
(2023) 10 NCLT CK 0008
In the National Company Law Tribunal
Case No : C.P.(IB)-554(MB)/2022

Mr. Atanu Kumar Chatterjee and Others Vs Rolta Defence Technology Systems Privatelimited ?

Date of Decision : 06-10-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 8, 9, 10A

Citation : (2023) 10 NCLT CK 0008

Hon'ble Judges : Lakshmi Gurung, Member (J); Charanjeet Singh Gulati, Member (T)

Bench : Division Bench

Advocate : Sanjana Panday, Rishab Aggarwal, Shadab S Jan, Shivam Bhagwati, Mufaddal Paperwala

Final Decision : Dismissed

Judgement

Charanjeet Singh Gulati, Member Technical

1. The Present Application is filed under section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by 29 Operational Creditors collectively, Mr. Atanu Kumar Chatterjee and Others (for brevity 'Operational Creditors') through its Authorised representative, Mr. Vinay Krishna Chaudhari, who has been duly authorised vide Authority Letters by the other Operational Creditors for initiating Insolvency Resolution Process (CIRP) against Rolta Defence Technology System Private Limited (for brevity 'Corporate Debtor') for default in repaying an amount of ₹ 3,50,75,185 as on 15.09.2021.

Brief Facts:

2. Looking at the Company Petition, it reveals that this Petition has been filed by 29 Operational Creditors who are the former employees of the Corporate debtor and have served the Corporate Debtor in different capacities and for different period. the Operational Creditors were granted various appraisal and promotions

by the Corporate Debtor, during their term of employment. The total amount of outstanding debt due to Operational creditors contains salary and other employment dues including Tax Deducted at Source (TDS), Provident Fund (PF), Food Coupons and interest, amounting to Rs. 3,50,75,185/-.

3. The Operational Creditors issued the Demand Notice to the Corporate Debtor on 15.10.2021. In response to this the Corporate Debtor issued a reply to the Operational creditors vide its email dated 01.11.2021, raising various objections. Subsequently, the Corporate Debtor also entered into a Settlement Agreement dated 28.02.2022, with the 29 Employees, whereby the Corporate Debtor agreed to make payments to the employees. The Settlement Agreement records the acknowledgement of the Corporate Debtor and the same was breached as the Corporate Debtor failed to make payments. In such circumstances, the Operational Creditors have filed the present Petition under section 9 of the Code.

4. The Outstanding Dues of individual Operational Creditors are as follows:

Sr.

No.

Name of the Operational Creditor

Outstanding fixed salary

Outstanding variable salary

Outstanding TDS

Outstanding Provident Fund

Outstanding Food Coupons

Other Dues

Interest

Total per employee

1.

Mr. Atanu Kumar Chatterjee

Rs.16,42,000/-

-

-

Rs.4,35,224/-

-

-

Rs.15,32,198/-

Rs. 31,420/-

Rs.36,40,842/-

2.

Mr. Vinay Krishna Choudhari

Rs.8,94,083/-

Rs.2,27,500/-

Rs.6,80,275/-

Rs.77,706/-

Rs.20,000/-

Rs.3,45,105/-

Rs.3,89,068/-

Rs.26,33,737/-

3.

Mr. Mallikarjuna Rao Vatti

Rs.5,40,158/-

-

-

-

Rs.12,000/-

Rs.10,70,620/-

Rs.2,58,753/-

Rs.18,81,531/-

4.

Mr. Shashikant Vasantrya Bagul

Rs.5,18,655/-

-

Rs.6,64,401/-

-

Rs.12,000/-

Rs.1172199/-

Rs. 248691/-

Rs.26,15,946/-

5.

Mr. Dinesh Sakharam

Ambekar

Rs.10,57,330/

-

-

Rs.6,33,797/-

Rs.97,248/-

Rs.18,000/-

Rs.5,41,762/-

Rs.4,42,974/-

Rs.27,91,111/-

6.

Mr. Sandeep Shantaram

More

Rs.9,93,975/-

Rs.1,51,601/-

-

-

-

Rs.9,83,714/-

Rs.3,39,121/-

Rs.24,68,411/-

7.

Mr. Manish

Jhalani

Rs.3,35,470/-

Rs.45,943/-

Rs.95,500/-

Rs.19450/-

Rs.12,000/-

Rs. 249121/-

Rs. 161022/-

Rs.9,18,506/-

8.

Mr. Thavasilingam Tharmalingam

Rs.4,66,670/-

-

Rs.6,43,213/-

-

Rs.2,47,501/-

Rs.2,18,270/-

Rs.15,75,654/-

9.

Mr. Aashish Narandas

Sethna

Rs.2,67,622/-

Rs.1,50,000/-

Rs.1,78,495/-

-

Rs.20,000/-

Rs.6,95,620/-

Rs.1,28,490/-

Rs.14,40,227/-

10.

Mr. Rupesh

Avinash Salvi

Rs.3,20,404/-

Rs.52,500/-

Rs.88,506/-

Rs.17,172/-

-

Rs.1,43,555/-

Rs.1,58,303/-

Rs.7,80,440/-

11.

Mr. Chanchal Kumar

Mukherjee

Rs.2,15,619/-

-

Rs.1,56,458/-

-

-

Rs.5,68,677/-

Rs.1,07,413/-

Rs.10,48,167/-

12.

Mr. Rajib Das

Rs.1,92,187/-

-

Rs.22,909/-

-

-

Rs.2,82,024/-

Rs.69,355/-

Rs.5,66,475/-

13.

Mr. Mohit Advani

Rs.2,89,988/-

Rs.42,000/-

Rs.1,14,297/-

-

Rs.29,089/-

Rs.1,39,132/-

Rs.6,14,506/-

14.

Mr. Gangarapu Appalaraju

Rs.1,40,926/-

Rs.40,000/-

Rs.20,494/-

-

-

Rs.2,40,328/-

Rs.67,350/-

Rs.5,09,098/-

15.

Mr. P. Shahul Hameed

Rs.2,50,278/-

Rs.1,46,468/-

Rs.34,330/-

Rs.4,667/-

Rs.4,48,029/-

Rs.67,350/-

Rs.9,51,122/-

16.

Mr. Ravi Kant

Vadlamani

Rs.4,41,404/-

-

Rs.2,66,291/-

-

-

Rs.3,50,790/-

Rs.2,12,234/-

Rs.12,70,719/-

17.

Mr. Anil Maruti Jadhav

Rs.1,70,289/-

Rs.30,000/-

Rs.24,480/-

Rs.22,884/-

-

Rs.2,35,423/-

Rs.81,739/-

Rs.5,64,815/-

18.

Mr. Kundan Malu

Rs.1,80,560/-

-

Rs.6,666/-

-

-

Rs.3,35,283/-

Rs.87,193/-

Rs.6,09,702/-

19.

Mr. Vishal Kumar Damir

Rs.1,44,751/-

-

Rs.25,790/-

Rs.15,192/-

-

Rs.2,01,018/-

Rs.69,679/-

Rs.4,56,430/-

20.

Mr. Hemant Vinod Wani

Rs.2,81,893/-

Rs.67,690/-

Rs.1,27,867/-

Rs.64,998/-

-

Rs.2,40,851/-

Rs.89,612/-

8,72,911/-

21.

Mr. Gafoor Nazir Shaikh

Rs.3,24,018/-

Rs.42,210/-

-

-

-

Rs.4,70,285/-

Rs.1,10,698/-

Rs.9,47,211/-

22.

Mr. Suprio Kumar

Bandyopadhyay

Rs.1,29,462/-

-

Rs.16,374/-

-

-

Rs.1,83,302/-

Rs.62,279/-

Rs.3,91,417/-

23.

Mr. Rabindra Nath Mridha

Rs.1,35,331/-

-

Rs.18,027/-

-

-

Rs.2,37,817/-

Rs.66,836/-

Rs.4,58,011/-

24.

Mr. Sujeet Baidyanath Scal

Rs.1,92,716/-

Rs.21,700/-

Rs.6,309/-

Rs.16,570/-

-

Rs.91,907/-

Rs.92,312/-

Rs.4,21,514/-

25.

Mr. Kushagra

Singh

Rs.73,676/-

Rs.22,800/-

-

Rs.11,928/-

-

Rs. 1,48,702/-

Rs.31,323/-

Rs.2,88,429/-

26.

Mr. Rajeshkumar

Sagar

Rs.2,03,450/-

-

-

-

-

Rs.3,63,895/-

Rs.1,00,841/-

Rs.6,68,186/-

27.

Ms. Padmaja

Huddar

Rs.3,12,667/-

-

Rs.5,86,751/-

-

-

Rs.2,84,231/-

Rs.1,20,190/-

Rs.13,03,839/-

28.

Mr. S. Mohanraj

Rs.3,65,761/-

Rs.1,35,000/-

Rs.3,75,609/-

Rs.72,031/-

Rs.18,000/-

Rs.3,53,587/-

Rs.1,38,821/-

Rs.14,58,809/-

29.

Mr. Reetesh

Sikarwar

Rs.3,53,964/-

-

Rs.2,57,141/-

-

Rs.20,000/-

Rs.1,20,182/-

Rs.1,76,132/-

Rs.9,27,419/-

TOTAL

Rs.1,14,35,307/

-

Rs.10,28,944/-

Rs.55,91,342/-

Rs.4,49,509/

-

Rs.1,36,667/-

Rs.1,21,66,815

Rs.42,66,601/-

Rs.3,50,75,185/-

Reply by the Corporate Debtor:

5. In response to this, the Corporate Debtor has filed a detailed reply and raised the contention that joint/composite application is not maintainable under the Section 9 of the Code.

6. According to the Corporate Debtor, bare perusal of the petition would reveal that none of the respective Petitioner's meet or satisfy the pecuniary limit of Rs. 1 crore individually which is essential for maintaining an action under Section 9 of the Code. Therefore, the Petitioners have attempted to club their alleged claims only with a view to create an illusion of maintainability and in order to prevent dismissal at the threshold on account of being viewed below the threshold pecuniary limit. Therefore, the present petition having been filed in the joint manner and based on joint demand notice, deserves to be dismissed.

7. Further raised an objection that even assuming that the petitioners are permitted to file the present petition through a bare letter purporting to authorize initiation of proceedings under the Section 9 of the Code, such letters seeking to appoint Mr. Vinay Krishna Chaudhari on behalf of each of the Petitioners as their respective attorney cannot be acted upon as it is ex facie unstamped in view of the mandatory provisions of the Maharashtra Stamp Act.

8. Further submitted that from a perusal of the purported authority letter it is also evident that the same is executed after issuance of demand notice, and that the same neither authorizes nor ratifies the action of Mr. Chaudhari in issuing the demand notice. The demand notice dated 13.10.2021 is bereft of any document to suggest that Mr. Chaudhari on the date of issuing the notice, was authorized to sign and issue demand notice on behalf of other petitioners. Therefore, the demand notice being issued without due authorization, the same has no effect in law and all subsequent actions taken, therefore, must also fall.

9. Further submitted that the petitioners have made claims towards statutory dues payable directly to the respective authorities, the Operational Creditors as well or claims which are in the nature of perquisites or gratuitous payment which do not constitute an operational debt qua the petitioner.

10. Moreover, the Corporate Debtor relied on the case of Sadashiv Nomaya Nayak Vs. Gammon Engineers and Contractors Private Limited (CP/1265 of 2021) where the Company Petition was filed by three Petitioners Jointly and severally to reach the claim under the threshold limit. This tribunal dismissed the Company petition vide order dated 07.03.2023, stating that the claim of each petitioner was below the threshold limit as per the Notification (F.No.30/9/2020-Insolvency).

Submission by the Operational Creditors:

11. In response, the Operational creditors submits that the Debt did not fall due during the period prescribed under Section 10A of the Code, and the dates of default in respect of every employee is mentioned separately in Annexure II (pg. 816) of the Petition. The date of default has been arrived at on the basis of date of the Final Settlement Report of each employee received from the Corporate Debtor, which in the case of two employees - Sandeep More and Hemant Vani - was June 1, 2020, despite the fact that the date of leaving employment was January 31, 2020. The date of leaving employment for both the said employees do not fall within the 10A period. It was also submitted that even if the claims of aforesaid employees (Rs. 33,41,322) are removed from the calculation of the entire debt (Rs. 3,50,75,185), the amount of Debt is still well above the threshold limit (Rs. 3,17,33,863). The Petition, therefore, is maintainable in light of the judgment of the Hon'ble National Company Law Appellate Tribunal (NCLAT) in Anil Kaushal vs. Colliers International (India) Property Services Pvt. Ltd., (2022 SCC OnLine NCLAT 331) whereby it was held that amounts that fell due during the 10A period could be excluded from the amount claimed as Debt.

12. In relation to the contention that a joint petition under section 9 of the Code is not maintainable, the Operational Creditors submits that employees as Operational Creditors can file a Joint Petition under Section 9 of the Code and the same has been affirmed by the following judgments:

a. In Suresh Narayan Singh vs. Tayo Rolls Limited (2018 SCC OnLine NCLAT 557) (Suresh Narayan), the NCLAT dealt with an appeal filed by an authorized representative of 284 workers of the corporate debtor against an order of the Hon'ble National Company Law Tribunal, rejecting the application on the ground that the application was filed jointly and not individually. The Hon'ble NCLAT read sections 8 and 9 of the Code along with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('IBBI Rules'), and noted the following at para 4-

"If Sections 8 & 9 are read with Form-5, it will be clear that the person authorized to act on behalf of the 'Operational Creditor' is entitled to file an application under Section 9. Therefore, where workmen/employees are 'Operational Creditors', the application may be made either by an 'Operational Creditor' in an individual capacity or as a joint capacity by one of them who is duly authorized for such purpose."

b. In Jk Jute Mill Mazdoor Morcha vs. Juggilal Kamlatpat Jute Mills Company Limited ((2019) 11 SCC 332) (JK Jute Mills), the Hon'ble Supreme Court - in appeal against the decision of the Hon'ble NCLAT - considered whether a Petition under Section 9 of the Code could be filed by a registered trade union on behalf its employees and whether such a joint petition could be filed in view of the separate claims of each employee in such a Petition. The Hon'ble Supreme Court allowed the Appeal and observed as follows in respect of observation made by

the Hon'ble NCLAT on whether a Joint Petition could be filed by employees:

"Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all."

Accordingly, it was submitted that an application under section 9 of the Code can be filed jointly on behalf of the employees.

13. In relation to the contention raised by the Corporate Debtor that the individual claims of the employees do not meet the threshold limit under Section 4 of the Code, the Operational Creditors submit that the issue of maintainability of a Joint Petition when individual claims do not meet the threshold limit has been considered by the Hon'ble Supreme Court in JK Jute Mills, wherein it is evident from a perusal of paragraphs 23 and 28 of order passed by Hon'ble NCLAT, which was overruled in Appeal by the Hon'ble Supreme Court. The same is reproduced hereinbelow:

"23. This apart, members of a Trade Union/Workmen Association, who are workman or employee of a 'corporate debtor' some amount may be due to such individual workman/employee from a 'corporate debtor' including salary, gratuity, provident Fund, etc., in view of services rendered by them, but in such cases, in respect of each workman, there will be a separate cause of action, separate claim and separate date of default.

28. and if there is debt and default: such individual workman/employee can prefer an application under Section 9 giving details of debt and default but it should not be less than one lakh rupees".

The Operational Creditors submitted that the Hon'ble Supreme Court overruled the aforesaid by specifically observing that "to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5..."

14. The Operational Creditors further relied on Vishnu Oil Mill Private Ltd. vs. Union of India and Ors. (MANU/RH/1250/2022), wherein, Hon'ble High Court of Rajasthan has held that if the provision is made for filing of joint application by the financial creditor, then, there is no reason for fixing the threshold limit of Rs. 1 crore qua each individual financial creditor.

15. In addition to this, the Operational Creditor also submits that workmen/employees are treated differently under the class of "operational creditors", and are, therefore, permitted to file a joint application under section 9 of the Code. In view of the specific permission given at Form 5 of the IBBI Rules and the affirmation of this view in JK Jute Mills wherein the Hon'ble Supreme Court has rejected the proposition that claims of workmen/employees are separate in case

of a joint petition being filed, the individual claim amount by the employees ought to be considered jointly, otherwise, the purpose of the legislature providing for a joint application under Form 5 of the IBBI Rules and the Hon'ble Supreme Court affirming such possibility, will be rendered otiose.

16. In relation to the contention that the authority for filing the Petition is defective as Mr. Vinay Chaudhari has been authorized to file the present Application by "mere letters". In response to this, the Operational Creditors submits that Form 5 of the IBBI Rules specifies that the application may be made in a joint capacity by one of the employees 'who is duly authorized for the purpose'. A perusal of the letters at Annexures A1-A28 would show that each of the employees has specifically authorized Mr. Chaudhari to file the Section 9 petition against the Corporate Debtor. Further submits that in the absence of a specific format laid down for an authorization, the aforesaid letters duly and specifically authorize Mr. Chaudhari for the specific purpose of filling the present Application and as such, they cannot be termed defective. The Authority Letter attached to the Demand Notice was different and has not been annexed to the present Petition, however was duly annexed to it when the same was delivered to the Corporate Debtor. The Authority Letter referred to by the Corporate Debtor to suggest the aforesaid, is solely in respect of filing the present Petition.

17. Further, in relation to the contention that the claim amount is inclusive of amounts that do not constitute an operational debt, the Operational Creditors have submitted that the amounts payable towards Provident Fund, TDS, etc., even if, are removed from the calculation of the Debt, the amount would still be above the threshold limit. In fact, the Corporate Debtor had itself - in the Settlement Agreement - agreed to pay an amount of Rs. 2,24,46,984/- to the Operational Creditors, which by their own admission did not include the claim of employees towards unpaid TDS and Provident Fund Contributions.

Observations and Findings:

18. Heard the Parties and on perusal of the petition along with the annexures, we observe that none of the respective/individual Petitioner's meet or satisfy the pecuniary limit of Rs. 1 crore individually which is essential for maintaining an action under Section 9 of the Code. The Operational Creditors relied on the Judgements of Suresh Narayan Singh vs. Tayo Rolls Limited (2018 SCC OnLine NCLAT 557) wherein, the Hon'ble Supreme Court have held that-

"If Sections 8 & 9 are read with Form-5, it will be clear that the person authorized to act on behalf of the 'Operational Creditor' is entitled to file an application under Section 9. Therefore, where workmen/employees are 'Operational Creditors', the application may be made either by an 'Operational Creditor' in an individual capacity or as a joint capacity by one of them who is duly authorized for such purpose."

And

Jk Jute Mill Mazdoor Morcha vs. Juggilal Kamlapat Jute Mills Company Limited ((2019) 11 SCC 332), wherein the Hon'ble Supreme Court has held that-

"Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all."

19. In view of the above judgments, it is a settled law that workmen/employees (Operational Creditors) may file an application to initiate CIRP in an individual capacity or as a joint capacity by the authorized person. Therefore, the application to initiate CIRP under Section 9 of the Code can be initiated by the Operational Creditors individually or jointly. However, none of the above judgements state in the favour of Operational Creditors that they can jointly file the Application to touch or cross the financial limit of One Crore to file the Petition under Section 9 of the Code.

20. The Operational Creditors also relied on Vishnu Oil Mill Pvt. Ltd. Vs. Union of India & Ors.(MANU/RH/1250/2022), wherein, Hon'ble High Court of Rajasthan have held that if the provision is made for filing of joint application by the financial creditor, then, there is no reason for fixing the threshold limit of Rs. 1 crore qua each individual financial creditor. This Judgement is in the context of Financial Creditors and pertains to section 7 of the Code. The Hon'ble High Court of Rajasthan have referred to and reproduced the provision of Section 7 of the Code and have observed that there is no ambiguity about application being filed individually or jointly with other Financial Creditors and threshold limit would apply accordingly. However, the provision of Section 9 is differently worded. For ready reference, provision of Section 7 and Section 9 are reproduced here in under:

Section 7(1): A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditors, as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Section 9(1): After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

Phrase in Section 7 is "itself or jointly", whereas the word jointly or any synonym of it is not finding place in Section 9 of the Code. Accordingly, this decision of Hon'ble Rajasthan High Court does not support the cause/stand of the Petitioner.

21. Moreover, the Counsel for the Corporate Debtor relied on the matter of Sadashiv Nomaya Nayak Vs. Gammon Engineers and Contractors Private Limited (CP/1265 of 2021) where the Company Petition was filed by three Petitioners Jointly and severally to reach the claim under the threshold limit. This tribunal dismissed the Company petition vide order dated 07.03.2023, stating that the claim of each petitioner was below the threshold limit as per the Notification (F.No.30/9/2020-Insolvency) and same was appealed before the Hon'ble NCLAT. In Company Appeal (AT) (Insolvency) No. 218 of 2023, the Hon'ble NCLAT has held that-

"10.in this case is as to whether all the workmen can together by adding their amount which is being claimed against the Corporate Debtor can cross the threshold set up under Section 4 of the Code. In our opinion the judgement relied upon by the Counsel for the Respondent in the case of Mr. Suresh Narayan Singh (supra) answers the question.

11. In view of the above facts and circumstances, we do not find any merit in this Appeal and the same is dismissed. No Costs."

[Bold for emphasis]

The abovementioned dismissal order was challenged before the Hon'ble Supreme Court of India, wherein, the Hon'ble Supreme Court has held that-

"1. We are not inclined to interfere with the impugned order of the National Company Law Appellate Tribunal dated 7 March 2023 in Company Appeal (AT) (Ins) No 218 of 2023.

2. The Appeal is accordingly dismissed."

22. Therefore, this issue has attained the finality. While dismissing the Appeal, the Hon'ble NCLAT relied on the judgement of Suresh Narayan Singh Vs. Tayo Rolls Limited, Company Appeal (AT) (Insolvency) No. 112 of 2018, wherein, the Hon'ble NCLAT has observed that each workman's due is more than rupees one lakh and the 'Corporate Debtor' having defaulted to pay the amount. Therefore, ordered to admit the petition. This Judgement of NCLAT was passed on 26.09.2018, which is much prior to the notification dated 24.03.2020, increasing the threshold limit from one lakh to one crore. Accordingly, for a valid Petitioner u/s 9 of the Code, threshold limit for each individual is required to be one crore.

23. Facts of the present case are squarely covered by the above-mentioned case (Sadashiv Nomaya Nayak Case). In view of this, we are of the opinion that the current Company Petition is not maintainable as the claim of each Operational Creditor is below the threshold limit of One Crore as per the Notification having No. (F.No.30/9/2020-Insolvency) dated 24.03.2020.

24. As the petition is liable to be dismissed on the ground of maintainability, the other contentions, such as the authority for filing the Petition being defective as Mr. Vinay Chaudhari has been authorized to file the present Application by "mere

letters”, and the claim amount being inclusive of amounts that do not constitute an operational debt, are become academic in nature in view of non-maintainability of Petition on account of threshold limit. Therefore, we are of the view that there is no need to delve into the merits of the aforementioned contentions.

25. Accordingly, the present Company Petition is dismissed as non-maintainable.