

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**Company Appeal (AT) (Insol.) No. 126 of 2017****IN THE MATTER OF:****Chharia Holdings Pvt. Ltd.****.....Appellant****Vs.****Brys International Pvt. Ltd. & Ors.****.....Respondents****Present: For Appellant:- Mr. Pawan Sharma and Ms. Arpita Yadav,
Advocates.****ORDER**

30.08.2017- The appellant who claimed to be 'Financial Creditor' filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I & B Code") for initiation of 'Corporate Insolvency Resolution Process' against the Respondents-M/s. Brys International Pvt. Ltd. & Ors. ('Corporate Debtor'). Ld. Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, by impugned order dated 22nd June, 2017 dismissed the application under section 7 of the 'I & B Code' preferred by appellant with the following observations: -

"On reading of the above 2 sub-sections, it is apparent that while there is a provision for the Adjudicating Authority to make a reference to the Board for a recommendation of an Insolvency professional, in the case of an operational creditor, there is no such provision in the case of a financial creditor. The instant application has been filed under section 7 of IBC as a financial creditor. The applicant financial creditor has not proposed the name

of any insolvency professional and thus, has not fulfilled the requirement as in sub-section 3 (b) of section 7 of the Code, which reads as follows: -

“The financial creditor shall, along with the application furnish —

- (a) Record of the default recorded with the information utility or such other record or evidence of default as may be specified;*
- (b) the name of the resolution professional proposed to act as an interim resolution professional ; and*
- (c) any other information as may be specified by the Board.”*

Hence, we are unable to admit the application for insolvency as the same is not complete.

Application is dismissed.”

2. Ld. Counsel for the appellant submits that the appellant had proposed the name of the ‘Interim Resolution Professional’ and referred to Part-III of the application filed under section 7 in format to suggest that name of one “Mr. Vivek Raheja, R/o CU-49, Pitampura, Delhi-110088 with e-mail address vivek@vpgs.in and Registration No. IBBI/IPA-01/IP-00006/2016-17” along with consent letter of the ‘Interim Resolution Professional’ in Annexure A-4 attached thereto. It is also submitted that non-furnishing the name of proposed ‘Interim Resolution Professional’ will not render the application incomplete.

3. The questions arise for consideration in this appeal are:

(i) Whether it is mandatory for a 'Financial Creditor' to propose the name of 'Interim Resolution Professional' in an application under section 7 of the 'I&B Code'?

(ii) Whether in absence of proposal of name of 'Interim Resolution Professional' the application is incomplete?

(iii) Whether the impugned order dated 22nd June, 2017 is legal and valid?

4. Before deciding the first two questions, it is desirable to notice the relevant facts as pleaded by the parties.

5. Appellant has pleaded and not disputed by respondents that the appellant preferred an application under section 7 in Form-1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. In the said Form-1, the appellant has proposed the name of 'Interim Resolution Professional', as apparent from the record and noticed in the preceding paragraph. In view of such admitted facts, the impugned order dated 22nd June, 2017 cannot be sustained and the matter is required to be remitted back to the Ld. Adjudicating Authority for admission of the case, if the application is otherwise complete.

6. To determine the question as to whether it is mandatory for the 'Financial Creditor' to propose the name of an 'Interim Resolution Professional' in the application under section 7 of the 'I&B Code', it is desirable to notice the relevant provisions.

7. As per clause (b) of Sub-section (3) of Section 7 the 'Financial Creditor' required to furnish name of the resolution professional proposed

to act as an 'Interim Resolution Professional', the relevant portion of which reads as follows: -

“7. Initiation of corporate insolvency resolution process by financial creditor. —(1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation. —For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3)."

8. However, under sub-section (4) of Section 9 an 'Operational Creditor' has been given option to propose the name of any 'Interim Resolution Professional' of its own choice, which reads as follows:

"9. Application for initiation of corporate insolvency resolution process by operational creditor.—*(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.

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9. From the aforesaid provision, it is clear that the ‘Operational Creditor’ may provide the name of an ‘Interim Resolution Professional’ and in a particular case, the ‘Operational Creditor’ may not provide the name of the ‘Operational Creditor’.

10. In so far the ‘Corporate Applicant’ is concerned, in their case provision has been made under clause (b) of sub-section (3) of Section

10 to furnish the name of 'Interim Resolution Professional', as quoted below: -

“10. Initiation of corporate insolvency resolution process by corporate applicant. – (1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

(3) The corporate applicant shall, along with the application furnish the information relating to—

(a) its books of account and such other documents relating to such period as may be specified; and

(b) the resolution professional proposed to be appointed as an interim resolution professional.

(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order—

(a) admit the application, if it is complete; or

(b) reject the application, if it is incomplete:

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the

applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

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11. On bare reading of the provisions aforesaid, it is clear that sub-section (3)(b) of Section 7 and sub-section (3)(b) of Section 10, are mandatory and the 'Financial Creditor' and the 'Corporate Applicant' are required to furnish the name of 'Interim Resolution Professional', failing which application being defective may be rejected.

12. On the other hand on bare perusal of sub-section (4) of Section 9, it is clear that for the 'Operational Creditor' it is not mandatory to propose the name of an 'Interim Resolution Professional', in view of the word 'may' used in sub-section (4) of Section 9, as distinct from word 'shall' used in sub-section (3) of Section 7 and sub-section (3) of Section 10 of 'I&B Code'.

13. Section 16 relates to appointment and tenure of 'Interim Resolution Professional' which reads as follows: -

“16. Appointment and tenure of interim resolution professional. –(1) The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.

(2) Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under section 7 or

section 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(3) Where the application for corporate insolvency resolution process is made by an operational creditor and—

(a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;

(b) a proposal for an interim resolution professional is made under sub-section (4) of section 9, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(4) The Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (3), recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.

(5) The term of the interim resolution professional shall not exceed thirty days from date of his appointment.”

14. From sub-section (2) of Section 16, it is clear that the ‘Interim Resolution Professional’, who have been proposed by ‘Financial Creditor’

and 'Corporate Applicant' under section 7(3)(b) and Section 10(3)(b) respectively are to be appointed as 'Interim Resolution Professional', if no disciplinary proceedings are pending. On the other hand, Clause (b) of sub-section (3) of Section 16 makes it is clear that if the name of 'Interim Resolution Professional' is proposed by 'Operational Creditor' as per sub-section (4) of Section 9, then only such person is to be appointed, if no disciplinary proceedings are pending, on the other hand, if no name of 'Interim Resolution Professional' is proposed by an 'Operational Creditor', the Adjudicating Authority is required to make reference to the Board for recommendation of an 'Interim Resolution Professional' under sub-section (1) read with sub-section 3(a) of Section 16 who may act as an 'Insolvency Resolution Professional'.

15. If Section 7(3)(b), Section 9(4) and Section 10(3)(b) are read along with Section 16, it will be clear that while it is mandatory for 'Financial Creditor' and 'Corporate Applicant' to propose name of an 'Interim Resolution Professional', but for 'Operational Creditor' it is not mandatory and the 'Operational Creditor' may or may not propose the name of an 'Interim Resolution Professional'.

16. In view of the findings aforesaid, while we uphold the decision of the Adjudicating Authority that proposal of name of 'Interim Resolution Professional' in terms of clause (b) of sub-section (3) of Section 7 is mandatory, but in the facts and circumstances of the case, as the name of 'Interim Resolution Professional' has already been proposed by the Appellant-'Financial Creditor', the impugned order dated 22nd June, 2017 cannot be upheld.

17. Further, we are of the view that if the application filed by 'Financial Creditor' or 'Corporate Applicant' is defective in absence of name of an 'Interim Resolution Professional', then in such case in terms of proviso to Section 7 and Section 10, the Adjudicating Authority is required to give a notice to the applicant to rectify the defect within seven days of the receipt of such notice.

18. For the reasons aforesaid, we set aside the impugned order dated 22nd June, 2017 passed in Company Petition No. IB-80(PB)/2017 and remit the case to the Ld. Adjudicating Authority, Principal Bench, New Delhi. If the application is otherwise complete, Ld. Adjudicating Authority will admit the application. However, in case of any defect, the appellant be provided with seven days' time to remove the defects/complete record.

19. The appeal is allowed with the aforesaid observations. However, in 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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