

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 98 of 2017

IN THE MATTER OF:

Mindtree Exports Private Limited

... Appellant

Versus

**M/s. Ashmita Multitrade Private
Limited & Anr.**

... Respondents

**Present: For Appellant : Shri P. Nagesh and Shri Karan Gandhi,
Advocates**

For Respondents : Shri Bakul Jain, Advocate

ORDER

31.07.2017 The respondent company claimed to be 'Financial Creditor' as defined under Section 5(7) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') and filed an application under Section 7 of the I&B Code to initiate Corporate Insolvency Resolution Process against the appellant-'Corporate Debtor'. Learned Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai (hereinafter referred to 'Adjudicating Authority') by the order dated 13th June, 2017 in Company Petition No. 1073/I&BP/NCLT/MB/MAH/2017, admitted the application, declared 'Moratorium' under Section 14 of the I&B Code, appointed an Interim Resolution Professional and

passed prohibitory orders. The said order is under challenge in the present appeal.

2. From the record, we find that the respondent initially claimed to be an 'Operational Creditor' and preferred an application under Section 9 of the I&B Code in Form-5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as 'Adjudicating Authority Rules') on 4th April, 2017. However, the same was withdrawn and thereafter a separate application under Section 7 of I&B Code was filed in Form-1 claiming to be 'Financial Creditor', which was registered as Company Petition No. 1073/I&BP/NCLT/MB/MAH/2017 and was admitted by impugned order dated 13th June, 2017.

3. It is not necessary to record all the facts as has been advanced by the parties, except the relevant one for disposal of this appeal.

4. Admittedly, the impugned order dated 13th June, 2017 has been passed by the Learned Adjudicating Authority without issuing notice to the respondent/appellant-'Corporate Debtor'. The order sheet also shows that nobody appeared on behalf of the 'Corporate Debtor'. Apart from this, according to the appellant/respondent, no notice under Rule 4(3) of the Adjudicating Authority Rules was

served after filing of the application under Section 7 of the I&B Code. The appellant had no knowledge of the application and, so, the appellant could not oppose the prayer. It is stated that the amount, as claimed to be due to the respondents, has already been paid.

5. Learned counsel for the respondents/'Financial Creditors' has not disputed the fact that the impugned order was passed *ex-parte* without hearing the appellant on 13th June, 2017. Learned Adjudicating Authority in the impugned order though recorded that the 'Financial Creditor' has sent a notice on 15th February, 2017, to the 'Corporate Debtor' demanding a sum of Rs. 5,37,00,000/- (Rupees Five Crores Thirty Seven Lakhs only), but failed to appreciate whether any notice was actually served on the 'Corporate Debtor' or not.

6. There is nothing on record to suggest that any notice was issued under Rule 4(3) of the Adjudicating Authority Rules, which provides for serving a copy of the application under Section 7, mentioning the date of hearing before the Adjudicating Authority. Learned Adjudicating Authority also failed to consider whether the respondents/petitioners come within the meaning of 'Financial

Creditors' or not as they earlier claimed to be 'Operational Creditors'.

7. For the reasons aforesaid, we set aside the impugned order dated 13th June, 2017 passed by the Learned Adjudicating Authority, Mumbai Bench, Mumbai in Company Petition No. 1073/I&BP/NCLT/MB/MAH/2017 and remit the matter to Learned Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai to decide the question as raised and noticed above.

8. In the result, the order declaring 'Moratorium', seizure of all the bank accounts, payment to Interim Resolution Professional and other rigorous orders passed against the appellant-'Corporate Debtor' are set aside. The 'Corporate Debtor' is allowed to function through its Board of Directors till the Learned Adjudicating Authority decides the matter after notice and hearing the parties.

9. We make it clear that we have not decided the question as raised above, which are required to be decided by the Learned Adjudicating Authority at the first instance. Learned Adjudicating Authority will fix the date of hearing and, after notice to the parties, will decide the application afresh.

10. The appeal is allowed with the aforesaid observations and directions. However, in the facts and circumstances of the case, the parties will bear their own cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Balvinder Singh]
Member (Technical)