

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION**

Company Appeal (AT) (Insolvency) No. 28 of 2017

(arising out of Order dated 31st January 2017 passed by NCLT, Mumbai Bench in C.P.No. 06/1 & BP/NCLT/MAH/2017)

**Smart Timing Steel Ltd.
Creditor**

...Operational

Vs.

**National Steel and Agro Industries Ltd.
Debtor**

.... Corporate

Present: For Appellants: Mr. Sanjay Grover, Advocate

For Respondents: Mr. Sandeep S.Deshmukha, Advocate

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA,J.

This appeal under Section 61 of Insolvency & Bankruptcy Code (hereinafter referred to 'I & B Code' for short) has been preferred by appellant against Order dated 31st January 2017 passed by 'Adjudicating Authority' in Mumbai Bench in C.P.No. 06/1 & BP/NCLT/MAH/2017, which reads as follows:

"The Petitioner/Operational Creditor filed this Creditor Petition u/s 9 of Insolvency and Bankruptcy Code without filing certificate from the Financial Institution maintaining

Accounts of the operational Creditor confirming that there is no payment of this unpaid Operational Debt by the Corporate Debtor as set out in (c) of Subsection (2) of Section (9) of this Code 2016.

Looking at non-filing of the certificate that is required to be filed along with this petition, this Bench had already given time to furnish the said document, but the counsel failed to furnish the said certificate. When this Bench has put it to the petitioner counsel how this Bench could pass this order without furnishing the certificate mandatorily to be filed along with the petition, the counsel appearing on behalf of the Operational Creditor submits that it is impossible to file copy of such Certificate from the Financial Institution for the Bank of the operational creditor is situated outside India, therefore, the compliances with such requirements shall be exempted.”

On perusal of Section 9 of Insolvency and Bankruptcy Code, it is evident, that it is mandatory to file copy of the Certificate from the Financial Institutions reflecting non-payment of the operational debt impugned, for the Operation Creditor has failed to annex copy of the said Certificate as required u/s 9(3) (c) of the Code, this petition is liable to be rejected.

Accordingly, the same is hereby rejected.”

2. The question for determination in this appeal is whether filing of “a copy of certificate from the “Financial Institution” maintaining accounts of the Operational Creditor confirming that there is no payment of unpaid operational debt by the ‘Corporate Debtor’ as prescribed under clause (c) of sub-section 3 of Section 9 of the ‘I & B Code’ is mandatory or directory.

3. The appellant who claimed to be ‘Operational Creditor’ filed an application under Section 9 of ‘I & B Code’ for initiation of Corporate Insolvency Resolution Process, enclosing some of the relevant documents. However, no copy of “the certificate from the Financial Institution maintaining account of the ‘Operational Creditor” as prescribed under clause(c) of sub-section (3) of Section 9 was enclosed. For the said reason the adjudicating authority rejected the application.

4. For deciding the issue it is desirable to notice relevant provisions of ‘I & B Code’ and Rules framed thereunder. Sub-section (14) of Section 3 defines ‘Financial Institution’ means--

- (a) a scheduled bank;
- (b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934); and
- (c) Public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013 (18 of 2013); and
- (d) such other institution as the Central Government may by notification specify as a financial institution;

5. The appellant is a foreign company of Hong-Kong having no office or bank account in India.

6. As the appellant has no account in any scheduled bank or 'Financial Institution' as defined in Section 45-I of the RBI Act 1934 nor having such account with "Public 'Financial Institution'" as defined in clause (72) of Section 2 of the Companies Act 2013 or with any other institution notified by Central Government as 'Financial Institution', it failed to enclose any certificate from 'Financial Institution' maintaining account of the 'Operational Creditor'.

7. Learned counsel appearing on behalf of the appellant submitted that the foreign companies and multi-national companies having no office or having no account in India with any of the 'Financial Institution' will suffer to recover the debt as due from 'Corporate Debtors' of India. The appellant being a foreign based 'Operational Creditor', the 'Adjudicating Authority' was required to interpret the provisions of 'I & B Code' in such a manner that Section 9 would have taken in its fold all the 'Operational Creditors' who are entitled to recover the debt defaulted by 'Corporate Creditors' of India. Learned counsel for the appellant further submitted that the word 'shall' used in sub-section (3) of Section 9 for furnishing documents etc. should be read as 'may', and hold that sub-section (3) of Section 9 is directory. Reliance was placed on Hon'ble Supreme Court decision in "**Kailash Vs. Nanhku and Others**"- (2005) 4 SCC 480".

8. In the said case the Hon'ble Supreme Court while deciding the question whether time limit of 90 days as prescribed by the Proviso appended to Rule-1 of Order VIII of CPC is mandatory or directory in nature? The Hon'ble

Supreme Court held that ordinarily the time prescribed by Order VIII, Rule I has to be honoured but it held that the provision being part of the procedural code is directory.

9. With due respect we are of the view that aforesaid decision of Hon'ble Supreme Court in 'Kailash Vs. Nanhku and Others' is not applicable in the present case, as clause (c) of sub-section (3) of section 7 does not relate to prescription of time.

10. Section 9 deals with application for initiation of corporate insolvency resolution process by 'operational creditor' 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.

(5) The Adjudicating Authority **shall**, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if-

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

*Provided that Adjudicating Authority, **shall** before rejecting an application under sub clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.*

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section”.

11. On perusal of entire Section (3) along with sub-sections and clauses, inclusive of proviso, it would be crystal clear that, the entire provision of sub-clause (3) of Section 9 required to be mandatorily followed and it is not empty statutory formality.

12. Sub-section (2) stipulates filing of an application under Section (1) only in the form and manner and accompanied with such fees as may be prescribed. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (hereinafter referred to as ‘Adjudicating Authority Rules 2016’ for short) are also enacted in exercise of the power conferred by Clauses (c), (d), (e), (f), of sub-section 239 read with sections 7, 8, 9 and 10 of the ‘I & B Code’. The rules provide the procedure required to be followed by filing an application by corporate insolvency resolution process. As per Rule 6 of the ‘Adjudicating Authority’ Rules 2016, an operational creditor shall make an application for initiating the corporate insolvency process under section 9, in Form 5 accompanied with documents and records required therein. As per sub-rule (2) of Rule 6 it is mandatory again to dispatch a copy of application filed with the adjudicating authority, by registered post or speed post to the registered office of the Corporate Debtor.

13. The provisions of sub-section (3) mandates the operational creditor to furnish copy of invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor, an affidavit to the effect that,

there is no notice given by the corporate debtor relating to dispute of unpaid operational debt, 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 such other information as may be stipulated. Sub-section (5) of section 9 is procedure required to be followed by Adjudicating Authority. One can say that procedural part is not mandatory but is directory.

14. The provision being "directory" or "mandatory" has fallen for consideration before Hon'ble Supreme Court on numerous occasions. In *Manilal Shah Vs. Sardar Sayed Ahmed* (1955) 1 SCR 108, the Hon'ble Apex Court held that where statute itself provide consequences of breach or non-compliance, normally the provision has to be regarded as having mandatory in nature.

15. One of the cardinal principles of interpretation of statute is that, the words of statute must prima facie be given their ordinary meaning, unless of course, such construction leads to absurdity or unless there is something in the context or in the object of the statute to the contrary. When the words of statute are clear, plain and unambiguous, then, the courts are bound to give effect to that meaning, irrespective of the consequences involved. Normally, the words used by the legislature themselves declare the legislative intent particularly where the words of the statute are clear, plain and unambiguous. In such case, effort must be to give a meaning to each and every word used by the legislature and it is not sound principle of construction to brush aside words in statute as being redundant or surplus, and particularly when such

words can have proper application in circumstances conceivable within the contemplation of the statute.

16. For determination of the issue whether a provision is mandatory or not, it will be desirable to refer to decision of Hon'ble Supreme Court in State of Mysore Vs. V.K.Kangan (1976) 2 SCC 895. In the said case, the Hon'ble Supreme Court specifically held:

“10. In determining the question whether a provision is mandatory or directory, one must look into the subject-matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. No doubt, all laws are mandatory in the sense they impose the duty to obey on those who come within its purview. But it does not follow that every departure from it shall taint the proceedings with a fatal blemish. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law-maker. And that has to be gathered not only from the phruseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.”

16. Therefore, it is clear that the word '**shall**' used in sub-section (3) of section 9 of 'I & B Code' is mandatory, including clause 3 therein.

17. The appellant has enclosed a Final Award given by Sole-Arbitrator, Hong Kong Special Administrative Region, People's republic of China dated 18th August 2014 to suggest that the respondent Corporate Debtor is liable to pay the amount determined by arbitrator but defaulted to pay the amount. Even if such submission is accepted, the Adjudicating Authority cannot assume that the amount has not been paid pursuant to the award till on the basis of evidence on record i.e. copy of certificate from the "Financial Institution" maintaining accounts of the appellant confirming that there is no payment of an unpaid operational debt by the Corporate Debtor".

18. From the record we find that the appellant was given opportunity to complete the record by enclosing the certificate of "Financial Institution" and thereby to remove the defects within 7 days but failed to do so.

19. In "J.K.Jute Mills Company Limited Vs. M/s Surendra Trading Company – Company Appeal (AT) No. 09 of 2017", the Appellate Tribunal was considering whether the time limit prescribed in 'I & B Code' 2016 for admitting or rejecting the petition or initiation of Insolvency Resolution Process is mandatory? The Appellate Tribunal, by Judgement dated 1st May 2017 held that proviso to sub-section (5) of section 7 and proviso to sub-section (5) of section 9 granting "Financial Creditor/Operational Creditor" to complete the documents, if incomplete is mandatory.

20. In view of the aforesaid findings of this Appellate Tribunal in "J.K. Jute Mills Company Limited, the appellant having failed to complete the documents within 7 days, the Tribunal was right in dismissing the application preferred by the Appellant.

21. The argument that the foreign companies having no office in India or no account in India with any “Financial Institution” will suffer in recovering the debt from Corporate Debtor cannot be accepted as apart from the ‘I & B Code’, there are other provisions of recovery like suit which can be preferred by any person.

22. We find no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI
19th May, 2017

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