

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 45 of 2017

IN THE MATTER OF:

Unimark Remedies Ltd.

... Appellant

Versus

Ashok Alco Chem Ltd.

... Respondent

Present: For Appellants : Shri Swapnil Gupta, Advocate

For Respondent : Shri Bineesh K., Advocate

ORDER

21.07.2017 This appeal has been preferred by the appellant against two orders dated 24th February, 2017 and 4th April, 2017 passed by the Learned Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai. By the first order dated 24th February, 2017, Learned Adjudicating Authority dismissed the petition preferred by the appellant and by the subsequent order dated 4th April, 2017, Learned Adjudicating Authority refused to recall the earlier order dismissing the appeal.

2. Respondent herein preferred an application under clause (e) of Section 433 of the Companies Act, 1956 before the Bombay High Court. Pursuant to Rule 5 of "The Companies (Transfer of Pending Proceedings) Rules, 2016" notified on 7th December, 2016 by the

Central Government, the case was transferred from the Bombay High Court to Learned Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai. Rule 5 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 subsection (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. Learned Adjudicating Authority treated the petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') admitted the application and ordered moratorium.

4. The Appellate Tribunal by its order passed today (21st July, 2017) in Company Appeal (AT) (Insolvency) No. 8 of 2017 – Rubina Chadha and Another Vs. AMR Infrastructure Ltd., doubted the validity of the Notification dated 7th December, 2016 issued by the Central Government and doubted the power of the Central Government to frame Rules under Section 239 of the I&B Code to transfer the cases under Section 433 of the Companies Act, 1956 while exercising its

power conferred under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013. While dealing with the case of Rubina Chadha and another today, Shri Sanjay Shorey, Joint Director (Legal), Ministry of Corporate Affairs, Government of India appeared and brought to the notice of the Appellate Tribunal a Notification dated 29th June, 2017 issued by the Central Government 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 I&B Code framing the Companies (Transfer of Pending Proceedings) Second Amendment Rule, 2017, whereby Rule 5 circulated vide Notification dated 7th December, 2016 has been substituted by new Rule 5, which 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 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 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 upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions shall, after the 15th 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 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.”

5. As the earlier Rule 5 now stand substituted by the amended Rule 5 vide Notification dated 29th June, 2017, we are of the opinion that the Tribunal should re-consider the matter in terms of the substituted Rule 5, in view of the fact that earlier Rule 5 was doubted by the Appellate Tribunal and the Central Government accepting the same, issued substituted Rule 5 vide Notification dated 29th June, 2017.

6. We are also of the *prima facie* view that the petition under Section 433(e) of the Companies Act, 1956 on transfer under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 cannot be treated to be an application under Sections 7, 9 or 10 of the I&B Code, as sub-section (1) of Section 239 of the I&B Code relates to framing of rules by the Central Government with regard to the I&B Code to the extent empowered therein and the Central Government has not been empowered to transfer the cases under the said provision except under Section 434 of the Companies Act, 2013.

7. For the reasons aforesaid, we set aside the impugned orders dated 24th February, 2017 and 4th April, 2017 passed by the Learned Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai.

8. As it is informed that the parties have settled the claim amicably, we have not remitted the case to Adjudicating Authority to admit the

application, after hearing the parties. If any amount is due to Interim Resolution Professional, the appellants will pay the cost as may be determined by the Tribunal.

9. The appeal stands disposed of with the aforesaid observations and directions. However, on the facts and circumstances of the case, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Balvinder Singh]
Member (Technical)

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