



Makarand Joshi,
Company Secretary

Neeraj Jain, Director of M/s Flipkart India Private Limited (Appellant) vs. Cloudwalker Streaming Technologies Private Limited (Respondent) [National Company Law Appellate Tribunal order dated 24th February, 2020]

Facts of the case

- Cloudwalker Streaming Technologies Private Limited, an Operational Creditor of Flipkart India Private Limited (“Corporate Debtor”) that used to supply the imported LED TVs, filed a petition before National Company Law Tribunal (“NCLT”) u/s. 9 of Insolvency and Bankruptcy Code, 2016 (“IBC”) contending that Corporate Debtor defaulted for an amount of ₹ 26.95 crore. The claim of the Operational Creditor was based on the issue of not taking delivery of LED TVs which were exclusively imported for the Corporate Debtor. (*The case is an appeal filed at NCLAT. The application and admission of CIRP at NCLT was discussed in November issue of CTC*).
- The Operational Creditor issued a demand notice u/s. 8 of IBC under Form 3 of the Insolvency and Bankruptcy (Adjudicating Authority) Rules, 2016 (“Adjudicating

Authority Rules”) which was received by the Corporate Debtor. However, Corporate Debtor neither raised any dispute nor paid any amount outstanding in connection to the said debt.

- NCLT admitted the petition filed by the Operational Creditor and initiated the Corporate Insolvency Resolution Process (“CIRP”) against the Corporate Debtor.
- The Appeal was filed by the Director of the Corporate Debtor against the order of NCLT before National Company Law Appellate Tribunal (NCLAT) on the following grounds:
- Operational Creditor’s claim was unsubstantiated;
- NCLT ignored the settled position of law that the claim for damages cannot amount to an Operational Debt; and
- NCLT failed to determine the amount claimed which was due and payable under the terms of the Supply Agreement.

Arguments of the Appellant

- Corporate Debtor had a formal mechanism under the supply agreement

with Operational Creditor wherein a Corporate Debtor would issue a Purchase Order, against which the Operational Creditor was to issue an Invoice, and at the time of supply of goods, the amount would become payable.

- Proceeding u/s. 9 of the IBC could be initiated only after delivery of the demand notice u/s. 8 of the IBC and on the occurrence of the default, i.e., on non-payment of debt u/s. 3 of the IBC.
- Operational Creditor had failed to provide any documentary evidence including, but not limited to, purchase orders, invoices, proof of any intimation of sale to the end customers or any post-delivery services to substantiate its alleged claim, as was required before issuing a demand notice.
- The Operational Creditor had solely placed reliance on few e-mails to allege that it suffered losses, on account of demand projections provided by the Corporate Debtor which did not constitute a binding purchase order, as per the Supply Agreement.
- While submitting an application u/s. 9 of the IBC, the Operational Creditor had submitted the Supply Agreement and the e-mails relating to demand projections, as relevant documents under which the debt was due, which, by no stretch of the imagination, constituted a proof of debt.
- The Operational Creditor did not even attach bank statements. The bank statements were crucial documents to establish, whether amounts have been received, and lack thereof.
- Since the goods were not delivered and the alleged claim was made on account of loss for not obtaining the delivery of 21,808 TVs, the said claim couldn't be

termed as an Operational debt. Thus, Respondent's claim did not even qualify as an Operational debt.

- Furthermore, Operational debt could only arise against the provisions of goods and services for which payment remained outstanding. In the absence of any supply the Corporate Debtor couldn't be treated as an Operational Creditor. Hence, the application for initiation of CIRP was not maintainable

Arguments of the Respondent

- As per section 8(1) of the IBC, an Operational Creditor could, on the occurrence of a default, deliver either a Demand Notice of the unpaid Operational debt or copy of an invoice demanding payment of the amount involved.
- The statutory requirement was only to give Demand Notice of the unpaid Operational Debt. The invoice had to be submitted if the demand was made by way of an invoice demanding payment. If the Demand Notice was given in Form 3, then the invoice was not a mandatory requirement. However, if the Demand Notice was given in Form 4, then only copy of the invoice demanding payment had to be delivered to the Corporate Debtor.
- It was the discretion of the Operational Creditor, to either send the Demand Notice under Form 3 or send an invoice demanding payment of the amount due as per Form 4 of the Adjudicating Authority Rules.
- If the Demand Notice was sent in Form 3, then the Operational Creditor had to submit the document to prove the existence of operational debt and the amount in default along with the notice.

The said document could either be an invoice or any other document to prove the existence of the Operational debt and the amount in default. This situation could arise when the Operational debt, was of such nature where no invoice had been generated. For example, if an operational debt was relating to the salary dues of an employee, then, in that case, the Operational Creditor would not have any invoice.

- Invoice raising the demand or Demand Notice was to be submitted as per the nature of the Operational debt.
- Furthermore, since the term ‘claim’ had been used in the definition of the Operational debt, the Respondent would be an Operational Creditor, notwithstanding the fact that the claim was disputed.

Held

- NCLAT held that Demand Notice delivered u/s. 8(1) of the IBC was

incomplete and not proper. Operational Creditor had failed to submit any documents to prove the existence of an Operational Debt and the amount in default.

- The Operational Creditor also failed to submit copy of invoices and copies of all documents that were required to be submitted along with the application and had placed reliance on few e-mails, which were only demand projections and did not constitute a binding Purchase Order under Supply Agreement
- The entire claim of the Corporate Debtor was an un-crystallised claim which couldn't be adjudicated by NCLT/NCLAT under summary jurisdiction.
- The appeal of the Corporate Debtor was allowed, thereby, releasing Corporate Debtor (Flipkart India Pvt. Ltd.) from the CIRP.

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