

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

(Arising out of Order dated 20.06.2017 passed by the National Company Law Tribunal, Chennai Bench, Chennai in TCP No. 263/(IB)/2017)

(Company Appeal (AT) (Insolvency) No. 117 of 2017)

IN THE MATTER OF:

M/s. Sabari Inn Pvt. Ltd. ...Appellant

Vs.

M/s. Rameesh Associates Pvt. Ltd. ...Respondent

Present: For Appellant:- Mr. Akash Jandial and Mr. Kumar Dushyant Singh, Advocates.

For Respondent:- None.

J U D G E M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant-‘Corporate Debtor’ has challenged the impugned order dated 19th June, 2017 passed by Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai, whereby and whereunder the application preferred by the Respondent- M/s. Rameesh Associates Pvt. Ltd. (‘Operational Creditor’) under Sections 433 and 434 of the Companies Act, 1956 has been treated to be an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “I&B Code”) read with Rule 6 of the Insolvency and

Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "Adjudicating Authority Rules, 2016"), the order of admission and Moratorium has been passed, name of 'Interim Resolution Professional' has been called for from the 'Insolvency and Bankruptcy Board of India' (hereinafter referred to as "Board") with further prohibitory orders in terms of 'I&B Code'.

2. Learned counsel for the Appellant-'Corporate Debtor' submitted that before treating the application as under Section 9 of the 'I&B Code', Respondent has not complied with the provisions of the 'I&B Code'. No notice under sub-section (1) of Section 8 was issued in Form-3 or 4 and the application has been admitted though there is an existence of dispute.

3. Notice was issued on Respondent but in spite of service of notice, the Respondent has not appeared nor disputed the statement made in the appeal.

4. The brief facts of the case are that the Appellant-'Corporate Debtor' entered into a contract with Respondent Contractor. According to Appellant, pursuant to the contract entire amount has already been settled and paid. However, in spite of that the Respondent issued a legal notice on 7th September, 2013 through a lawyer calling upon the Appellant to pay the outstanding sum of Rs. 12,06,508/-. Thereafter, the Respondent filed a Company Petition under Sections 433 & 434 of the Companies Act, 1956 before the Hon'ble High Court of Madras in C.P.No. 243 of 2015 claiming a sum of Rs. 12,06,508/- from the Appellant.

5. After constitution of the Tribunal and Adjudicating Authority, pursuant to the Notification No. G.S.R. 1119(E) dated 7th December, 2016, issued by Central Government under Section 434 of the Companies Act, 2013 read with Section 239 of the 'I&B Code', the case was transferred to Adjudicating Authority, Chennai Bench and re-numbered as TCP/263/(IB)/2017.

6. On notice, the Appellant appeared on 7th June, 2017 and disputed the liability. The case was adjourned to 20th June, 2017, on which date the counsel for the Appellant sought time to file reply. According to Appellant, no such opportunity was given and the transferred application has been treated to be an application under Section 9 of the 'I&B Code' and was admitted by impugned order dated 20th June, 2017 giving rise to the present appeal.

7. Learned counsel for the Appellant submitted that no notice under sub-section (1) of Section 8 was issued in Form-3 or 4 prior to treating the application as under Section 9 of the 'I&B Code' or before the admission. The application was also not filed in the proper format i.e. Form 5, as required under Section 9 of the 'I&B Code' read with Rule 6 of the Adjudicating Authority Rules, 2016 in terms of which details of record of default etc. were required to be provided.

8. The aforesaid stand taken by the Appellant has not been disputed by the Respondent, as he failed to appear.

9. Learned counsel for the Appellant has enclosed the Central Government notification dated 7th December, 2016 issued from the Ministry of Corporate Affairs. By the said notification, in exercise of the powers conferred under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of Section 239 of the 'I&B Code', the Central Government framed "The Companies (Transfer of Pending Proceedings) Rules, 2016".

10. Rule 5 relates to transfer of pending proceedings of winding up on the ground of inability to pay debts which are to be transferred from the Hon'ble High Court's to the respective Tribunal and reads as follows: -

"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.- (1) All petitions relating to winding up 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 as required 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 Act, exercising territorial jurisdiction and such petitions shall be treated as applications

under sections 7, 8 or 9 of the Code, as the case may be, and 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 within sixty days from date of this notification, failing which the petition shall abate.

2. All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act.”

11. From the aforesaid Rule 5, it is clear after transfer of the case the Applicant (Respondent herein) was required to submit all information, other than information forming part of the records transferred from the High Court, for admission of the petition under Sections 7, 8 or 9 of the 'I&B Code', including details of the proposed 'Insolvency Professional' within sixty days, failing which, the petition shall stand abated.

12. As per Section 9 of the 'I&B Code', before admission of application and its filing, a demand notice under sub-section (1) of Section 8 is required to be issued on the 'Corporate Debtor', as quoted below: -

"8. Insolvency resolution by operational creditor.

– (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed."

13. It is only on receipt of such notice under sub-section (1) of Section 8 of the 'I&B Code', the 'Corporate Debtor' may either pay the amount or may dispute the claim in terms of sub-section (2) of Section 8 of the 'I&B Code'.

14. Clause (a) and (b) of sub-rule (1) of Rule 5 of the 'Adjudicating Authority Rules' provides the format in which the demand notice/invoice

demanding payment in respect of unpaid 'Operational Debt' is to be issued by 'Operational Creditor'. As per Rule 5(1) (a) & (b), the following person (s) are authorised to act on behalf of operational creditor, as apparent from the last portion of Form-3 and 4 which reads as follows: -

"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>

15. In the case of ***"Uttam Galva Steels Limited v. DF Deutsche Forfait AG & Anr. in Company Appeal (AT) (Insolvency) 39 of 2017"*** this Appellate Tribunal by judgment dated 28th July, 2017 held as follows:

*"30. 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 an Operational Creditor can apply himself or through a person authorised to act on behalf of Operational Creditor. **The person who***

is authorised to act on behalf of Operational Creditor is also required to state "his position with or in relation to the Operational Creditor", meaning thereby the person authorised by Operational Creditor must hold position with or in relation to the Operational Creditor and only such person can apply.

31. The demand notice/invoice Demanding Payment under the I&B Code is required to be issued in Form-3 or Form - 4. Through the said formats, the 'Corporate Debtor' is to be informed of particulars of 'Operational Debt', with a demand of payment, with clear understanding that the 'Operational Debt' (in default) required to pay the debt, as claimed, unconditionally within ten days from the date of receipt of letter failing which the 'Operational Creditor' will initiate a Corporate Insolvency Process in respect of 'Corporate Debtor', as apparent from last paragraph no. 6 of notice contained in Form - 3, and quoted above.

Only if such notice in Form-3 is served, the 'Corporate Debtor' will understand the serious consequences of non-payment of 'Operational Debt',

otherwise like any normal pleader notice/ Advocate notice, like notice under Section 80 of C.P.C. or for proceeding under Section 433 of the Companies Act 1956, the 'Corporate Debtor' may decide to contest the suit/case if filed, distinct Corporate Resolution Process, where such claim otherwise cannot be contested, except where there is an existence of dispute, prior to issue of notice under Section 8."

16. Form-5 is the format for filing application under section 9, as per which the following details are to be provided: -

"Part I- particulars of applicant

Part II- particulars of corporate debtor

*Part III- particulars of the proposed interim resolution
professional (if proposed)*

Part IV- particulars of operational debt

*Part V- particulars of operational debt [documents,
records and evidence of default]*

As per the instructions, the following documents are required to be attached:

Annex I Copy of the invoice/demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the Corporate debtor.

Annex II Copies of all documents referred to in this application.

Annex III Copy of the relevant accounts from the banks/financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the relevant unpaid operational debt by the operational debtor, if available.

Annex IV Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Annex VI Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Annex VI Proof that the specified application fee has been paid.”

17. Admittedly, no notice was issued under sub-section (1) of Section 8 of the 'I&B Code'. In terms with Rule 5, other informations were also not placed before the Adjudicating Authority.

18. The Respondent having failed to provide all the details as required under Form-5 as noticed above, the application under sections 433 and 434 of the Companies Act, 1956 cannot be treated to be an application under section 9 of the 'I&B Code' in terms of Rule 5 of Transfer Rules,

2016. In such circumstances, in view of proviso to Rule 5 of the Transfer Rules, the application under Sections 433 and 434 of the Companies Act, 1956 stands abated.

19. For the reasons aforesaid, while we set aside the impugned order dated 20th June, 2017 passed by the Adjudicating Authority, Chennai Bench in T.C.P No. 263/(IB)/2017, also declare that the application preferred by Respondent under Sections 433 and 434 of the Companies Act, 1956 stood abated.

20. In effect, order (s) passed by Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account and all other order (s) passed by Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications and all such orders and actions are declared illegal and are set aside. The application preferred by Respondent is dismissed as abated. 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.

21. The 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 observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice A.I.S Cheema)
Member (Judicial)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

17th November, 2017

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