

CASE STUDY 18-(Insolvency & Bankruptcy Code,2016)

QUESTION: *Bright Mills Company Ltd (the Company) was closed and opened several times for one reason or another and finally was closed in March, 2014. However, the proceedings were pending under the Sick Industrial Companies (Special Provisions) Act, 1985. The Bright Mill Mazdoor Morcha, (the trade union) a registered trade union on 14.03.2017, issued a demand notice on behalf of roughly 3,000 workers under Section 8 of the Code for outstanding dues of workers. The Company replied to it on 31.03.2017. The National Company Law Tribunal (NCLT), on 28.04.2017, after considering all the antecedent facts including suits that have been filed by respondent and referring to pending writ petitions in the High Court of Delhi, ultimately held that a trade union not being covered as an operational creditor, the petition would have to be dismissed.*

By the impugned order dated 12.09.2017, the National Company Law Appellate Tribunal (NCLAT) did likewise and dismissed the appeal filed by the trade union and stating that each worker may file an individual application before the NCLT.

The NCLAT, by the impugned judgment, refused to go into whether the trade union would come within the definition of “person” under Section 3(23) of the Code. The NCLAT held that a trade union would not be an operational creditor as no services are rendered by the trade union to the corporate debtor.

Based on the above, answer the following questions:

(a) Who can be termed as ‘Operational creditor’ and what is meant by ‘Operational debt’ under the Insolvency and Bankruptcy Code, 2016? Whether Trade Union can be treated as ‘person’ under the Code?

(b) Whether you endorse the decision awarded by the NCLT and further affirmed by the NCLAT? Give reasons in support of your answer.

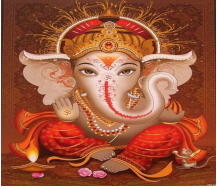
(c) If you disagree with the award given by NCLT/NCLAT, what you will suggest to the Trade Union?.

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LET'S CONSIDER APPLICABLE PROVISIONS

WHO IS OPERATIONAL CREDITOR?

AN OPERATIONAL CREDITOR refers to a person to whom an operational debt is owed and includes any person to whom such amount has been legally assigned or transferred for goods or services done by them. Vendors and suppliers, employees, government etc. are examples of operational creditors.

An operational creditor is defined under Section 5(20) of the Insolvency and Bankruptcy Code (hereinafter the IBC) to mean “any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred”, and is owed an operational debt which is defined under section 5(21) of the IBC.

OPERATIONAL DEBT: means debt incurred in exchange for the provision of goods or services (including employment) or debt in respect of the payment of dues arising under any law for the time being in force payable to the Central Govt., any State Govt. or any regulator.

Section 5(21) Operational Debt to mean: “a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”.

ANSWER:

(A) OPERATIONAL CREDITOR: In terms of section 5(20) of the Code, ‘operational creditor’ means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

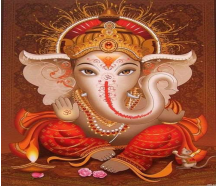
OPERATIONAL DEBT: In terms of section 5(21) of the Code, ‘operational debt’ means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

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PERSON: SECTION 3(23) of the Code provides the inclusive definition of the word 'person', which includes:

- (a) an individual;
- (b) a Hindu Undivided Family;
- (c) a company;
- (d) a trust;
- (e) a partnership;
- (f) a limited liability partnership; and
- (g) any other entity established under a statute, and includes a person resident outside India;

Provisions under the Trade Union Act: Before going to answer, whether Trade Union comes under the term 'person' or not, we have to see the definition of the Trade Union as provided in the Trade Union Act, 1926.

SECTION 2(H) OF THE TRADE UNION ACT provides that 'Trade Union' means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions.

TRADE DISPUTE has been defined in section 2(g) of the Trade Union Act, as any dispute between employers and workmen or between workmen and workmen, or between employers and employers which is connected with the employment or non-employment, or the terms of employment or the conditions of labour, of any person, and "workmen" means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises.

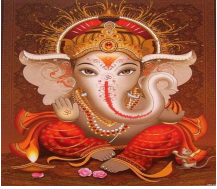
On a reading of the aforesaid statutory provisions, what becomes clear is that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, 1926 and would therefore fall within the definition of "person" under Sections 3(23) of the Code, 2016.

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(B) No, we do not endorse the decision awarded by the NCLT/NCLAT for the following reasons:

(i) After having discussed in the (a) above, it is clear that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, 1926 and would therefore fall within the definition of ‘person’ under Sections 3(23) of the Code.

(ii) This being so, it is clear that an ‘operational debt’, meaning a claim in respect of employment, could certainly be made by a person duly authorised to make such claim on behalf of a workman.

Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also recognises the fact that claims may be made not only in an individual capacity, but also conjointly.

(iii) A registered trade union recognised by Section 8 of the Trade Unions Act, 1926 makes it clear that it can sue and be sued as a body corporate under Section 13 of that Act. Equally, the general fund of the trade union, which inter alia is from collections from workmen who are its members, can certainly be spent on the conduct of disputes involving a member or members thereof or for the prosecution of a legal proceeding to which the trade union is a party, and which is undertaken for the purpose of protecting the rights arising out of the relation of its members with their employer, which would include wages and other sums due from the employer to workmen.

(iv) NCLAT is not correct in stating that a trade union would not be an operational creditor as no services are rendered by trade union to corporate debtor. What is clear is that trade union represents its members who are workers, to whom dues may be owed by employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by trade union. 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.

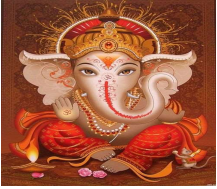
(v) Even otherwise, we are of the view that instead of one consolidated petition by a trade union representing a number of workmen, filing individual petitions would be burdensome as each workman would thereafter have to pay insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers,

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etc. Looked at from any angle, there is no doubt that a registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members.

(C) We are of the opinion based on the above discussions that the Trade Union should make an appeal before the Supreme Court.

*The above case is based on the recently decided case of the Supreme Court in the matter of **JK Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mills Company Ltd., Civil Appeal No. 20978 of 2017, April 30, 2019**, which Apex Court held that a registered trade union which is formed for purpose of regulating relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members.*

*Senior Advocate appearing on behalf of the appellant took Court through various provisions of the Code and the Trade Unions Act, 1926, and cited a Division Bench judgment of the **Bombay High Court in Sanjay Sadanand Varrier v. Power Horse India Pvt. Ltd., [2017] 5 Mah LJ 876** to argue that even literally speaking, the provisions of the Code would lead to the result that a trade union would be an operational creditor within the meaning of the Code. Even otherwise, a purposive interpretation ought to be granted, as has been done in various recent judgments to the provisions of the Code, and that therefore, such an application by a registered trade union filed as an operational creditor would be maintainable.*

On the other hand, learned Senior Advocates appearing on behalf of respondent No.1 supported the NCLAT judgment to argue that as no services are rendered by a trade union to the corporate debtor to claim any dues which can be termed as debts, trade unions will not come within the definition of operational creditors. That apart, each claim of each workman is a separate cause of action in law, and therefore, a separate claim for which there are separate dates of default of each debt. This being so, a collective application under the rubric of a registered trade union would not be maintainable.

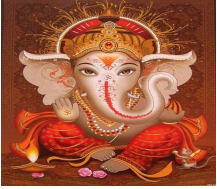
On a reading of the aforesaid statutory provisions, what becomes clear is that a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, and would therefore fall within the definition of “person” under Sections 3(23) of the Code.

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This being so, it is clear that an “operational debt”, meaning a claim in respect of employment, could certainly be made by a person duly authorised to make such claim on behalf of a workman.

Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also recognises the fact that claims may be made not only in an individual capacity, but also conjointly. Further, a registered trade union recognised by Section 8 of the Trade Unions Act, makes it clear that it can sue and be sued as a body corporate under Section 13 of that Act. Equally, the general fund of the trade union, which inter alia is from collections from workmen who are its members, can certainly be spent on the conduct of disputes involving a member or members thereof or for the prosecution of a legal proceeding to which the trade union is a party, and which is undertaken for the purpose of protecting the rights arising out of the relation of its members with their employer, which would include wages and other sums due from the employer to workmen.

PLEASE NOTE THAT:

Here, a “person” includes a company in clause (c), and would include any other entity established under a statute under clause (g). It is clear that clause (g) has to be read noscitur a sociis with the previous clauses of Section 3(23). This being the case, entities such as companies, trusts, partnerships, and limited liability partnerships are all entities governed by the Companies Act, the Indian Trusts Act, and the Partnership Act, which are not “established” under those Acts in the sense understood in Canara Bank (supra) and the judgments followed by it. The context, therefore, in which the phrase “established under a statute” occurs, makes it clear that a trade union, like a company, trust, partnership, or limited liability partnership, when registered under the Trade Union Act, would be “established” under that Act in the sense of being governed by that Act. For this reason, the judgment in Canara Bank (supra) would not apply to Section 3(23) of the Code.

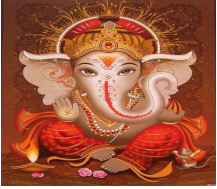
The Supreme Court observed, even otherwise, we are of the view that instead of one consolidated petition by a trade union representing a number of workmen, filing individual petitions would be burdensome as each workman would thereafter have to pay insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers, etc. under the provisions of the Code read with Regulations 31 and 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

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Looked at from any angle, there is no doubt that a registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members.

The NCLAT, by the impugned judgment, is not correct in refusing to go into whether the trade union would come within the definition of 'person' under Section 3(23) of the Code.

Equally, the NCLAT is not correct in stating that a trade union would not be an operational creditor as no services are rendered by the trade union to the corporate debtor. What is clear is that the trade union represents its members who are workers, to whom dues may be owed by the employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by the trade union.

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.

For all these reasons, we allow the appeal and set aside the judgment of the NCLAT. The matter is now remanded to the NCLAT who will decide the appeal on merits expeditiously as this matter has been pending for quite some time. The appeal is allowed accordingly.

CONCLUSION: *from above discussion it is clear that a Trade Union will be considered as Operational Creditors for claims of members of Trade Unions (workers of trade unions). The definition of Person ,Section 3(33) of IBC,2016 also provides that 3(33) (g) any other entity established under a statute, and includes a person resident outside India, a Trade Union is also established under provisions of Trade Unions Act, 1926 and hence will be considered as person able to file petition under provisions of Section 8 of the IBC,2016.*

DISCLAIMER: *the case law presented here is only for sharing information with readers. The views are personal. In case of necessity do consult with professionals for more clarity and understanding on subject matter.*

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