

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 675 of 2020

IN THE MATTER OF:

Silvassa Cement Products Pvt. Ltd.

...Appellant

Versus

Noor India Buildcon Pvt. Ltd.

...Respondent

Present:

For Appellant: Mr. K. Gaurav Kumar and Ms. Alpa Jain, Advocates.

For Respondent: Mr. Devashish K. Tiwari, Ms. Shgufa Salim, Mr. Siddhartha Nagpal and Mr. Jatin Choudhary, Advocates.

ORDER
(Through Virtual Mode)

22.01.2021: Application filed by the Appellant – Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 seeking initiation of Corporate Insolvency Resolution Process against the Respondent – Corporate Debtor stands dismissed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench Ahmedabad Court II in terms of the impugned order dated 15th June, 2020 on the ground that the same was non-maintainable. The impugned order is assailed, inter-alia, on the ground that the Adjudicating Authority has violated the mandate of law in not providing opportunity to the Appellant for rectifying the defect or remove the shortcomings.

2. After hearing learned counsel for the parties for a while, we find that the finding in regard to non-maintainability of the application is recorded in para 11 of the impugned order, which reads as under:-

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“11. On perusal of the record it is found that Board Resolution was passed on 28.09.2018 authorising Mr. Praveen Kumar B. Mundra (Manager) to file/defend the legal proceedings and Insolvency and Bankruptcy Code on behalf of the company (Page No.16- Exhibit A) apart from other powers such as filing of Vakalatnama, engaging counsel etc. but, in the instant case Form 5 i.e. application is neither signed by authorised person named above nor it is notarized; rather the petition is signed by Mr. Niraj Shah and Mr. Dhruv K. Dave, advocates and date is also not mentioned. Thus, in view of the above, the petition is bad in the eye of law and it is not maintainable in view of the above case laws.”

3. Though some more observations have been made in regard to the operational debt in respect of which default is alleged in para 14, the finding is that the petition has been dismissed on the issue of maintainability taking into consideration provisions of I&B Code. Para 14 of the impugned order is extracted hereinbelow:-

“14. However, this will not stand in the way of the Petitioner approaching the appropriate forum seeking to enforce its claim against the Respondent as this petition has been dismissed on the issue of maintainability and taking into consideration the provisions of IB Code, 2016. The observations made by us on any other aspect would

not constitute an expression of opinion on the merit of controversy”

4. Reading Para 11 in juxtaposition with Para 14, it is absolutely clear that application has been dismissed on the issue of non-maintainability which relates to omission in appending of signatures on the application in the prescribed format in Form 5 and the same being notarized. We take notice of the fact that the Adjudicating Authority has noticed the Board Resolution passed on 28th September, 2018 authorising one Mr. Praveen Kumar B. Mundra, Manager to file legal proceedings including proceedings under I&B Code. Once the filing of the application under Section 9 was backed by the Board Resolution and Adjudicating Authority had noticed that two Advocates viz. Mr. Niraj Shah and Mr. Dhruv K. Dave had signed the petition, albeit without recording date, there was hardly any justification on this score for holding that the application was non-maintainable. Incompleteness is distinct from non-maintainability, the latter having broader contours. If, there was any shortcoming in regard to filing of Vakalatnama or making endorsement in regard to date in the prescribed format, Appellant could be provided an opportunity in terms of mandate of proviso under Section 9(5) of the I&B Code, which reads as under:-

“9. Application for initiation of corporate insolvency resolution process by operational creditor.-

x.x.x

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, -

(a) the application made under sub-section (2) is complete;

(b) there is no [payment] of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if –

(a) the application made under sub-section (2) is incomplete;

(b) there has been [payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.”

5. Thus, we find that the Adjudicating Authority who was required to pass the order of admission or rejection of the application being satisfied about the completion of the application and proof of debt and default as mandated under Section 9(5) has failed to provide opportunity of rectifying the defect as noticed and allowing the applicant to bring it in conformity with the requirements of law. Dismissal of application as being non-maintainable for such technical defect is not warranted. We accordingly, set aside the impugned order and remit the matter back to the Adjudicating Authority to allow the Appellant/Applicant opportunity of rectifying the defect, if any, in the application and thereafter pass order of admission or rejection in regard to initiation of Corporate Insolvency Resolution Process on merit. Appeal is disposed off with aforesaid observations.

6. We make it clear that we are not expressing any opinion on the merits of the case.

7. A copy of this order be communicated to the Adjudicating Authority forthwith. Parties are directed to appear before the Adjudicating Authority on 3rd February, 2021.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Kanthi Narahari]
Member (Technical)**

**[Dr. Alok Srivastava]
Member (Technical)**

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