

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Comp. App. (AT) (Insolvency) No. 112 of 2017

In the matter of:

Mass Metals Pvt. Ltd.

...Appellant

Vs.

Sunflag Iron & Steel Co. Ltd.

...Respondent

Present: For Appellant : Shri Manish Raghav, Advocate

For Respondent: Shri Ankur S. Kulkarni, Shri Uditha Kulkarni
and Ms. Shweta S. Parihar, Advocates

ORDER

22.09.2017 The appellant has challenged the order dated 24th May 2017 passed by Adjudicating Authority (National Company Law Tribunal) Principal Bench, New Delhi in CP No.16/2017. By the impugned order, the Adjudicating Authority treating the Transfer Petition under Section 434 (1)(a) as a petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as I&B Code) admitted the application, initiated Corporate Insolvency Resolution Process, declared moratorium and appointed Interim Resolution Professional with other directions in accordance to the I&B Code.

2. On 25th July, 2017 when the matter was taken up, the learned counsel for the corporate debtor made submission, as recorded below:

“Learned counsel for the appellants submits that no separate notice was issued by the Learned Adjudicating Authority on the appellant. Whatever discussion about the notice has been made is so-called mobile and WhatsApp

notice(s) given by the respondent. According to the appellant, though the application of respondent was treated to be an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (I&B Code), but no notice was issued under Section 8 of the I&B Code. Further it is pleaded that there is an 'existence of dispute'.

Let notice be issued on the respondent by Speed Post. Requisite along with process fees, if not filed, be filed by tomorrow i.e. 26th July, 2017. If the appellant provides e-mail address of the respondent, let notice be also issued through e-mail.

Post the matter on 8th August, 2017.”

3. On notice, the respondent has appeared. Learned counsel for the respondent - the operational creditor submits that notice under sub-section (1) of section 8 was issued on the appellant - corporate debtor on 17th March, 2017.

4. From the demand notice dated 17th March, 2017, we find that the so called notice under Section 8 was issued by e-mail/ speed post by an advocate on record of Supreme Court of India namely Ankur S. Kulkarni. The said so called notice under section 8 was not issued by respondent - operational creditor.

5. In “*Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr.*” Company Appeal (AT) (Insolvency) No. 39 of 2017), similar issue fell for consideration as to whether a notice under sub-section (1) of Section 8 can be issued by an advocate/lawyer or Chartered Accountant or Company

Secretary. This Appellate Tribunal by its Judgement 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.

32. *In view of provisions of I&B Code, read with Rules, as referred to above, we hold that an 'Advocate/Lawyer' or 'Chartered Accountant' or 'Company Secretary' in absence of any authority of the Board of Directors, and holding no position with or in relation to the Operational Creditor cannot issue any notice under Section 8 of the I&B Code, which otherwise is a 'lawyer's notice' as distinct from notice to be given by operational creditor in terms of section 8 of the I&B Code."*

6. In the present case as an advocate/lawyer has given notice under Section 8 and there is nothing on record to suggest that the Advocate/lawyer has been authorised by 'Board of Directors' of the Respondent - 'Sunflag Iron & Steel Co. Ltd.' to do so, and there is nothing on record to suggest that the Advocate/lawyer hold any position *with or in relation with the Respondent*, we hold that the notice issued by the Advocate/lawyer on behalf of the Respondent cannot be treated as a notice under section 8 of the I&B Code. For the said reason, the petition under section 9 at the instance of the Respondent against the Appellant was not maintainable.

7. This apart, we find that no notice issued by Adjudicating Authority was served on the appellant prior to passing of the impugned order. Learned counsel appearing on behalf of the respondent - operational creditor brings to the notice of this Appellate Tribunal, an order dated 20th April 2017 passed by the Adjudicating Authority in CP No.16/2017 to suggest that the respondent - operational creditor issued a notice to the appellant. From the said order, we find that for giving another opportunity on 26th April, 2017

notice was issued by speed post as well as by e-mail but no such notice was issued by the Adjudicating Authority but was issued by the respondent - operational creditor.

8. In “*M/s. Innoventive Industries Ltd. vs. ICICI Bank & Anr.*”, [Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017], this Appellate Tribunal held that limited notice is required to be given by the Adjudicating Authority before admitting an application, as quoted below:-

“In view of the discussion above, we are of the view and hold that the Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the corporate debtor and to find out whether the application is complete and or there is any other defect required to be removed. Adherence to Principles of natural justice would not mean that in every situation the adjudicating authority is required to afford reasonable opportunity of hearing to the Corporate debtor before passing its order.”

9. In view of the fact that notice under sub-section (1) of Section 8 was issued by an advocate and not by the Respondent and that the appellant was not given a proper opportunity by the Adjudicating Authority before passing of the impugned order and the impugned order was passed in violation of the rules of natural justice, the impugned order cannot be upheld. We accordingly set aside the impugned order dated 24th May 2017 and dismiss the CP No.16/2017 preferred by the respondent, operational creditor.

10. In the result, the appointment of Interim Resolution Professional, order declaring moratorium, freezing of account and all other order (s) passed by the Adjudicating Authority pursuant to impugned order(s) and action taken by the Interim Resolution Professional including the advertisement published in the newspaper calling for applications are declared illegal. The appellant is released from the rigour of law and allow the appellant company to function independently through its Board of Directors with immediate effect.

11. Learned Adjudicating Authority will now determine the fee of Interim Resolution Professional and the appellant will pay the fees of the Interim Resolution Professional for the period he has worked.

12. At this stage, learned counsel for the appellant submits that appellant, corporate debtor intends to settle the dispute with the respondent, operational creditor. The Appellant may do so, to ensure that no subsequent step is taken by the operational creditor.

The appeal is allowed with aforesaid observation. No cost.

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Balvinder Singh)
Member(Technical)

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