

+NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI

Comp. App. (AT) (Ins) No. 2149 of 2024

IN THE MATTER OF:

KNK Ship Management

...Appellant

Versus

Thrani Industries Ltd.

...Respondent

Present:

For Appellant : **Mr. Saket Sikri, Mr. Gautam Khanzanchi, Mr. Rohit Pardeshi, Mr. Ajay Pal Kullar, Ms. Suruchi Jaiswal & Ms. Aditi Kukreja, Advocates.**

For Respondent : **Mr. Karan Luthra & Mr. Rohan Dua, Advocates.**

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is filed by the Operational Creditor, being aggrieved against the order dated 24.09.2024, passed by the NCLT, New Delhi, by which CP (IB) No. 540/ND/2022 filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('Code') against Thrani Industries Ltd. (CD) for the resolution of its debt of Rs. 2,25,87,068/-, has been dismissed.

2. Brief facts of this case are that the Appellant/OC is a marine consultant and agent functioning at the Mumbai Port and provides its services, was appointed as the Marine Manager, Consultant and Agent by the CD on 31.03.2017 to manage its two vessels, namely, Istanbul and Istanbul 2 (TBN Neverland and Sea Yah) (referred to collectively as 'Vessels').

3. The Appellant has allegedly provided crew manning and management services to the CD in the financial year 2018-19 and raised cumulative invoice amounting to Rs. 2,36,24,281/- out of which it received an amount of Rs. 1,64,15,810/-. Thus, a sum of Rs. 72,08,471/- remained unpaid in respect of financial year 2018-19.

4. It is also the case of the Appellant that it provided the same services to the CD in the financial year 2019-20 and raised invoices of Rs. 1,38,20,997/- from 02.04.2019 to 14.03.2020 but no amount was paid.

5. The Appellant also provided the same services to the CD in the year 2021-22 and raised invoices of Rs. 15,57,600/- from 01.04.2021 to 31.03.2022 but the said amount was also not paid, therefore, the Appellant has alleged that there is a default of Rs. 72,08,471 for the financial year 2018-19, Rs. 1,38,20,997/- for the financial year 2019-20 and Rs. 15,57,600 for the financial year 2021-22, total amounting to Rs. 2,25,87,068/-.

6. Since, the CD did not pay the aforesaid debt, therefore, the Appellant, in order to initiate CIRP proceedings served demand notice under Section 8 of the Code on 02.05.2022 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for short 'Rules') in which an amount of Rs. 2,25,87,068/- was claimed.

7. It is alleged that notice was sent on the registered email address of the respondent i.e. mthirani@gmail.com and also sent it by speed post upon the address of the Respondent i.e. E-2/203, Bhatia Trade Centre, Alaknanda, New Delhi 110019 on which past invoices were sent and were duly received and paid. However, the demand notice through speed post

was returned with the endorsement “addressee left without instructions”. The Appellant again sent demand notice on 07.05.2022 on the registered address of the CD obtained from the companies’ master data available on the website of the Ministry of Corporate Affairs i.e. E-2/203, Bharti Trade Centre, Alaknanda Shopping Complex, New Delhi - 110019 but it was also returned with the endorsement that “receiver shifted from given address”.

8. It is alleged that the Appellant also obtained certificate under Section 9(3)(c) of the Code from Bank of Baroda and Kotak Mahindra Bank where it maintained its account in which it has been stated that no payments were received from the CD after 31.03.2019.

9. Thereafter, the Appellant filed the application under Section 9 of the Code on 09.06.2022.

10. Notice in the application was issued. The Appellant served copy of the petition on the registered email as well as registered address through speed post and registered courier but the same were returned with the instructions “addressee left without instructions” and receiver shifted from given address’.

11. The Tribunal, in its order dated 02.09.2022 and 10.10.2022, observed that the Respondent is not interested in contesting the application, therefore, it was proceeded against ex-parte and thereafter, arguments were heard and order was reserved but on 15.03.2023 the Respondent filed an I.A No. 1510 of 2023 for setting aside the order dated 02.09.2022 and 10.10.2022 on the ground that notices were sent on the wrong address

though the Appellant had served it both on the email address as well as on the postal address.

12. On 17.03.2023, the I.A No. 1510 of 2023 was allowed subject to 1,50,000/- as cost and time was granted to Respondent to file reply which was ultimately filed on 27.03.2023.

13. In the reply filed by the Respondent, it was alleged that there is a pre-existing dispute between the parties. The Appellant was appointed as a marine manager, consultant and agent for assisting and managing the purchase, inspection and import of two vessels. It referred to clause 9 of the appointment letter dated 31.03.2017 in which it was provided that “certification and documentation of passenger ferry with statute/administration, and Govt of India Officers, State Govt. Offices, related to any permission for the ferry namely Navy, Coast Guard, Food and Drug, Pollution Board, Excise, Customs, police, BMC etc. etc. through Capt. Naresh Kalra or KNK Ship Management or appointed Sub-Agent by NK in India”

14. It is also alleged that the Respondent had paid an ad-hoc amount of Rs. 15,00,000/- to the Appellant which was to be adjusted against the future invoices. It is further alleged that the Respondent paid Rs. 1,64,15,870/- pertaining to 22 invoices raised between 2017-18 by the Appellant. It is further alleged that thereafter the Respondent came to know that services rendered by the OC were deficient. There was delay in the performance of the works by the Appellant because of which the operation of the two vessels was delayed. The Architects engaged by the CD also

sent emails to the CD with a copy to the OC bringing to its notice that the works were behind schedule and the OC had to devote sufficient manpower to ensure timely completion of works. It is also alleged that the vessels were to be used for commercial purposes i.e. as restaurants and delay in completion of the works led to the loss of revenue to the CD which is directly resulted because of deficient and poor services rendered by the Appellant/OC. It is further alleged that the vessels were seized by the Customs Authorities and are lying seized since 25.11.2020.

15. In the rejoinder, the Appellant has alleged that notice under Rule 5(2)(a) was served on the registered address of the Respondent provided on the website of the MCA and has referred to a decision of this Court in the case of Abhinandan Jain Vs. Tanaya Enterprises Pvt. Ltd, 2021 SCC OnLine NCLAT 102 to contend that the registered address mentioned in the MCA website can be relied upon. It is also alleged that demand notice was also delivered through email and speed post. The Respondent, if allegedly left the address, was supposed to upload the fresh address on the MCA website. It is further submitted that Respondent has referred to two emails dated 21.09.2018 and 29.09.2018 which were pertaining to some plumbing work as pre-existing dispute which was corrected and both vessels were made operational and inaugurated as per schedule on 17.11.2018 by the Union Minister for shipping. It is also submitted that till 13.03.2020 parties were organized and hosted on the vessels. It is submitted that the restaurant manager vide email dated 05.03.2020 had sent the operational schedule regarding the vessels to the OC for the period from 07.03.2020 to 13.03.2020. It is also submitted that the CD had never raised any

dispute regarding the imposition of penalty / custom duty by way of a notice, suit or arbitration rather it is submitted that the CD itself appointed M/s Sunrich Logistics Pvt. Ltd. (Sunrich) vide appointment letter dated 02.01.2018 as the customs clearing and forwarding agent for the necessary documentation at the customs/ port for import of the vessels on its behalf. He has also referred to the statement of Shri Kamlesh Patel and Shri Shreekanth Ramakrishnan, reproduced in the customs order, which shows that Sunrich had filled the bill of entry, wherein the classification of the vessels was done. It is further submitted that Respondent has already filed appeal against the order of customs which is pending before the Customs, Excise and Service Tax Appellate Tribunal, therefore, the liability of the Appellant has not been crystalized.

16. The Tribunal on the basis of the pleadings before it framed two questions i.e. whether the demand notice issued by the OC in Form – 3 is valid and whether there was any discernible pre-existing dispute surrounding the debt.

17. In respect of notice, the Tribunal has observed that if the demand notice is issued in form 3 then copy of invoice is not mandatory but if the claim is based on the invoices then the demand notice has to be served in form 4, in this regard, reliance has been placed by the Tribunal in the case of Neeraj Jain Vs. Cloudwalker Streaming Technologies Pvt. Ltd., CA (AT) (Ins) No. 1354 of 2019.

18. In so far as the issue of pre-existing dispute is concerned, the Tribunal has referred to two emails dated 29.09.2018 and 08.10.2018 on

the basis of which it has been held that there was deficiency in the performance and breach of contractual obligations, therefore, there is a pre-existing dispute.

19. Counsel for the Appellant has submitted that the Appellant had attached all the invoices with the demand notice issued in form 3, therefore, there is complete compliance of Rule 5 of the Rules. It is submitted that the Tribunal has erred in relying upon the case of Neeraj Jain (Supra) in which the demand notice was sent without invoices. Counsel for the Appellant has further argued that the finding recorded by the Tribunal that there is pre-existing dispute between the parties is also bad because it has relied upon selective emails dated 29.09.2018 and 08.10.2018, which have also been referred in the impugned order, to hold that there was deficiency of service on the part of the Appellant. It is submitted that the Tribunal has failed to note that the Appellant, vide emails dated 29.09.2018 and 21.09.2018, had clearly informed the Respondent that the plumbing work had already been initiated and that the delay was due to improper allocation of work to the fabrication team, therefore, the delay was at the end of the Respondent and not the Appellant. It is further submitted that Respondent wanted to open the restaurant in the vessels by 10.11.2018 which was inaugurated on 17.11.2018 and were in use till 13.03.2020. It is also submitted that even Respondent made the payment to the Appellant till 30.03.2019, no notice for termination of the agency or notice raising a dispute was ever issued by the Respondent to the Appellant prior to the petition filed by the Appellant. It is further submitted that the Respondent had availed the services of the Appellant even after the alleged deficiency because on

15.02.2019, the Appellant secured licenses for the vessels to operate in the MbPT harbour without a pilot, on 18.01.2020, the Appellant communicated with MbPT on behalf of the Respondent regarding vessels operations and on 05.03.2020 the restaurant manager emailed the Appellant about the operational schedule for vessels (07.03.2020 to 13.03.2020) indicating ongoing operations and events. It is also submitted that the issue of seizure of vessels by the customs authorities is not concerning the Appellant because the CD had categorically engaged another company M/s Sunrich as its clearing and forwarding agents for documentation at customs/ port for importation of the vessels in question. The same is also evident from the seizure memo dated 25.11.2020. It is also submitted that the customs dispute is not an inter se dispute between the Appellant and Respondent rather it is a dispute between the Respondent and the Commissioner of Custom Mumbai over the classification of the vessels. It is submitted that no dispute with the Appellant has ever been raised by the Respondent in the form of notice, suit, arbitration etc. and even no liability has been crystallized by the Custom because of an appeal against custom order is pending. It is submitted that for considering that there is pre-existing dispute, it should be existing prior to the receipt of the demand notice as has been held in the case of Mobilox Innvations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd., (2018) 1 SCC 353 that the dispute or suit or arbitration proceedings must be pre-existing before the receipt of the demand notice as the case may be. It is further submitted that this Court in the case of G.T. Polymers Vs. Keshava Medi Devices Pvt. Ltd.,

2020 SCC OnLine NCLAT 1046 has held that any civil suit filed after the receipt of demand notice will not be considered as a pre-existing dispute.

20. On the other hand, Counsel appearing on behalf of the Respondent has submitted that both vessels were brought to India from Istanbul, Turkey and the customs clearance was done by the Appellant but because of deficiency in the services and breach of obligations under the appointment letter, vessels were seized by the office of the Commissioner of Customs. The Respondent received a notice on 09.02.2021 alleging evasion of customs duty amounting to Rs. 9,03,76,156/- on the import of the vessels and the Commissioner of Customs passed an order of demand of Rs. 9.03 Cr. It is submitted that because of the aforesaid issues, there is a breach of contract which is clearly a pre-existing dispute. It is submitted that the Appellant has erroneously contended that the customs clearance was done by the customs broker and that this dispute is not notified to it. It is further submitted that the demand notice dated 02.05.2022 is in form 3 of the Rules. It is alleged that in the demand notice issued on the basis of invoice then it has to be in Form 4. It is submitted that operational debt has been claimed on the basis of invoices for which a notice under form 3 is not issued but in form 4 and reliance has been placed in the case of Neeraj Jain (Supra).

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

22. The Tribunal has dismissed the application only on two issues, firstly, that the demand notice issued under Rule 5 of the Rules appending the invoices should have been in form 4 instead of in form 3 and secondly the

Respondent has raised the issue before the notice about the deficiency in work of the Appellant by two emails dated 29.09.2018 and 08.10.2018. It has also taken into consideration the issue of seizure of vessels on 25.11.2020 by the customs authorities.

23. There is no dispute raised by the Respondent that it has no liability to pay to the Appellant the amount raised on the basis of the invoices. The Appellant has raised invoices pertaining to three financial years i.e. Rs. 72,08,471 for the financial year 2018-19, Rs. 1,38,20,997/- for the financial year 2019-20 and Rs. 15,57,600 for the financial year 2021-22, total amounting to Rs. 2,25,87,068/- which has not been paid by the Respondent.

24. Since, the amount was not paid, therefore, the Appellant decided to pursue the remedy under the Code and served notice in form 3 prescribed in Rules. Both forms are provided in Rule 5 of the Rules. Rule 5(1)(a) prescribes a demand notice in form 3 and Rule 5(1)(b), a copy of the invoice attached in form 4. Form 3 and 4 are printed performa of the notice. Form 3 is the form of demand notice / invoice demanding payment under the insolvency and bankruptcy code, 2016 whereas Form 4 is the form of notice with which invoice demanding payment is to be attached. Form 3 may be sent as a demand notice or invoice demanding payment whereas Form 4 notice with which invoice demanding payment is to be attached. There is no dispute that the Appellant has sent notice with invoices. The demand notice with invoices fulfils the requirements to prove the existence of operational debt and the amount of default. If the notice sent in form 3, OC has to give

particulars of unpaid operational debt whereas in the notice sent on form 4, the OC has to only attach the invoices on which its claim is based without giving any further particulars. Both Forms 3 and 4 are 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.

Form 4

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

FORM OF NOTICE WITH WHICH INVOICE DEMANDING PAYMENT IS TO BE ATTACHED
(Under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

[Date]

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

From,
[Name and address of the operational creditor]

Subject: Notice attached to invoice demanding payment

Madam/Sir,

[Name of operational creditor], hereby provides notice for repayment of the unpaid amount of INR [*insert amount*] that is in default as reflected in the invoice attached to this notice.

In the event you do not repay the debt due to us within ten days of receipt of this notice, we may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process under section 9 of the Code.

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

25. Repeated demand notice was sent by the Appellant which were tried to be avoided on the pretext that notices were served on the office address of the Respondent but endorsement was made by the postal authority that

addressee left without instructions” without the CD updating latest address on the portal of the MCA. The Respondent also practiced the same thing when the notice under Section 9 was issued but when the Respondent was proceeded against ex-parte by the order of the Court and order was reserved then it appeared before the Court by filing an application for setting aside the ex-parte order.

26. The very fact that the notice contained the invoices and that the invoices have not been challenged by the Respondent on the ground that the same are fake and fabricated, it would be totally hyper technical plea to reject the application of the Appellant on the ground that the notice issued under Section 8 in form 3 with invoices was a defective notice.

27. In so far as the issue regarding the pre-existing dispute is concerned, the Tribunal has referred to two emails dated 29.09.2018 and 08.10.2018. These mails also reproduced again for a quick reference which are as under:-





Mridul Thirani <mthirani@gmail.com>

Sea Yah - Completion Date

Samir D'Monte - SDM Architects <samir@sdmarchitects.com>

8 October 2018 at 19:58

To: "Capt.Naresh Kalra" <kalranaresh@gmail.com>, Mainfleet <mainfleet@knkshipping.co.in>, Mridul Thirani <mthirani@gmail.com>, Shripriya Thirani <shripriya.thirani@gmail.com>, Sanjay Baikerikar <greensquarearchitects@gmail.com>, Divya - SDM Architects <divya@sdmarchitects.com>, Vibhuti Bane <bakushospitality@gmail.com>

Dear Captain Kalra, Captain Manjeet,

We request that you please put full pressure on the plumbing, electrical and hot work teams.

If work continues at the current pace, we may not finish the vessel even by November 10.

Also, with the revision of the design for the Captains' Lounge / VIP Room, that room may not be ready for several weeks after the other works are done. Greensquare can elaborate on this.

Thanks and regards, Samir.

--

Samir D'Monte
Principal Architect

sdmarchitects

28. But the Tribunal has lost sight of the fact that restaurant in the vessels were inaugurated after their emails on 17.11.2018 by the Union Minister. It is also pertinent to mention that till 13.03.2020, parties were organized and hosted in the vessels. In this regard, the restaurant manager sent email dated 05.03.2020 regarding operations in the vessels to the Appellant from the period 07.03.2020 to 13.03.2020. In such circumstances, the said emails cannot be relied upon.

29. In so far as the dispute raised by the Respondent about the seizure of the vessels is concerned, the said action has been taken by the customs authorities on 25.11.2020 much after the inauguration of the restaurant in the vessels and no dispute was ever raised earlier as there is no evidence

brought on record by the Respondent by way of any notice, suit or arbitration etc. with the Appellant in respect of seizure.

30. Beside this, the Tribunal has not really appreciated that Sunrich was appointed by the Respondent as its clearing and forwarding agent for documentation at customs/port for import of the vessels in question for which the said company was responsible and that the appeal against the order of confirming the demand raised by the customs department is still pending and the liability of the Appellant has not been crystalized.

31. Thus, in view of the aforesaid facts and circumstances, we are of the opinion that the order passed by the Tribunal is patently erroneous and hence, the appeal is allowed and the impugned order is set aside.

The parties shall bear their own costs.

I.As, if any, pending, are hereby closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Justice Mohammad Faiz Alam Khan]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

New Delhi
11th September, 2025
Sheetal