

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION**

Company Appeal (AT) No. 09 of 2017

(arising out of Order dated 9th March 2017 passed by NCLT, Allahabad Bench in C.P.No. 19/Ald/2017)

JK Jute Mills Company Limited

.....Appellant

Vs.

M/s Surendra Trading Company

.....Respondent

Present: For Appellants: Mr. Virendra Ganda, Senior Advocate with Mr. Arvind Kumar and Mr. Abhijeet Sinha, Advocates

For Respondent: Mr. Krishnendu Dutta with Ms. Bhawna Chopra Rustogi, Ms. Prachi Ohri, Advocates for R-1

Mr. Ashok Kumar Jain with Mr. Sahil Dhawan, Advocates for R-2

For other Respondents: Mr. Shakti Ahmed and Mr. Atanu Mukherjee, Advocates.

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by appellant – J.K. Jute Mills Company Limited against Order dated 9th March 2017 passed by Adjudicating Authority (National Company Law Tribunal), Allahabad Bench in C.P. No. 10/Ald/2017.

2. By the impugned order the Adjudicating Authority overruled the objection of the appellant – corporate Debtor and directed the appellant to maintain status quo on immovable properties.

3. The question involved in this case is:

Whether the time limit prescribed in Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as Code 2016) for admitting or rejecting a petition or initiation of insolvency resolution process is mandatory?

4. The brief fact of the case are as follows: -

The Respondent/ 'operational creditor' – Surendra Trading Company issued a Demand notice under section 8 of the 'Code' on 6th January 2017 to the appellant/'Corporate Debtor' raising claim of dues pertaining to the year 2001-2002.

5. The appellant/'Corporate Debtor' by letter dated 25th January 2017 objected the claim as 'time barred'. Thereafter, the respondent/ 'Operational Creditor' filed a petition under section 9 of the 'Code', before the Adjudicating Authority, Allahabad on 10th February 2017. In the said application the adjudicating authority passed the interim order.

6. According to appellant, the petition under section 9 was filed without following the mandatory provision of sub-rule (2) of Rule 6 of "Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016" (hereinafter referred to as 'Adjudicating Authority Rules').

7. The case was listed before Adjudicating Authority on 16th February 2016 but there being defects, learned counsel for the operational creditor sought time to rectify the defects as also to receive instructions about the stage of proceedings pending before BIFR though such proceeding stood abated by virtue of Companies Act 2013.

8. The 'Adjudicating Authority' noticed that the debt due for payment was defaulted in the year 2004. The 'operational creditor' was asked to clarify whether the claim is barred by law of limitation and whether any recovery proceedings were earlier initiated by the operational creditor before any competent court of Law or was deferred or stayed under the provisions of 'Sick Companies Rehabilitation Act 1985'. The matter was ordered to be listed on 28th February 2017 for removal of objection and procedural defects.

9. On 28th February 2017, counsel for the operational creditor sought more time for filing formal memo by providing/furnishing of the latest order passed by BIFR. The appellant – corporate debtor was instructed to clarify about the position of prescribed limitation for making recovery of his debt through its memo. The case was ordered to be listed for further hearing on 3rd March 2017.

10. On 9th March 2017, a third party, J.K.Jute Mill Majdur Sabha filed a Misc. Application for Intervention. The Adjudicating Authority after going through the petition for intervention observed that its 'Locus standi' is to be decided first. Therefore, parties were granted time to file reply on maintainability of the third party application/claims. Further, the operational creditor was also granted liberty to file rejoinder to objection of

the corporate debtor. Learned counsel for the 'operational creditor' as also the workers union requested the Adjudicating Authority to grant order of status quo, as the corporate debtor may alienate its assets. When it was objected by learned counsel for the appellant/corporate debtor, the Adjudicating Authority held that under Rule 11 of NCLT Rules 2016, it is conferred with the powers to provide substantial justice to the party concerned.

11. Learned counsel for the appellant submitted that the Adjudicating Authority became 'functus officio' after the time period specified under section 9 of the 'Code' and, therefore, it has no power to grant stay of sale of assets or 'status quo' in regard to any assets.

12. It was further contended that no prayer having been made by the 'operational creditor' to grant stay, it was not open to the Adjudicating Authority to pass interim order of status quo.

13. It was further contended that the Adjudicating Authority has no inherent jurisdiction under the 'Code' to pass any ad interim order.

14. Learned counsel for the appellant highlighted the defects in the Demand notice dated 6th January 2017 as was sent by respondent/'operational creditor'. It was also contended that the petition under Section 9 is barred by law of limitation.

15. On the other hand according to Learned counsel for the respondent/'operational creditor' 14 days' time limit prescribed under section 9 of the 'Code' for passing orders of admission or rejection of application is directory; it is not mandatory. It was also contended that the court should

avoid any construction of an enactment which will lead to an unworkable, inconsistent or impracticable results. Reliance was placed on Hon'ble Supreme Court's decision in ***H.S.Vankani V. State of Gujarat, AIR 2010 SC 1714.***

16. Referring to different situation, learned counsel for the respondent/'operational creditor' further submitted that if 14 days' period prescribed under section sub-section (5) of section 9 is considered as mandatory, it will result in numerous anomalous situations which is not the intention of the legislature in drafting the Code.

17. Further, according to learned counsel for respondent/'operational creditor' 7 days' period for curing of defects is independent of the 14 days' period for prescribed under sub-section (5) of section 9 before admission or rejection of the application.

18. The case was heard on merit and judgement was reserved on 28th March 2017. The Adjudicating Authority in the meantime was given liberty to decide the question of maintainability of the petition and the contentions as raised in this appeal.

19. In the written submissions, it has been brought to the notice of this court that the Adjudicating Authority fixed 5th April 2017 as the date for hearing the petition on the question of maintainability as raised in this appeal. Therefore, the respondent requested the Appellate Tribunal to allow the Adjudicating Authority to pass the order of maintainability as raised in this appeal with further prayer 'not to deny' the right of appeal after final decision

rendered by the Adjudicating Authority. It is informed that subsequently the Tribunal taken up the matter on 10th April 2017, but on certain ground adjourned the case.

20. We have also noticed that the Adjudicating Authority, Mumbai Bench in other cases under section 9 of the 'Code' rejected some of the applications in view of mandatory time limit prescribed under section 9 of the 'Code'.

21. As important question of law is involved and even after three weeks of reserved judgement, Adjudicating Authority has not passed any final order of admission or rejection on the petition under section 9 and now more than 60 days have passed after filing of the petition and as important question of law are involved, we decided to proceed with the matter.

22. To decide the question whether the time limit prescribed for initiation and completion of Insolvency Resolution Process is mandatory, it is desirable to notice different time limit prescribed under the Insolvency and Bankruptcy Code, 2016.

23. 'Corporate Insolvency Resolution Process' can be initiated under different provisions of the Code, such as under section 7 by 'financial creditor', under section 9 by 'operational creditor' and under section 10 by the 'Corporate applicant'. Though procedures after 'admission' of Insolvency Resolution Process is almost common, the legislature prescribed different time limit for admission or rejection of the petitions.

24. For initiation of Insolvency Resolution Process by 'financial creditors' under section 7, the Adjudicating Authority is allowed 14 days of the receipt

of the application to ascertain the existence of a default from the records with information utility or on the basis of other evidence furnished by the financial creditors; under sub-section (5) of Section 7 before or after 14 days, if Adjudicating Authority is satisfied that a default has occurred and the application under sub-section (2) of section 7 is complete and there is no disciplinary proceedings pending against the proposed resolution professional, the Adjudicating Authority is required to admit the application. On the contrary, if the default has not occurred or the application is not complete then the Adjudicating Authority is required to dismiss the petition.

However, in case of incomplete application the Adjudicating Authority is required to grant seven days' time to the applicant/financial creditor to rectify the defect. The Section 7 reads as follows: -

“Section 7. Initiation of corporate insolvency resolution process by financial creditor -

(1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation. —For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

- (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;*
- (b) the name of the resolution professional proposed to act as an interim resolution professional; and*
- (c) any other information as may be specified by the Board.*

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

- (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*
- (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.*

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the

applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor,

within seven days of admission or rejection of such application, as the case may be.”

25. On the contrary in the case of ‘operational creditors’ under sub-section (5) of section 9, within 14 days of the receipt of the application the ‘Adjudicating Authority’ is required to either admit the application, if complete or reject the application, if not complete or may grant 7 days’ time from the date of receipt of notice to the operational creditor to rectify the defect, as evident from section 9 and reads as follows: -

“Section 9. Application for initiation of corporate insolvency resolution process by operational creditor. -

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive

payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

- (a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;*
- (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;*
- (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and*
- (d) such other information as may be specified.*

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.”

26. Similarly in the case of initiation of Corporate Insolvency Resolution Process by ‘corporate applicant’, like sub-section (5) of section 9, the Adjudicating Authority, within a period of 14 days of the receipt of the application, by an order required to admit the application, if it is complete or reject the application if it is incomplete.

However, before rejecting the application it is required to give notice and “corporate applicant” can be allowed 7 days’ period to rectify the defects. This is evident from sub-section (4) of section 10, as quoted below:

“Section 10. Initiation of corporate insolvency resolution process by corporate applicant.

(1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating

corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

(3) The corporate applicant shall, along with the application furnish the information relating to—

(a) its books of account and such other documents relating to such period as may be specified; and

(b) the resolution professional proposed to be appointed as an interim resolution professional.

(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order—

(a) admit the application, if it is complete; or

(b) reject the application, if it is incomplete: Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.”

27. Where an application is not disposed of or an order is not passed within a period specified in the Code, in such case the Adjudicating Authority may

record the reasons for not doing so within the period so specified and may request the Hon'ble President of National Company Law Tribunal for extension of time, who may after taking into account the reasons so recorded can extend the period specified in the Act but not exceeding 10 days, as apparent from sub-section (1) of Section 64, as quoted below:

“64.(1) Where an application is not disposed of or an order is not passed within the period specified in this Code, the National Company Law Tribunal or the National Company Law Appellate Tribunal, as the case may be, shall record the reasons for not doing so within the period so specified; and the President of the National Company Law Tribunal or the Chairperson of the National Company Law Appellate Tribunal, as the case may be, may, after taking into account the reasons so recorded, extend the period specified in the Act but not exceeding ten days.”

28. There are other time limit prescribed under the 'Code' such as section 16(1) in terms of which the Adjudicating Authority is required to appoint an interim resolution professional within 14 days from the insolvency commencement date (admission of the case). Under sub-section (5) of section 16, the term of the interim resolution professional cannot exceed 30 days from the date of appointment, as evident from relevant provisions, which reads as follows:-

“Section 16. Appointment and tenure of interim resolution professional.

(1) *The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.*

(2) *Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under section 7 or section 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.*

(3) *Where the application for corporate insolvency resolution process is made by an operational creditor and—*

(a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;

(b) a proposal for an interim resolution professional is made under sub-section (4) of section 9, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(4) *The Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (3), recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.*

(5) The term of the interim resolution professional shall not exceed thirty days from date of his appointment.”

29. Time limit for completion of Insolvency Resolution Process is prescribed under section 12 as per which the corporate insolvency resolution process required to be completed within a period of 180 days from the date of admission of the application. If resolution professional for any reason not in a position to complete this job within 180 days may file an application under sub-section (2) of section 12 before the Adjudicating Authority to extend the period. Under sub-section (3) of section 12, the Adjudicating Authority may extend the period, but not exceeding 90 days i.e. total 270 days has been allowed for Insolvency Resolution Process. This is evidence from section 12 as quoted below:

“Section 12. Time-limit for completion of insolvency resolution process.

(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent. of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.”

30. Before expiry of the insolvency resolution process of the maximum period permitted for completion under section 12 if the Adjudicating Authority does not receive a resolution plan, under section 33 the Adjudicating Authority is required to pass an order requiring the Corporate Debtor to be liquidated in the manner as laid down in the said chapter. For proper appreciation, section 33 of the Code is quoted below:

“33. Initiation of liquidation. - (1) Where the Adjudicating Authority, —

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein,

it shall—

- (i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;*
- (ii) issue a public announcement stating that the corporate debtor is in liquidation; and*
- (iii) require such order to be sent to the authority with which the corporate debtor is registered.”*

31. From the aforesaid provisions we find that time is the essence of the Insolvency and bankruptcy Code 2016, but it is to be seen whether on failure to do so, the Adjudicating Authority is competent to pass appropriate order. Further in case resolution process is not completed within the time prescribed as per section 33 it will lead to initiation of liquidation proceedings, which may affect the corporate debtor, which otherwise was not required to be initiated.

32. In ***P.T.Rajan Vs. T.P.M. Sahir and Ors.(2003) 8 SCC 498***, the Hon'ble Supreme Court observed that where Adjudicating Authority has to perform a statutory function like admitting or rejecting an application within a time period prescribed, the time period would have to held to be directory and not mandatory. In the said case, Hon'ble Apex Court observed:

“48. It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. (See Shiveshwar Prasad Sinha v. The District Magistrate of Monghyr & Anr., AIR (1966) Patna 144, Nomita Chowdhury v. The State of West Bengal & Ors., (1999) CLJ 21 and Garbari Union Co-operative Agricultural Credit Society Limited & Anr. V. Swapan Kumar Jana & Ors., (1997) 1 CHN 189.)

49. Furthermore, a provision in a statute which is procedural in nature although employs the word “shall” may not be held to be mandatory if thereby no prejudice is caused.”

33. That the Hon’ble Apex Court has on numerous occasions interpreted the word ‘shall’ to mean ‘may’. An analogous position can be found in the context of the time period prescribed for filing Written Statements by Defendants to a suit, wherein, the Hon’ble Apex Court was faced with the question of a Court’s power to take on record Written Statements that were filed beyond the period of 90 days, as prescribed under Order VIII Rule 1 of the Code of Civil Procedure, 1908. In this regard, the Hon’ble Supreme Court in **Kailash Versus Nanhku and Ors (2005) 4 SCC 480 held as under:-**

“27. Three things are clear. Firstly, a careful reading of the language in which Order 8 Rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of

summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Secondly, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order 8 Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried.”

34. Further, Hon'ble Supreme Court in the matter of **Smt. Rani Kusum vs Smt Kanchan Devi and Ors (2005) 6 SCC 705**, concurring with the ratio laid down in **Kailash Versus Nanhku (supra)** held that:

“10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of

justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

11. *The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.*

12. *The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in the judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive. (See *Sushil Kumar Sen v. State of Bihar* [(1975) 1 SCC 774] .)*

13. *No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode.*

(See Blyth v. Blyth [(1966) 1 All ER 524 : 1966 AC 643 : (1966) 2 WLR 634 (HL)] .) A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See Shreenath v. Rajesh [(1998) 4 SCC 543 : AIR 1998 SC 1827] .)

14. *Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.”*

35. Sub-section (2) of section 7, sub-section (2) of section 9 and sub-section (2) of section 10 deals with the form and manner in which respective applications under section 7, 9 and 10 ought to be filed along with such process fee as may be prescribed. This is a procedural matter to be verified by the Registry of the NCLT.

36. Sub-section (1) of Section 5 defines “adjudicating authority” for the purpose of that part means “National Company Law Tribunal”, (NCLT) constituted under Section 408 of the Companies Act, 2013 (18 of 2013).

37. We have noticed that Code, empowers ‘adjudicating authority’ to pass orders under Section 7, 9 and 10 of the Code, 2016 and not the NCLT. It is by virtue of the definition under sub-Section (1) of Section 5 of the Code, the NCLT plays its role as “adjudicating authority” and not that a Company Law Tribunal. Therefore, in strict sense, mandate under Section 420 of the

Companies Act, 2016 cannot be transpose in Code 2016 by reading 'orders of Tribunal, as "Order of Adjudicating Authority".

38. The Adjudicating Authority has different roles to play at different stages. The one of such role is somewhat administrative in nature when under sub-section (4) of section 7 or sub-section (5) of section 9 and sub-section (4) of section 10, the adjudicated authority is required to find out whether (i) the case is complete in terms of the provisions of sub-section (2) of section 7 or sub-section (2) of section 9 or sub-section (2) of section 10, as the case may be or (ii) whether there is a defect i.e. application is nor in order and incomplete. Otherwise role of Adjudicating Authority is judicial in nature particularly when it decides as to whether the 'Insolvency Resolution Process' to be initiated by admitting of the application or to reject the application. As a judicial authority, in case the application is incomplete, it is also empowered to decide whether to grant 7 days' time to rectify the defects. In case the applications are admitted and resolution process starts, the Adjudicating Authority is required to pass judicial order under section 13 and 14 of the 'Code' and may order for public announcement in terms section 15 and then to oversee the resolution process and finally, if so required, to pass order for liquidation.

39. The time period of 14 days prescribed under sub-section (4) of section 7, sub-section (5) of section 9 and sub-section (4) of section 10 are to be counted from the date of receipt of application. The word 'date of receipt of application' cannot be treated to be 'date of filing of the application'. We have noticed that the Registry is required to find out whether the application is in proper form and accompanied with such fees as may be prescribed. So, the Registry will take

certain time and during such period, the applications are not brought to the notice of the 'Adjudicating Authority'. Therefore, 14 days' period granted to the Adjudicating Authority under the provisions of the Code cannot be counted from the 'date of filing of the application' but from the date when 'such application is presented before the Adjudicating Authority i.e. 'the date on which it is listed for admission/order.

40. In the present scenario, the Insolvency Bankruptcy Code do not bar or render the Adjudicating Authority powerless to admit an application or rejecting the application.

41. Further, nature of the provisions contained in sub-section (5) of section 7 or sub-section (5) of section 9 and sub-section (4) of section 10 of the 'Code' like Order VIII, rule 1 being procedural in nature cannot be treated to be a mandate of law.

42. The object behind the time period prescribed under sub-section (5) of section 7, sub-section (5) of section 9 and sub-section (4) of section 10, like Order VIII, Rule 1 of CPC is to prevent the delay in hearing the disposal of the cases. The Adjudicating Authority can not ignore the provisions. But in appropriate cases, for the reasons to be recorded in writing, it can admit or reject the petition after the period prescribed under section 7 or section 9 or section 10.

43. Thus, in view of the aforementioned unambiguous position of law laid down by the Hon'ble Apex Court and discussion as made above, we hold that the mandate of sub-section (5) of section 7 or sub-section (5) of section 9 or sub-

section (4) of section 10 procedural in nature, a tool of aid in expeditious dispensation of justice and is directory.

44. However, the 7 days' period for the rectification of defects as stipulated under proviso to the relevant provisions as noticed above is required to be complied with by the corporate debtor whose application, otherwise, being incomplete is fit to be rejected. In this background we hold that the proviso to sub-section (5) of section 7 or proviso to sub-section (5) of section 9 or proviso to sub-section (4) of section 10 to remove the defect within 7 days are mandatory, and on failure applications are fit to be rejected.

45. Section 12 is a "time limit for completion of insolvency resolution process" which is to be completed within 180 days from the date of admission of the application. An extension of the period of corporate insolvency resolution process can be granted by the Adjudicating Authority but it cannot exceed 90 days and cannot be granted more than once.

46. The resultant effect of non-completion of insolvency resolution process within the time limit of 180 days + extended period of 90 days i.e. total 270 days will result in to initiation of liquidation proceedings under section 33. As the end result of Resolution Process is approval of resolution plan or initiation of liquidation of proceedings, we hold the time granted under section 12 of 'the Code' is mandatory.

Similarly, term allowed to "Interim resolution professional" is 30 days. Thereby "Interim resolution professional" cannot exceed 30 days from the date of his appointment as per sub-section (5) of section 16. However, as the Regular

resolution professional starts functioning on completion of period of Interim resolution professional the performance of the duties of Interim resolution professional cannot be held to be mandatory though the period is required to be counted for completion of the interim resolution process i.e, 180 days and in appropriate case another 90 days can be granted i.e. maximum 270 days which is mandatory.

47. It is not mandatory for 'operational creditors' to propose the resolution professional to act as an interim resolution professional. It may or may not propose. In such case, the Adjudicating Authority will nominate insolvency resolution professional as recommended by the Board on reference from the Adjudicating Authority. This process also may take some time after admission of the case and therefore, it is clear that the procedural part of section 7 or section 9 or section 10 are directory in nature.

48. We have noticed the decision of Hon'ble Supreme Court in "Union of India Vs. Popular Construction Co." (2001) 8 SCC 470. In the said case, Hon'ble Supreme Court was deciding the question regarding extension of time period beyond the time prescribed in the statutes and held when the legislatures prescribed a special limitation for the purpose of the appeal, the Court cannot entertain an application beyond the extended period, if prescribed therein.

49. The aforesaid decision of the Hon'ble Supreme Court in Popular Construction Company cannot be said to be applicable to procedural part of section 7 or section 9 or section 10, though it is applicable to section 64 which mandates extension of period not beyond 10 days as also to sub-section (3) and

(4) of section 12 which relates to time limit prescribed for completion of insolvency resolution process.

50. In these cases, we are not happy with the manner by the Adjudicating Authority has passed one or other order. The Adjudicating Authority, in spite of time frame scheme has taken the matter very leisurely and lightly. The time is the essence of the Code and all the stakeholders, including the Adjudicating Authority are required to perform its job within time prescribed under the Code except in exceptional circumstances if the adjudicating authority for one or other good reason fail to do so. In the case in hand we find that the Adjudicating Authority has unnecessarily adjourned the case from time to time which is against the essence of the Code.

51. Further, we find that the application was defective, and for the said reason the application was not admitted within the specified time. Even if it is presumed that 7 days additional days time was to be granted to the operational creditor, the defects having pointed out on 16th February 2017 and having not taken care within time, we hold that the petition under section 9 filed by respondent/operational creditor being incomplete was fit to be rejected.

52. For the reasons aforesaid, we direct the Adjudicating Authority to reject and close the Petition preferred by Respondents. After we reserved the judgment if any order has been passed by the Adjudicating Authority, except order of dismissal, if any, are also declared illegal.

53. The appeal is allowed. However, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
1st May, 2017

sm