIEF JUSTICE (RTD.) M. M. KUMAR

HON'BLE PRESIDENT

S. K. MOHAPATRA

HON'BLE MEMBER (TECHNICAL)

PRESENTS:

For the Petitioner(s):-

**Mr. Rahul Chinis, Mr. Aaditya Parde and
Mr. Samrat Krishnarao Shinde, Advocates**

For the Respondent(s):-

ORDER

This is an application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer that Corporate Insolvency Resolution Process be triggered in the matter of M/s. Ahluwalia Contract (India) Limited-respondent. Before approaching this Tribunal, the applicant has sent a statutory notice under Section 8 of the Code on 15.09.2017 which was duly replied by the Operational Debtor on 26.09.2017 (Annexure-2.9, page 1387). In para 8 of the reply a specific objection has been raised by the Operational Debtor which reads as under:-

"8. It is pertinent to mention that you have prior to this notice, on 22.02.2017 have filed a Commercial Summary Suit bearing number COMSL/79/2017 against Our Client on the same subject matter, before the Hon'ble High Court of Bombay, which was rejected vide an order dated 19.06.2017 due to non removal of defects in the plaint. Further, you have filed an application for restoration of the same and it has been restored vide an order 04.08.2017 which is much prior to the issuance of this notice. The details and status of the case obtained from the website of the Hon'ble High Court is attached herewith. Also, the orders under the said suit, including that of rejection and restoration has also been appended herewith to bring on record the existence of dispute within the meaning of the Insolvency and Bankruptcy Code 2016. Furthermore, the notice dated 31.07.2017 along with the copy of the chamber order application

so received on your behalf in the same matter with respect to the chamber order, by Our Client has also been attached herewith.”

A perusal of the aforesaid objection shows that the applicant has already filed a Commercial Summary Suit bearing No. COMSL/79/2017 against the Operational Debtor on the same subject before Hon’ble High Court of Bombay which was firstly rejected vide order dated 19.06.2017 on account of non removal of defects in the plaint. However, an application for restoration of suit was filed and it has been restored on 04.08.2017 much prior to the issuance of notice dated 15.09.2017 issued under Section 8 of the Code.

The aforesaid fact has not been disputed before us during the course of hearing and the matter was passed over on the request of the learned counsel for the applicant to seek instructions whether they wish to withdraw the instant application or they wish to press the same. After receiving instructions, the applicant has preferred to press the present application.

The Code has debarred entertainment of any application of a Operational Creditor where a dispute in the form of suit or arbitration is pending. Section 8 (2) (a) of the Code brings to the aforesaid legal position and the same is reproduced for the facility of reference:-

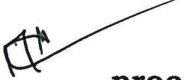
Section 8 (2) (a)

(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;

A perusal of the aforesaid provision would show that an Operational Debtor could on the receipt of the demand notice or a copy of invoice mentioned in sub-section (1) bring to the notice of the Operational Creditor-applicant about the factum of existence of dispute and record of pendency of the suit or arbitration proceedings filed before the receipt of notice. It has not been disputed that suit has been filed and it is still pending before the Hon’ble High Court of Bombay in which various orders have been passed. The notice has been duly replied within ten days and the objection has been raised with regard to the dispute pending in the form of suit before the Hon’ble High Court of Bombay.

We are further fortified in taking the aforesaid view when we read the provisions of Section 9 (5) (ii) (d) of the Code which read as under:-

 **Application for initiation of corporate insolvency resolution process by operational creditor.**

Section 9 (5) (ii) (d)

- (1)
- (2)
- (3)
- (4)

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

- (a)
- (b)
- (c)

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility

A perusal of the aforesaid provisions would show that if a notice of dispute has been received by the Operational Creditor or there is a record of dispute in information utility then the Adjudicatory Authority shall reject the application and communicate such decision to the Operational Creditor and the Operational Debtor.

Accordingly, we have already recorded the finding with regard to the admitted factual position of pendency of a suit. We do not feel the necessity of issuing any notice calling upon the respondent-Operational Debtor as the facts are admitted and even otherwise patent from a perusal of the reply sent to notice issued under Section 8 of the Code.

As a sequel to the above discussion, the application fails and the same is dismissed.

Sd/-

(M. M. KUMAR)
PRESIDENT

Sd/-

(S. K. MOHAPATRA)
MEMBER (TECHNICAL)