

NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH: GUWAHATI

Diary No. 580/2017

Under Section 9 of the Insolvency & Bankruptcy Code, 2016.

In the matter of:

M/s. K. S. Marketing
(Formerly known as Royal Marketing) ... Operational Creditor

Versus

M/s. Kitply Industries Ltd. ... Corporate Debtor

Order delivered on 10-10-2017

Coram:

PRESENT

HON'BLE MR. JUSTICE P.K. SAIKIA, MEMBER (JUDICIAL)

ORDER

This application under Section 9 of the Insolvency and Bankruptcy Code 2016 (in short, the Code 2016) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (in short, Rule 2016) has been initiated by M/s. K. S. Marketing, (Formerly known as Royal Marketing), the Operational Creditor, seeking initiation of Corporate Insolvency Resolution Process against M/s. Kitply Industries Ltd., the Corporate Debtor.

This Registry, on receipt of the application under Section 9 of the Code 2016, examined the same and noticed some defects in the presentation/preferring the application under consideration and such defects were reflected in its note dated 15.09.2017. For ready reference, the defects, so raised by the Registry in its note dated 15.09.2017 are reproduced below: -

"i) The basis of the claim of the operational creditor (in short OC) is the consignment agreement dated 01/05/2010 entered between Kitply Industries Limited and M/s. Royal Marketing. From the representation provided by the applicant in part 1 of the form, it appears that M/s. K.S. Marketing was erstwhile known as Royal Marketing. But no

vii. The affidavit verifying the petition has to be in NCLT Form 6 format in non-judicial stamp paper of value of Rs.20.

vii. The demand draft details in the application needs to be filed by the applicant.

These shortcomings were duly communicated to the Operational Creditor for their information and requiring them to rectify the defects within a period as stated in the proviso to Section 9 (5) (ii) of the Code of 2016 vide order dated 15-09-2017 of this Tribunal. For ready reference, the order dated 15-09-2017 is reproduced below: -

"O R D E R
Date: 15.09.201

This application under Section 9 of the Insolvency and Bankruptcy Code 2016 (in short, the Code 2016) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (in short, Rule 2016) has been initiated by M/s. K. S. Marketing, (Formerly known as Royal Marketing) Port Road, Azhikode, Kannur seeking initiation of corporate insolvency resolution process against M/s. Kitply Industries Ltd, Makum Pathat, A. T. Road, Margherita, Tinsukia, Assam.

This Registry, on receipt of the application under Section 9 of the Code 2016, examined the same and noticed some defects in the presentation/preferring the application under consideration and such defects were reflected in its report dated 15.09.2017. For ready reference, the objection so raised by the Registry in its note dated 15.09.2017 is reproduced below: -

"i) The basis of the claim of the operational creditor (in short OC) is the consignment agreement dated 01/05/2010 entered between Kitply Industries Limited and M/s. Royal Marketing. From the representation provided by the applicant in part 1 of the form, it appears that M/s. K.S. Marketing was erstwhile known as Royal Marketing. But no documentary proof evidencing the change of name has been submitted to the Registry. It is desirable that M/s. K.S. Marketing provide some documentary evidence that it was earlier known as M/s. Royal Marketing, in accordance with section 60 of the Partnership Act, 1932.

ii). From perusal of the demand notice sent by the OC to the alleged corporate debtor (in short CD) in form 3 dated 08/06/2017, it appears that the provision of law/contract under which the debt has become due are clause 7 and clause 9 of the Consignment Agent Agreement dated 1st May, 2010. The date of default has been submitted to be due from April, 2012.

There is no clear documentary proof submitted as to how the amount claimed has become due other than a mention of section 9 of the consignment agreement which pertains to termination of the contract. The OC may perhaps be advised to submit detailed legal documents in the form of termination notices, etc. due to which section 9 is attracted. Accordingly, the date of default may be calculated and submitted.

iii) As per section 9(3) of Insolvency and Bankruptcy Code, the following documents needs to be submitted along with the main application-

vii. The affidavit verifying the petition has to be in NCLT Form 6 format in non-judicial stamp paper of value of Rs.20.

vii. The demand draft details in the application needs to be filled by the applicant.

These shortcomings were duly communicated to the Operational Creditor for their information and requiring them to rectify the defects within a period as stated in the proviso to Section 9 (5) (ii) of the Code of 2016 vide order dated 15-09-2017 of this Tribunal. For ready reference, the order dated 15-09-2017 is reproduced below: -

ORDER
Date: 15.09.2017

This application under Section 9 of the Insolvency and Bankruptcy Code 2016 (in short, the Code 2016) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (in short, Rule 2016) has been initiated by M/s. K. S. Marketing, (Formerly known as Royal Marketing) Port Road, Azhikode, Kannur seeking initiation of corporate insolvency resolution process against M/s. Kitply Industries Ltd, Makum Pathat, A. T. Road, Margherita, Tinsukia, Assam.

This Registry, on receipt of the application under Section 9 of the Code 2016, examined the same and noticed some defects in the presentation/preferring the application under consideration and such defects were reflected in its report dated 15.09.2017. For ready reference, the objection so raised by the Registry in its note dated 15.09.2017 is reproduced below: -

"i) The basis of the claim of the operational creditor (in short OC) is the consignment agreement dated 01/05/2010 entered between Kitply Industries Limited and M/s. Royal Marketing. From the representation provided by the applicant in part 1 of the form, it appears that M/s. K.S. Marketing was erstwhile known as Royal Marketing. But no documentary proof evidencing the change of name has been submitted to the Registry. It is desirable that M/s. K.S. Marketing provide some documentary evidence that it was earlier known as M/s. Royal Marketing, in accordance with section 60 of the Partnership Act, 1932.

ii). From perusal of the demand notice sent by the OC to the alleged corporate debtor (in short CD) in form 3 dated 08/06/2017, it appears that the provision of law/contract under which the debt has become due are clause 7 and clause 9 of the Consignment Agent Agreement dated 1st May, 2010. The date of default has been submitted to be due from April, 2012.

There is no clear documentary proof submitted as to how the amount claimed has become due other than a mention of section 9 of the consignment agreement which pertains to termination of the contract. The OC may perhaps be advised to submit detailed legal documents in the form of termination notices, etc. due to which section 9 is attracted. Accordingly, the date of default may be calculated and submitted.

iii) As per section 9(3) of Insolvency and Bankruptcy Code, the following documents needs to be submitted along with the main application-

- c. An affidavit to the effect that there is no notice given by corporate debtor relating to the dispute of the unpaid OD.
- d. A copy of certificate from the financial institution maintaining accounts of the OC confirming that there is no payment of the unpaid OD by the corporate debtor(CD).

The applicant has not furnished the above details in the application.

iv) The annexures submitted are not in the format provided in form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. As per the rules the annexures have to be submitted in the following format:

Annexure-1- Copy of the invoice/demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

Annexure-ii.- Copies of all documents referred to in the application.

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

Annexure iv.- Proof that specified application fee has been paid.

In Part iv of the form, the amount claimed to be in default and the date on which the

v. Default occurred has to be submitted in a particular format, i.e. the workings for computation of amount and dates of default in tabular form. The applicant has merely attached the statement of accounts. The applicants may perhaps be advised to provide the table as mandated by the form along with the date of default.

vi. Applicant has not provided a service affidavit yet certifying that a copy of the application has been served on the corporate debtor.

vii. The affidavit verifying the petition has to be in NCLT Form 6 format in non-judicial stamp paper of value of Rs.20.

vii. The demand draft details in the application needs to be filled by the applicant.

I have considered the note of the Registry in the light of the statements made in the application and other connected documents and found reasons to concur with the objection so raised by the Registry quo preferring / presenting application in hand before the Tribunal. Accordingly, operational creditor is directed to rectify the same immediately."

Now, it is stated by the Registry that seven days' time, so specified in proviso to Section 9(5)(ii) of the Code of 2016 is already over in the meantime. But the defects aforesaid have not been rectified by the Operational Creditor as yet.

The Registry vide note dated 09-10-2017, further notified that an email has been received from the advocate of the Operational Creditor seeking extension for rectification of the defects so noticed, for a further period of fifteen days.

Today, Mr. J. Singh, learned counsel for the Operational Creditor appeared before this Tribunal and submitted that due to some pressing and compelling reasons, the operational creditor could not rectify the defects pointed out by this Bench in time and, therefore, prayed for extension of time by another few days for rectification of the aforesaid shortcomings.

However, such prayer is found untenable in view of the law laid down by National Company Law Appellate Tribunal, New Delhi in the case of Smart Timing Steel Ltd. Vs National Steel & Agro Industries Ltd. reported in (2017) 142 SCL 382, as well as the decision of the same Tribunal in the case of J. K. Jute Mills Company Ltd. Vs Surendra Trading Co. reported in (2017) 142 SCL 188.

In J. K. Jute Mills Company Ltd. (supra), it was held that seven days' time meant for rectification of defects noticed in the application filed under Section 9 and 10 of the Code of 2016 are mandatory and there is no scope of enlargement of such time. For ready reference, relevant part of the decision in the case of J. K. Jute Mills Company Ltd. (supra) is reproduced below: -

"44. However, the 7 days' period for the rectification of defects as stipulated under proviso to the relevant provisions as noticed above is required to be complied with by the corporate debtor whose application, otherwise, being incomplete is fit to be rejected. In this background we hold that the proviso to sub-section (5) of section 7 or proviso to sub-section (5) of section 9 or proviso to sub-section (4) of section 10 to remove the defect within 7 days are mandatory, and on failure applications are fit to be rejected."

I have already found that certain defects did creep up in preferring the application under Section 9 of the Code of 2016 by the Operational Creditor and such defects were duly communicated to the Operational Creditor requiring them to rectify the said defects within the period so specified in proviso to Section 9 (5) (ii) of the Code of 2016.

Despite above, the defects, so notified, were not rectified by the Operational Creditor in time. Therefore, this Bench has no other option but to reject the application.

Accordingly, this application preferred under Section 9 of the Code of 2016 is dismissed for the aforesaid reason.

Member (Judicial)
National Company Law Tribunal
Guwahati Bench: Guwahati