

order of moratorium with certain observations and directions in terms of 'I & B Code'.

2. Learned Counsel for the appellant submitted that the impugned order was passed by the Adjudicating Authority in violation of Rules of natural justice without giving any notice to the Appellant - 'Corporate Debtor'.

3. It was also submitted that no post filing notice under Rule 4(3) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as 'Adjudicating Authority Rules') was given by the respondent - "Financial Creditor". A notice was served on appellant, purported to be a notice under Rule 4(3), was pre filing notice with wrong date of admission of the application mentioned therein.

4. It was further submitted that a record of default recorded with the information utility or a record of default available with any Credit Information Company (CIBIL) or copies of entries in Banker's book in accordance with the Bankers Book Evidence Act, 1891 as required in terms of Form - I read with Rule 4 of the Adjudicating Authority Rules was not filed. Reliance was also placed on sub-section (3) of Section 7 to suggest that record of default recorded with the information utility or such other record or evidence of default as specified by Insolvency & Bankruptcy Board of India (IBBI) has not been filed.

5. On the other hand, according to Learned Counsel for the respondents, the appellant has no locus to file this appeal after

appointment of Interim Resolution Professional, who has already taken over the management of the 'Corporate Debtor'. The powers of Board of Directors, since then stands suspended in terms of Section 17(1)(a) & (b) of the 'I & B Code.

6. In so far as notice under Rule 4(3) is concerned, according to Learned Counsel for the respondent proper notice was issued to the 'Corporate Debtor' who had appeared before Learned Adjudicating Authority on 17th April 2017 and was given ample opportunity to present the case.

7. Relying on the decision of the Appellate Tribunal in "*M/s. Innoventive Industries Ltd. Vs ICICI Bank & Anr.*" (Company Appeal (AT)(Ins.) Nos. 1 and 2 of 2017 decided on 15th May 2017), it was contended that the Adjudicating Authority is required to issue only a limited notice to the 'Corporate Debtor' before admitting a case for ascertainment of existence of default. It was submitted that along with application under Section 7 of 'I & B Code' preferred before the Learned Adjudicating Authority, notice was issued to appellant under Rule 4(3) of the Adjudicating Authority Rules, intimating that the said application is likely to be listed. Therefore, according to respondent there is no violation of Rule 4(3) of the Rules or the principles of natural justice.

8. In so far as statement of account is concerned it was contended that Learned Adjudicating Authority, before admitting the application under Section 7 of the 'I & B Code', is only required to ascertain whether there has been a default of debt on the part of the 'Corporate Debtor'. In the

present case, the 'Financial Creditor', apart from filing the statement of accounts duly certified by the office of the 'Financial Creditor's Company, filed records of default which is available with CIBIL. In so far as Banker's Book of Evidence Act 1891 is concerned, it is submitted that the same is not applicable to the non-banking financial companies.

9. We have heard learned counsel for the parties and perused the record.

10. In "*M/s Innoventive Industries Limited Vs. ICICI Bank & Anr.*" – Company Appeal (AT) (Insol.) No. 1 & 2 of 2017, this Appellate Tribunal by judgement dated 15th May 2017, noticed the exception of the principle of rules of natural justice, as follows: -

"42. From the aforesaid decisions of Hon'ble Supreme Court, the exception on the Principle of Rules of natural justice can be summarised as follows: -

- (i) Exclusion in case of emergency,*
- (ii) Express statutory exclusion*
- (iii) Where discloser would be prejudicial to public interests*
- (iv) Where prompt action is needed,*
- (v) Where it is impracticable to hold hearing or appeal,*
- (vi) Exclusion in case of purely administrative matters.*
- (vii) Where no right of person is infringed,*

(viii) *The procedural defect would have made no difference to the outcome.*

(ix) *Exclusion on the ground of 'no fault' decision maker etc."*

11. In the said case this Appellate Tribunal, taking into consideration the facts that though notice was not issued to "M/s Innoventive Industries Limited" (Appellant), but the said appellant having appeared and heard by Adjudicating Authority at the time of admission of the application under Section 9 of the 'I & B Code', observe and held as under: -

"65. In the present case though no notice was given to the Appellant before admission of the case but we find that the Appellant intervened before the admission of the case and all the objections raised by appellant has been noticed, discussed and considered by the 'adjudicating authority' while passing the impugned order dated 17th January 2017. Thereby, merely on the ground that the Appellant was not given any notice before admission of the case cannot render the impugned order illegal as the Appellant has already been heard. If the impugned order is set aside and the case is remitted back to the adjudicating authority, it would be 'useless formality' and would be futile to order its observance as the result would not be different.

Therefore, order to follow the principles of natural justice in the present case does not arise.”

12. In the present case we find that the respondent issued post filing notice under Rule 4(3) along with application under Section 7 of 'I & B Code'. In the said notice date of hearing was shown as 11th April 2017 but the matter was listed before the Adjudicating Authority, a day earlier on 10th April 2017. In the aforesaid background, the Adjudicating Authority adjourned the matter, and directed to issue notice on respondent. When the application was taken up for admission on 19th April 2017, the appellant appeared through their lawyers, Mr. Ketan Parikh with Mr. Pavan Godiawala. Paragraph 6 of the impugned order dated 19th April 2017 suggests that both the counsel for the “Financial Creditor” (Respondent) and “Corporate Debtor” (Appellant) were heard wherein after the impugned order was passed.

In the aforesaid background, we hold that even if it is presumed that no separate notice was issued by Adjudicating Authority to the “Corporate Debtor”, the appellant having heard before passing the impugned order, the question of remitting the case for hearing on the ground of non-compliance of principles of natural justice does not arise as it will be futile. For the reason aforesaid we are not inclined to interfere with the impugned order dated 19th April 2017 on the ground that no notice was issued to appellant by the Adjudicating Authority.

13. For the same reason, we also reject the plea taken by the appellant that the notice under Rule 4(3) of the Adjudicating Authority Rules was a pre filing notice, wrong date of hearing having shown therein.

14. Whether enclosures of record of default or copies of entries in Banker's Book as required in terms of Form - 1, read with Rule 4 of the Adjudicating Authority Rules and sub-section (3) of Section 7 of the 'I & B Code', is mandatory or not fell for consideration before this Appellate Tribunal in **"Neelkanth Township and Construction Pvt. Limited. Vs. Urban Infrastructure Trustees Limited"** - Company Appeal (AT) (Insolvency) No. 44 of 2017 by its judgement dated 11th August 2017. In the said case, this Appellate Tribunal held:

"18. It is well settled that rules of procedure are to be construed not to frustrate or obstruct the process of adjudication under the substantive provisions of law. A procedural provision cannot override or affect the substantive obligation of the adjudicating authority to deal with applications under Section 7 merely on the ground that Board has not stipulated or framed Regulations with regard to sub-section 3(a) of Section 7. The language of Section 240, whereby Board have been empowered to frame regulations is clear that the said regulation should be consistent with the 'I & B' Code

and the rules made thereunder by the Central Government.

19. In exercise of power conferred by Section 239 read with Sections 7, 8, 9 and 10 of the 'I & B code, the Central Government framed the rules known as "Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as 'Adjudicating Authority Rules, 2016). As per Rule 41, a 'Financial Creditor' required to apply itself or jointly in an application under Section 7 in terms of Form-1 attached thereto. Part V of Form-1 deals with particulars of 'Financial Debt' (documents, record and evidence of default), as quoted below: -

"PART V

**PARTICULARS OF FINANCIAL DEBT [DOCUMENTS,
RECORDS AND EVIDENCE OF DEFAULT]**

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1. 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)
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2. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)

3. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)

4. DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)

5. THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)

6. A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)

7. COPIES OF ENTIRES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891)

8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT"

20. The rules framed by the Central Government under Section 239 having prescribed the documents, record and evidence of default as noticed above, we hold that in absence of regulation framed by the Board relating to record of default recorded with the information utility or other record of evidence of default specified, "the documents", 'record' and 'evidence of default' prescribed at Part V of Form-1, of the Adjudicatory Rules 2016 will hold good to decide the default of debt for the purpose of Section 7 of the 'I & B Code'.

21. We further hold that the 'Regulations framed by the Board' being subject to the provisions of 'I & B Code' and rules framed by the Central Government under Section 239, 'Part V of Form - 1' of Adjudicating Authority Rules, 2016 framed by Central Government relating to 'documents', 'record' and 'evidence of default', will override the regulations, if framed by the Board and if inconsistent with the Rule. However, it is always open to Board to prescribe additional records in support of default of debt, such as records of default recorded with the information utility or such other record or evidence of default in addition to the records as mentioned in Part V of Form-I.

22. At this stage, it is pertinent to note that the Board has also framed Insolvency Resolution Process for Corporate Persons, Regulations, 2016 ('Corporate Persons Regulation' for short). It has come into force since Notification dated 30th November 2016 was issued. Regulation 8 of 'Corporate Persons Regulation', 2016 relate to claims by 'Financial Creditor'. Regulation 11(2) relates to existence of debt due to 'Financial Creditor', which is to be proved on the basis documents mentioned therein and quoted below: -

"8. Claims by financial creditors.

(1) A person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the interim resolution professional in electronic form in Form C of the Schedule:

Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(2) The existence of debt due to the financial creditor may be proved on the basis of -

(a) the records available with an information utility, if any; or

(b) other relevant documents, including –

(i) a financial contract supported by financial statements as evidence of the debt;

(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;

(iii) financial statements showing that the debt has not been repaid; or

(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.”

23. ‘Form – C’ attached to the Regulation relates to proof of claim of ‘Financial Creditor’ whereunder at Serial No. 10, the ‘Financial Creditor’ is supposed to refer the list of documents in proof of claim in order to prove the existence and non-payment of claim dues to the ‘Operational Creditor’.

Therefore, the stand of the appellant that the Board has not framed any Regulations, relating to clause (a) of sub-section (3) of Section 7, cannot be accepted.”

15. The case of the appellant is covered by the decision in **“Neelkanth Township and Construction Pvt. Ltd.”**. For the said reason, the contention with regard to documents, records and evidence of default as raised by appellant is also rejected.

17. For determination of the issue whether the “Corporate Debtor” can prefer appeal under Section 61 of the ‘I & B Code’ through the Board of Directors, which stand suspended after admission of an application it is necessary to refer to Section 17, which reads as follows:-

“17. Management of affairs of corporate debtor by interim resolution professional. —

(1) From the date of appointment of the interim resolution professional, —

(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;

(b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and

be exercised by the interim resolution professional;

(c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;

(d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

(2) The interim resolution professional vested with the management of the corporate debtor shall—

(a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;

(b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;

- (c) *have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;*
- (d) *have the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified.”*

16. From Clause (a) of sub-section (1) of Section 17 while it is clear that the Management of affairs of the ‘Corporate Debtor’ stand vested with the ‘Interim Resolution Professional’, such vesting is limited and restricted to the extent of power vested under sub-section (2) of Section 17 which empowers the ‘Interim Resolution Professional’ to act and execute in the name of ‘Corporate Debtor’ all deeds, receipts, and other documents, if any, to take such action in the manner and subject to such restrictions, as may be specified by the Board and have access of authority to the electronic records of ‘Corporate Debtor’, books of accounts, records etc.

From the aforesaid provision we find that “Interim Resolution Professional’ has not been vested with any specific power to sue any person on behalf of the ‘Corporate Debtor’. However, in case of such

difficulty, it is always open to the 'Interim Resolution Professional' to bring to the notice of the Adjudicating Authority for appropriate order.

17. Admittedly, 'Corporate Debtor' was a party respondent to the resolution process when application under Section 7 or 9 is preferred. The 'Corporate Debtor' represented itself, at the initial stage before the Adjudicating Authority through the Board of Directors or person authorised by the Board of Directors. It is only after hearing the 'Corporate Debtor' the Adjudicating Authority can pass an order under Section 7 or 9, admitting or rejecting the application.

18. Once the application under Section 7 or 9 is admitted, the 'Corporate Insolvency Resolution Process' starts in such case one of the aggrieved party being the 'Corporate Debtor' has a right to prefer an appeal under Section 61, apart from any other aggrieved person like Director(s) of the company or members, who do not cease to be Director(s) or member(s), as they are not suspended but their function as 'Board of Director(s)' is suspend.

19. The 'Corporate Debtor' if represented before the Adjudicating Authority through its Board of Directors or any person authorised by Board of Director or its officers, for the purpose of preferring an appeal, no objection can be raised that the 'Corporate Debtor' cannot appear through its Board of Directors or authorised person or officer through whom 'Corporate Debtor' represented before the Adjudicating Authority.

Once a 'Corporate Debtor' appeared before the Adjudicating Authority through its Board of Director(s) or its officers or through authorised person and is heard before admission of an application under 'I & B Code', being aggrieved such 'Corporate Debtor' cannot prefer an appeal under Section 61 on the ground that the 'Corporate Debtor' appeared through another person 'Interim Resolution Professional', though he had not appeared before the Adjudicating Authority.

20. Though the Board of Directors or partners of 'Corporate Debtor', as the case may be is suspended and their power can be exercised by the 'Interim Resolution Professional', but such exercise of power is limited to the extent to sub-section (2) of Section 17 of the 'I & B Code' and not for any other purpose. If the matter is looked from another angle, it will be clear as to why 'Corporate Debtor' should not be represented through 'Interim Resolution Professional' for preferring an appeal under Section 61 of the 'I & B Code'. The Role of 'Interim Resolution Professional' starts after initiation of 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'. The 'Interim Resolution Professional' once given consent to function directly or indirectly he cannot challenge his own appointment, except in case where he has not given consent. If the 'Corporate Debtor' is left in the hands of 'Interim Resolution Professional' to raise his grievance by filing an appeal under Section 61, it will be futile, as no 'Interim Resolution Professional' will challenge the initiation of 'Insolvency

Resolution Process' which ultimately result into the challenge of his appointment.

21. For example, if an application under Section 7 or 9 is admitted and at the stage of admission, the 'Interim Resolution Professional' is not appointed and such appointment is made later on within 14 days of admission under Section 16, then in case of appointment of an ineligible 'Interim Resolution Professional' against whom a Departmental proceeding is pending, can the 'Corporate Debtor' prefer appeal under Section 61 challenging the appointment of 'Interim Resolution Professional', if the 'Corporate Debtor' is asked to be represented through the same very 'Interim Resolution Professional'? The answer will be in negative means a 'Corporate Debtor' in such case cannot be represented to the 'Interim Resolution Professional', whose appointment is under challenge and for all purpose to be represented through the person who represented the 'Corporate Debtor' at the stage of admission before the Adjudicating Authority.

22. At this stage, it is desirable to notice that though pursuant to Section 17, the Board of Directors of a 'Corporate Debtor' stand suspended (for a limited period of 'Corporate Resolution Process maximum 180 days or extended period of 90 days i.e. 270 days), but they continued to remain as Directors and members of the Board of Directors for all purpose in the records of Registrar of Companies under the Companies Act 2013.

23. For the reasons aforesaid, we also reject the plea taken by Learned Counsel for the appellant that the "Corporate Debtor" has no locus to prefer appeal under sub-section (1) of Section 61 through its Board of Directors or authorise person or its officers except through the "Interim Resolution Professional".

24. We find no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances of the case the parties shall bear the respective costs.

(Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
29th August 2017

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