

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 635 of 2018

IN THE MATTER OF:

Sunil Sanghavi

...Appellant

Vs.

Cytech Coatings Pvt. Ltd.

...Respondent

Present: For Appellant: - Mr. K.K Sharma, Mr. Mayank Sapra and Mr. Arjun Natrajan, Advocates.

**For Respondent: - Mr. Abhigya, Advocate for R1.
Mr. Ashish Verma and Ms. Avika Madhura, Advocates for RP.**

O R D E R

30.10.2018— This appeal has been preferred by the shareholder of 'ESS DEE Aluminium Limited'- ('Corporate Debtor') with a petition for condonation of delay.

2. It is submitted that the impugned order was not communicated to the Appellant and he having come to know, filed the appeal on 10th October, 2018. If limitation is counted from the date of knowledge, then there is no delay and otherwise there is a delay of 6 days if it is counted from the date of the impugned order.

3. Having heard learned counsel for the Appellant, learned counsel appearing on behalf of the 1st Respondent- 'Operational Creditor' and learned counsel appearing on behalf of the 'Interim Resolution Professional', we hold that there is no delay in preferring the appeal, the

Appellant having not been communicated with the order and not being party before the Adjudicating Authority (National Company Law Tribunal).

I.A. No. 1753 of 2018 stands disposed of.

Company Appeal (AT) (Insolvency) No. 635 of 2018

1st Respondent- ('Operational Creditor') filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) for initiation of 'Corporate Insolvency Resolution Process' against 'ESS DEE Aluminium Limited'- ('Corporate Debtor'). The application was admitted by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata on 18th June, 2018. Having come to know of the initiation of 'Corporate Insolvency Resolution Process', the Shareholder of 'ESS DEE Aluminium Limited'- ('Corporate Debtor') filed an application before the Adjudicating Authority for recalling of the said order on one of the grounds that notice under Section 8(1) of the 'I&B Code' was actually not served on the 'Corporate Debtor'. The Adjudicating Authority by impugned order dated 4th October, 2018 rejected the application with following observations:

"22. The above order is self-explanatory regarding the service of demand notice u/s. 8 of the I & B Code. since the corporate debtor seriously

*alleged that there was no proper service of demand notice issued u/s. 8 of the Code as an abundant caution, I have once again perused the records in C.P. (IB) No. 157/KB/2018. The copy of Master Data produced in the application is marked as **Annexure 'K'**. the address of the corporate debtor in the Master Data read as “**1, Sagore Dutta Ghat Road Kamarhati Kolkata Kolkata WB 700058 IN**”. It is in the said address, both the notices were issued. Copy of demand notice produced along with the application clearly proves that notice was sent in the above address and copy of track consignment produced in the C.P., proves that notice was delivered to the corporate debtor in the said address. It is significant to note that the demand notice u/s. 8 of the Code was delivered to the corporate debtor’s address at Kamarhati. Therefore, the notice to the corporate debtor u/s 8 was served at the registered address of the corporate debtor. So no doubt proper service of demand notice was taken note in this case before filing the application. The service of demand notice under Section 8 was delivered to the corporate debtor directly and the Tribunal’s notice was*

published in the news paper to the known address of the operational creditor and to the address shown in the Master Data as on the date of the filing of the application. More over notice by e-mail is also seen to be sent. Therefore, the contention that the corporate debtor was not in receipt of the demand notice issued under Section 8 of the code is found devoid of any merit. So also the contention that it has no knowledge regarding the application filed by the applicant is also found unsustainable upon the above said circumstances.

23. *It is also significant to note here that u/s. 12 of the Companies Act, 2013 a company has to give notice of every change of the situation of the registered office under sub-section 4 of Section 12 and notice of change of address shall be given to the Registrar within 15 days of the change, who shall make relevant corrections in the Master Data. The applicant/corporate debtor has no such case that there was change of address or any written communication has been issued stating that there is change of address. Therefore, the contention on the side of the corporate debtor that there was no proper service of notice is found unsustainable*

under law. Therefore, the prayer for setting aside the order of appointment of IRP for want of proper service of notice is found unsustainable under law.”

2. According to Appellant, the office of the ‘Corporate Debtor’ was not functioning in the Kolkata address which was closed much earlier and was functioning at Bombay, namely— “ESS DEE Aluminium Ltd. at Akurli Road, Kandivali (E), Mumbai- 400 101”. This was also known to the ‘Operational Creditor’ who filed the Interlocutory Application before the Adjudicating Authority showing the address at Mumbai of the ‘Corporate Debtor’.

3. It is further submitted that the parties have already settled the matter and as per the settlement, the amount has already been deposited with the Registrar, NCLT, Kolkata Bench.

4. Learned counsel appearing on behalf of the 1st Respondent- ‘Operational Creditor’ accepted that the notice was not served in the Bombay address where the office was functioning. He further submits that they have settled the claim.

5. Learned counsel appearing on behalf of the ‘Interim Resolution Professional’ opposed the prayer and submits that a large number of creditors have already filed their claim. He referred to paragraphs 22 and 23, as quoted above, to suggest that the notice was served legally in the valid address of the ‘Corporate Debtor’.

6. We have heard learned counsel for the parties and perused the order.

7. We do not agree with the argument that technical notice was served in the valid address of the 'Corporate Debtor'. The provision relating to demand notice under Section 8(1) amounts to an advance notice to caution the 'Corporate Debtor', that if it does not pay the defaulted amount of debt, then the 'Operational Creditor' may file an application under Section 9 of the 'I&B Code' for initiation of 'Corporate Insolvency Resolution Process'. It is only on receipt of such demand notice under Section 8(1), the 'Corporate Debtor' will decide either to pay it or to reply under Section 8(2). It is only thereafter the 'Operational Creditor' may file an application under Section 9 after 10 days of service of notice.

8. From the provision of Section 8, it is clear that the legislature intended to put the 'Corporate Debtor' on notice that the amount due having defaulted if the amount is not paid. The 'Operational Creditor' may take steps for 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'. It is not a mere formality but mandate of law that such notice is actually served on the 'Corporate Debtor' who may act accordingly. For the said reason, the Adjudicating Authority is required to record its satisfaction that the records, including service of demand notice are in order. The Adjudicating Authority is required to satisfy

itself that the notice was actually served on the 'Corporate Debtor' not that technically it was served in the address.

9. The Adjudicating Authority having failed to do so, we have no other option but to set aside the order dated 18th June, 2018 and the order dated 4th October, 2018. The parties having settled the matter we are not remitting the matter to the Adjudicating Authority. The Adjudicating Authority will direct the Registrar NCLT, Kolkata Bench to release the amount in favour of the 1st Respondent- 'Cytech Coatings Private Limited' deposited on behalf of the 'Corporate Debtor' immediately.

10. In effect, order (s), passed by the Adjudicating Authority appointing 'Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, taken by the 'Resolution Professional', including the advertisement, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the 'I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' (company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

11. The Adjudicating Authority will fix the fee of 'Resolution Professional' and the 'Corporate Debtor' will pay the fees for the period

he has functioned along with cost if any incurred. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

Ar/uk