

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insol.) No. 127 of 2017**

**IN THE MATTER OF:**

**M/s. Paharpur Cooling Towers Limited** .....Appellant

**Vs.**

**Dalmia Cement (Bharat) Limited** .....Respondent

**Present: For Appellant:- Mr. Murari, Senior Advocate with Mr. Raj Jhabakh and Mr. Anandh. K, Advocates.**

**For Respondent:- Mr. Goutham Shivshankar, Mr. Avinash Krishnan and Mr. Prashant, Advocates.**

**ORDER**

**31.08.2017-** On 8<sup>th</sup> August, 2017, notice was issued and the following observations were made by this Appellate Tribunal: -

*“The question arises whether the Tribunal ought to have allowed the appellant to start the insolvency and bankruptcy proceeding without giving notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 ( I&B Code for short), followed by Rule 4(3) of the Insolvency and Bankruptcy (Application to (Adjudicating Authority) Rules, 2016, before going through the question whether the bank statement as per Section 9(3),(b) & (c) of the I & B Code has been complied with or not?*

*Shri Gautam Shivshankar, Advocate accepts notice on behalf of the respondent. No further notice need be*

*issued on it. The respondent is allowed a week's time to file reply. Rejoinder, if any, be filed within a week thereof.*

*Post the matter on 31<sup>st</sup> August 2017.”*

2. We have noticed that the Central Government issued Notification No. G.S.R. 1119(E) dated 7<sup>th</sup> December, 2016 exercising 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 Insolvency and Bankruptcy Code, 2016 framed the Companies (Transfer of Pending Proceedings) Rules, 2016. Rule 5 therein 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.”*

3. The aforesaid notification was doubted by this Appellate Tribunal as we were of the view that Central Government while exercising powers conferred under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 has no jurisdiction to frame Rules with respect to transferred cases under Rule 239 of the Insolvency and Bankruptcy Code, 2016. This was also pointed out to the Central Government.

4. This was also noticed by Appellate Tribunal in the case of *“Unimark Remedies Ltd. Vs. Ashok Alco Chem Ltd. in Company Appeal (AT) (Insol.) No.45 of 2017”* disposed of on 21<sup>st</sup> July, 2017. The Central Government thereafter came out with the notification dated 28<sup>th</sup> February, 2017, under the same provision as referred to earlier and framed the Companies (Transfer of Pending Proceedings) Amended Rules, 2017, therein in place of ‘sixty days’ time, the time was extended to ‘six months’ from the date of transfer. Rule 2 of amended Rules 2017 reads as follows: -

*“2. In the Companies (Transfer of Pending Proceedings) Rules, 2016, in rule 5, in sub-rule (1) in the proviso for the words “sixty days” the words “six months” shall be substituted.”*

5. In that view of the matter, the matter should have been transferred within the time allowed to act in view of said Rules which was extended by ‘six months’. However, suddenly the Central Government issued a Notification No. GSR 732(E) dated 29<sup>th</sup> June, 2017, whereby 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 Insolvency and Bankruptcy Code, 2016 amended the Rule known as The Companies (Transfer of Pending Proceedings) Second Amendment Rules, 2017 wherein Rule 5 was substituted and time was granted only till 15<sup>th</sup> July, 2017.

*“5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.— (1) All*

*petitions relating to winding up of a company 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 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 Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:*

*Provided that the petitioner shall submit all information, other than information forming pan 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 upto 15<sup>th</sup> day of July, 2017, failing which the petition shall stand abated:*

*Provided further that any party or parties to the petitions shall, after the 15<sup>th</sup> day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:*

*Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15<sup>th</sup> December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.”*

6. Ld. Counsel for the appellant submits that the appellant was entitled to act in terms of the First Amended Rules published by notification dated 28<sup>th</sup> February 2017 i.e. in six months, before issuance of the subsequent Second Amended Rule by notification dated 29<sup>th</sup> June, 2017. Before last date of completion on 15<sup>th</sup> July, 2017, the impugned order was passed on 6<sup>th</sup> July, 2017 rejecting the transfer application on the ground that steps have not been taken in terms of Rule 5.

7. We have heard Ld. Counsel for the appellant and Ld. Counsel for the respondent. The aforesaid fact has not been denied.

8. Ld. Counsel for the respondent submits that before treating the petition under section 9, the respondent should have given notice under section 8 of the Insolvency and Bankruptcy Code, 2016.

9. Taking into consideration the totality of the case, while we accept the stand taken by Ld. Counsel for the appellant that it should have been

allowed time till 15<sup>th</sup> July, 2017 to take steps in terms of Second Amended Rules published on 29<sup>th</sup> June, 2017 i.e. prior to the impugned order, but setting aside of the impugned order will be of no avail as no further time can be granted to the appellant to act in terms of Rules aforesaid which is not in force after 15<sup>th</sup> July, 2017.

10. In the circumstances, in terms of Second proviso to Second Amendment Rule 5, the appellant is allowed to file a fresh application under Section 7 or Section 9 of the Insolvency and Bankruptcy Code, 2016, as the case may be, in accordance with the provision of the I & B Code. It is for the appellant is to decide whether it comes within the meaning of 'Financial Creditor' or 'Operational Creditor'. If the appellant feels that if the company is an 'Operational Creditor' then before filing application under section 9, it will provide notice under section 8 to the 'Corporate Debtor' and follow all conditions of the Insolvency and Bankruptcy Code and Rules framed thereunder.

11. In such case, the application cannot be decided on the ground of limitation taking into consideration that the appellant originally preferred a petition under section 433(e) of the Companies Act, 1956, for the purpose of counting delay and laches.

12. It will also be open to the respondent to raise all the objections at the stage of giving reply to Section 8 notice or at the time of admission of the application.

13. The appeal stands disposed of with aforesaid observations and directions. However, in the facts and circumstances, there shall be no order as to cost.

**(Justice S.J. Mukhopadhaya)**  
**Chairperson**

**(Balvinder Singh)**  
**Member(Technical)**

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