

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) Nos. 124 & 125 of 2017

IN THE MATTER OF :

Ganesh Sponge Pvt. Ltd.

... Appellant

Versus

Aryan Mining & Trading Corporation Pvt. Ltd.

... Respondent

**Present: For Appellant : Shri Amarendra Sharan, Senior Advocate
with Shri Dhananjaya Mishra, Shri R.M.
Patnaik and Shri Avnish Sharma, Advocates**

**For Respondent : Shri Anuj Singh and Shri Ritoban Sarkar,
Advocates**

ORDER

23.08.2017 Both these appeals have been preferred by the appellant-‘Corporate Debtor’ against orders dated 19th July, 2017 and 3rd August, 2017 passed by the Learned Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in C.P. (I.B.) No. 341/KB/2017.

2. By impugned order dated 19th July, 2017, learned Adjudicating Authority, while admitted the application preferred by the respondent ‘Operational Creditor’ under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as I&B Code), by the subsequent order dated 3rd August, 2017, learned Adjudicating Authority rejected

the joint application preferred by the appellant and the respondent to withdraw the petition.

3. Before deciding the question about the legality and propriety of order dated 19th July, 2017, it is desirable to notice Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which reads as follows :

“8. Withdrawal of application.—The Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission.”

4. From the aforesaid Rule, it is clear that the learned Adjudicating Authority is empowered to permit withdrawal of the application under Section 7, 9 or 10 of the I&B Code, as the case may be, on the request made by the appellant before the admission, but such withdrawal cannot be permitted once the application is admitted. In view of the aforesaid provisions and in absence of any illegality, we find no ground to interfere with the impugned order dated 3rd August, 2017.

5. In so far as impugned order dated 19th July, 2017 is concerned, the appellant has challenged the order on different counts.

6. Shri Amarendra Sharan, Learned Senior Counsel appearing for the appellant submits that the application was defective; the notice under

Section 8 was not issued by the 'Operational Creditor' but by its lawyer. Reliance has been placed on decision of this Appellate Tribunal in **"Macquarie Bank Limited Vs. Uttam Galva Metallics Limited"** – [Company Appeal (AT) (Insolvency) No. 96 of 2017] wherein by order dated 17th July, 2017, the Appellate Tribunal held as follows :

"15. Clause (a) & (b) of sub-Rule (1) of Rule-5 of the Adjudicating Authority Rules mandates the 'Operational Creditor' to deliver the 'Corporate Debtor' either the demand notice in Form – 3 or a copy of an invoice attached with a notice in Form–4. If the Rule 5 is read with the demand notice Form – 3 or invoice in Form – 4, it is clear that who are persons authorized to give the notice under Section 8 of the 'I & B Code', as apparent from last portion of Form – 3 & Form – 4, as quoted below: -

"6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [name of corporate debtor].

Yours sincerely,

| |
|--|
| <i>Signature of person authorised to act on behalf of the operational creditor</i> |
| <i>Name in block letters</i> |
| <i>Position with or in relation to the operational creditor</i> |
| <i>Address of person signing</i> |

16. From bare perusal of Form-3 and Form-4, read with sub-Rule (1) of Rule 5 and Section 8 of the 'I & B Code, it is clear that the 'Operational Creditor' can apply himself or through a person authorized to act on behalf of the 'Operational Creditor', who hold same position with or in relation to the 'Operational Creditor'. Thereby such person(s) authorized by 'Operational Creditor', holding position with or in relation to the 'Operational Creditor' can only apply.

17. In view of such provision we hold that an advocate/lawyer or Chartered Account or a Company Secretary or any other person in absence of any authority by the 'Operational Creditor', and if such person do not hold any position with or in relation to the 'Operational Creditor', cannot issue notice under Section 8 of 'I & B Code', which otherwise can be treated as a lawyer's notice/pleader's notice, as distinct from notice under Section 8 of 'I & B Code.'

7. It has also been brought to our notice that there is an 'existence of dispute' regarding the quality of goods for which complaints were made by the appellant on 3rd August, 2012 and 25th August, 2012 etc.

8. The respondent has appeared and has not disputed that the notice under Section 8 was issued by a lawyer and that some objections were raised by the appellant much prior to the so-called notice under Section 8 regarding quality of goods.

It is submitted that the parties have settled the dispute in the meantime and the due amount has already been paid to the respondent.

9. In the present case, we are not deciding the question as to whether the parties have settled the dispute or not, but in view of the fact that the impugned order dated 19th July, 2017 was passed by the learned Adjudicating Authority in the application under Section 9, which was not complete and the case of the appellant is covered by decision of this Appellate Tribunal in '**Macquarie Bank Limited Vs. Uttam Galva Metallics Limited** (*supra*)', we set aside the impugned order dated 19th July, 2017.

10. In effect, order(s), if any, passed by learned Adjudicating Authority appointing any 'Interim Resolution Professional' or declaring moratorium, freezing the account and all other order(s) passed by Adjudicating Authority pursuant to impugned order dated 19th July, 2017 and action, if any, taken by the 'Interim Resolution Professional', including the

advertisement, if any, published in the newspaper calling for applications etc. and all such orders and actions are declared illegal and are set aside. The application preferred by the respondent under Section 9 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The appellant company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

11. Learned Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed and the appellant will pay the fees of the Interim Resolution Professional, for the period he has functioned. The appeal is allowed with aforesaid observations and directions. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Balvinder Singh]
Member (Technical)