

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 246 of 2018

IN THE MATTER OF:

Axis Bank Ltd.

...Appellant

Versus

**Lotus Three Developments Ltd.
& Ors.**

...Respondents

Present:

For Appellant : **Mr. Animesh Bisht and Mr. Karan Khanna,
Advocates**

**For 1st & 2nd
Respondent:** **Mr. P. P. Hegde, Advocate**

For 3rd Respondent : **Mr. Amit A. Pai, Advocate**

O R D E R

31.07.2018 The appellant – Axis Bank Limited filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the '**I&B Code**') for initiation of 'Lotus Three Developments Limited'. In the said case an impleadment application I.A. No. 159 of 2017 was filed by Respondent Nos. 1 and 2 for impleading them as party-respondent. By impugned order dated 25th April, 2018, the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench has ordered to implead these respondents as party-respondents.

2. Earlier when the matter was taken up before this Appellate Tribunal, learned counsel for the appellant submitted that the respondents are

shareholders of the 'Corporate Debtor' and *prima facie*, we expressed our view that shareholders are not a necessary party as the 'Corporate Debtor' is represented through its Board of Directors.

3. Learned counsel appearing for the respondents submits that Respondent Nos. 1 and 2 are not only 'shareholders' but also the 'personal guarantor' of the 'Corporate Debtor' but that cannot be a ground to implead them as the party-respondent for the following reasons.

4. Initiation of 'corporate insolvency resolution process' under Section 7 or 9 or 10 of the I&B Code is not an adversary litigation. It is not a recovery proceedings nor can be treated to be a suit or case pending for decision on merit. The Adjudicating Authority on the application filed under Section 7 of the I&B Code is required to consider whether the application is complete or not and if not complete to reject the application. But before rejecting the application, if not complete, time is to be allowed to the applicant to remove the defects.

5. The Hon'ble Supreme Court in "*Innoventive Industries Ltd. Vs. ICICI Bank and Ors.*, - (2018) 1 SCC 407" observed as follows:

28. *When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the*

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a

default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”

6. From the aforesaid decision, it is clear that the Adjudicating Authority is only to satisfy that the default has occurred and that the ‘Corporate Debtor’ is entitled to point out that the default has not been occurred in the sense that the debt is not due. No other person has a right to be heard at the stage admission of the application under Section 7 and 9 of the I&B Code including the ‘shareholders’ or the ‘personal guarantor’ etc..

7. In this regard, it is also desirable to refer Section 60(2)(3) of the I&B Code, which reads as follows :

60. Adjudicating Authority for corporate persons ---

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of

such corporate debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

8. The aforesaid provision shows that with regard to a 'personal guarantor' of 'Corporate Debtor', insolvency resolution or bankruptcy can be filed but before the same Adjudicating Authority (National Company Law Tribunal) where application against 'Corporate Debtor' is pending in terms of sub-section (2) of Section 60. In such case 'personal guarantor' may claim his right of hearing, which is filed against 'personal guarantor' and he may also address the Adjudicating Authority, if it is 'corporate insolvency resolution process' pending against the 'Corporate Debtor'.

9. The Adjudicating Authority having failed to notice the aforesaid provision, we set aside the order dated 25th April, 2018 passed in I.A. No. 159/2017 in CP (IB)/66/BB/2017 and direct the Adjudicating Authority to decide the case in terms of the observations made by the Hon'ble Supreme Court in "*M/s. Innoventive Industries Ltd. (Supra)*" as quoted above, preferably within two weeks. Now it is only the 'Corporate Debtor' is to be heard, who is represented through the Board of Directors and the 'Financial Creditor' and

no other person such as 'shareholders' or the 'personal guarantor'. However, after the order of admission or rejection is passed, it is always open to the aggrieved person to move in appeal. The appeal is allowed with the aforesaid observations but no cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

/ns/gc/