

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeals (AT)(Ins) No.31 of 2017

IN THE MATTER OF:

Era Infra Engineering Ltd

...Appellant

Vs

Prideco Commercial Projects Pvt Ltd.

...Respondent

Present: Mr. Manoj K. Singh, Mr. Vijaya Singh, Ms Bornali Roy, Mr Mahip Singh, Mr. Gyanendra Kumar, Mr. Tanuka De, Advocates for the appellant.

ORDER

03.05.2017- The Appellant/Corporate Debtor has challenged the order(s) dated 12th April, 2017, passed by the Adjudicating Authority, Principal Bench, New Delhi in Insolvency Petition No. 26(ND) of 2017. By one of the order the Adjudicating Authority held that the order is being passed, within 14 days, as per Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code' for short). By the other order dated 12th April 2017, the Adjudicating Authority initiated Insolvency Resolution Process by admitting the application, appointed interim resolution professional, ordered Moratorium and passed the following directions:

"14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

- (b) *transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
- (c) *any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
- (d) *the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*
- (2) *The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.*
- (3) *The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.*
- (4) *The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:*

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

10. The insolvency resolution professional shall also take steps and perform his duties in terms of Section 15, 17 & 18. All personnel of the Corporate Debtor including its promoters are expected to extend full cooperation to the interim resolution professional as is provided by Section 19 and any other provisions of the Code. The insolvency professional shall submit his report to us within four weeks.

11. The petition stands disposed of in above terms.”

2. Counsel for the Appellant/Corporate Debtor submitted that the Adjudicating Authority initiated the insolvency process under section 9 of the I & B Code, 2016, and admitted the case, though the Application

preferred by Operational Creditor was not complete. It is contended that the Appellant/ Corporate Debtor was not served any notice under section 8 of the I & B Code,2016, and the petition was not filed in terms of (Form 3) Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

3. On notice, the Respondent/Operational Creditor has appeared and filed reply affidavit. Ld. Counsel appearing on behalf of Operational Creditor while accepted that no notice under section 8 of I & B Code,2016, was served on the Appellant/Corporate Debtor, it is submitted that the other formalities were completed. It is further submitted that earlier a notice was issued to the Appellant/Corporate Debtor under section 271 of the Companies Act, 2013, for winding up which should be treated to be a notice for the purpose of section 8 of the I & B Code,2016. However, such submissions made on behalf of the Operational Creditor cannot be accepted in view of the mandatory provision under section 8 of the I & B Code read with Rule 5 of Insolvency and Bankruptcy, (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as I & B 'Rules' for short).

4. Insolvency resolution by an Operational Creditor can be initiated only on the occurrence of a default which is to be followed by a demand notice of unpaid Operational Debtor as stipulated sub-section (1) of Section 8, as quoted below:

“ 8(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.”

5. Rule 5 of I & B Rules also mandates an Operational Creditor to deliver the Corporate Debtor a demand notice in Form 3 or a copy of an invoice attached with a notice in Form 4, as quoted below:

“5. Demand notice by operational creditor.—(1) *An operational creditor shall deliver to the corporate debtor, the following documents, namely,-*

(a) a demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.”

6. The application for initiation of corporate insolvency resolution process, thereafter can be filed by Operational Creditor after expiry of period of 10 days from the date of delivery of the notice or invoice demanding payment, as provided under sub-section (1) of section 9.

7. Only thereafter, in terms of sub-section (5) of Section 9, the Adjudicating Authority, within 14 days of receipt of the application, by an order is required to either admit the application, if complete or to reject the application if incomplete, provided seven days' time is granted for completion of the application if incomplete. As per clause (ii) (c) & (d) of sub-section (5) of section 9, the adjudicating authority is required to reject the application, in absence of affidavit that the Operational Creditor in absence of delivery of demand of notice or invoice demanding payment to the Corporate Debtor. In this connection we refer Section 9 of the I & B Code, as quoted below:

9. (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.

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”

Section 230 reads as follows:

“The Board may, by general or special order in writing delegate to any member or officer of the Board subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Code (except the powers under section 240 as it may deem necessary”

8. Admittedly, no notice was issued by Operational Creditor under section 8 of the I & B Code,2016. Demand notice by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of any expiry period of tenure of 10 days there was no question of preferring an application under section 9 of I & B Code,2016.

9. The Adjudicating Authority has failed to notice the aforesaid facts and the mandatory provisions of law as discussed above. Though the application was not complete and there was no other way to cure the defect, the impugned order cannot be upheld.

10. For the reasons aforesaid, we set aside the order dated 12th April 2014 passed by the Adjudicating Authority. The application preferred by Operational Creditor under section 9 stands dismissed being incomplete. All orders, interim arrangement etc as has been made are vacated, moratorium as declared earlier is quashed, appointment of interim resolution professional also stands quashed. All action taken by interim resolution profession is declared illegal. The appeal is allowed with the aforesaid observations.

(Justice S.J. Mukhopadhaya)
Chairperson

(Mr. Balvinder Singh)
Member(Technical)

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