

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 266 of 2017**

**IN THE MATTER OF:**

**DF Deutsche Forfait AG**

**...Appellant**

**Versus**

**Uttam Galva Metalics Ltd.**

**...Respondent**

**Present:**

**For Appellant :**

**Shri Vivek Sibal and Ms. Khyati Sharma,  
Advocates**

**For Respondent :**

**Shri Arvind Gupta, Shri Dhiraj Mhetre, Ms.  
Shruti Munjal and Ms. Henna George,  
Advocates**

**O R D E R**

**30.11.2017** The appellant –DF Deutsche Forfait AG, a company incorporated under the laws of Germany having its office at Kattenbug 18-24, 50667, Cologne, Germany originally filed a petition for winding up under Section 433(3) of the Companies Act, 1956 before the Hon’ble High Court of Punjab and Haryana against the respondent – ‘Uttam Galva Metalics Ltd.’ for its inability to pay the debt. The case was transferred to the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh in terms of Rule 5 of ‘The Companies (Transfer of Pending Proceedings) Rules, 2016’. The appellant requested to treat the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the, ‘I & B Code’). The Adjudicating Authority rejected the application by the impugned order dated 22<sup>nd</sup> September, 2017 on the following grounds :

- i) Statement of Bank Account from a financial institution has not been filed in terms of Section 9(3)(c) of the I & B Code.
  - ii) The notice under sub-section (1) of Section 8 was issued by a lawyer.
2. For rejecting the application on the ground that the appellant- Operation Creditor has not filed any certificate from any institution the Adjudicating Authority relied on this Appellate Tribunal's judgement in ***Smart timing Steel Ltd. vs. National Steel and Agro Industries Ltd. – Company Appeal (AT) (Insolvency) No. 28 of 2017*** wherein this Appellate Tribunal by judgment dated 19<sup>th</sup> May, 2017 held –
  - “16. Therefore, it is clear that the word '**shall**' used in sub-section (3) of section 9 of 'I & B Code' is mandatory, including clause 3 therein.”*
3. Learned counsel appearing on behalf of the appellant submitted that the question as to whether notice under sub-section (1) of Section 8 can be issued by a lawyer or not as decided by this Appellate Tribunal in ***Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr. – Company Appeal (AT) (Insolvency) NO. 39 of 2017*** is pending for consideration before the Hon'ble Supreme Court.
4. It is further submitted that insofar as the certificate given by a financial institution is concerned, such issue having noticed in ***Uttam Galva Steels Limited (Supra)*** based on decision of this Appellate Tribunal in ***Smart Timing Steel Ltd. vs. National Steel and Agro Industries Ltd.*** is also under consideration before the Hon'ble Supreme Court.

5. Learned counsel appearing on behalf of the respondent submitted that enclosure of certificate from a 'Financial Creditor' is mandatory as held by this Appellate Tribunal in **Smart Timing Steel Ltd. (Supra)**. The said judgment has been upheld by the Hon'ble Supreme Court by its order dated 18<sup>th</sup> August, 2017 passed in Civil Appeal No. 9813 /2017, in **Smart Timing Steel Ltd. (Supra)** which reads as follows:

*“Heard the learned counsel appearing for the appellant.*

*We do not find any reason to interfere with the order dated 19.05.2017 passed by the National Company Law Appellate Tribunal, New Delhi.*

*In view of this, we find no merit in the appeal.*

*Accordingly, the appeal is dismissed.”*

6. Rule 5 of 'The Companies (Transfer of Pending Proceedings) Rules, 2016', relates to Transfer of pending winding up proceedings on the ground of inability to pay debts, as quoted below:

*“5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts -*

*(1) All petitions relating to winding up of a company under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Companies Act, 2013 exercising territorial*

*jurisdiction to be dealt with in accordance with Part II of the Code:*

*Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:*

*Provided further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:*

*Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent."*

7. In the present case as admittedly the certificate enclosed by appellant has not been issued by a 'financial institution' as defined in Section 3(14) of the I & B Code but by foreign bank (Misr Bank) which is not a 'Scheduled Bank' or 'Financial Institution' as defined in Section 45(i) of the Reserve Bank of India Act, 1934 and the said Bank has not been declared as 'financial institution', as

defined in clause (72) of Section 2 of the Companies Act, 2013 and the said Bank has not been recognised by the Central Government by any notification following the decision of '**Smart Timing Steel Ltd. (Supra)**' we hold that the petition under Section 9 preferred by appellant was not maintainable.

8. Insofar as notice of demand under sub-section (1) of Section 8 can be given through a lawyer or this Appellate Tribunal having expressed its opinion in '**Uttam Galva Steels Limited** and as the issue is pending for consideration before the Hon'ble Supreme Court, we do not express any further observation.

9. There being a deficiency of the one of the document i.e. 'a certificate from the financial institution' and the certificate issued by 'Misr Bank' being not in terms of Section 9(3)(c) of the I & B Code which mandates the 'Financial Institution' to maintain accounts of the operational creditor, we hold that the application preferred by the appellant under Section 9 was not maintainable. The Adjudicating Authority rightly dismissed the application preferred by the appellant under Section 9 of the I & B Code.

11. We find no merit in this appeal, it is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]  
Chairperson

[ Justice Bansi Lal Bhat ]  
Member(Judicial)

/ns/uk