

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 97 of 2017

IN THE MATTER OF:

Achenbach Buschhutten CmbH & Co.

... Appellant

Versus

Arcotech Ltd.

... Respondent

Present: For Appellant : Shri Vivek Sibal with Ms. Pooja M. Saigal and Ms. Khyati Sharma, Advocates

For Respondent : Shri Ramesh Singh and Shri A.T. Patra, Advocates

ORDER

31.07.2017 This appeal has been preferred by the appellant against the order dated 25th May, 2017 passed by the Learned Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh in CP(IB) No. 21/Chd/Hry/2017.

2. Appellant - Achenbach Buschhutten GmbH & Co., is a company incorporated under the laws of Germany having its office at 'Siegener Straße, 152, 57223, Kreuztal, Germany', claimed to be 'Operational Creditor' and filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') to initiate Corporate Insolvency Resolution Process

in respect of respondent-Arcotech Limited/'Corporate Debtor'. The said order is under challenge in the present appeal.

3. One of the plea taken by the learned counsel for the appellant is that the Learned Adjudicating Authority, referring to clause of arbitration, has not entertained the application on the ground that there is an existence of a dispute. We are of the view that mere clause of arbitration in an agreement cannot be termed to be an "existence of dispute" pending before the Arbitral Tribunal for the purpose of refusal of an application preferred under Section 9 of the I&B Code.

4. Learned counsel for the respondent brought to our notice that the appellant has not enclosed any certificate granted by the 'Financial Institution' as stipulated under clause (c) of sub-Section (3) of Section 9 of the I&B Code. From the record, we find that the appellant has enclosed one letter relating to 'confirmation of receipt of payment' from foreign institution known as 'Sparkasse Siegen'.

5. The question as to whether filing of a copy of the 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, was considered by this Appellate Tribunal

in "Smart Timing Steel Ltd. Vs. National Steel and Agro Industries Ltd.- [Company Appeal (AT) (Insolvency) No. 28 of 2017]". The Appellate Tribunal by its judgement dated 19th May 2017 while held that 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' mandatory, observed and held as follows: -

"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), (D 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 phraseology 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."*

6. In 'Macquarie Bank Limited Vs. Uttam Galva Metallics Limited' -(Company Appeal (AT) (Insol.) No. 96 of 2017) decided on 17th July, 2017, this Appellate Tribunal, after taking into consideration that the foreign bank was not incorporated under the Companies Act, 1956 or Companies Act, 2013 and the bank has no office in India nor any account with any of the bank or 'Financial Institution', held that the said bank is not a 'Financial Institution' as defined under sub-section (14) of Section 3 of the I&B Code. In

this regard, we may only refer to sub-section (14) of Section 3 of the I&B Code, which reads as follows :

“Definitions:-

3. In the Code, unless the context otherwise requires: -

(14) “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);

(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;”

7. Admittedly, the Bank in question is not a scheduled bank, nor is a 'financial institution' as defined under Section 45-I of Reserve Bank of India Act 1934 (2 of 1934). The Bank aforesaid also do not come within the meaning of 'Public Financial Institution' as defined in clause (72) of Section 2 of Companies Act 2013 (18 of 2013). The Central Government has also not issued any

Notification specifying the Bank in question for the purpose of sub-section (14) of Section 3 r/w Section 9 of 'I & B Code'.

8. In the circumstances, we hold that the application preferred by the appellant was not maintainable in the absence of record of 'Financial Institution' as defined in sub-section (14) of Section 3 of the I&B Code.

9. We find no merit in this appeal and it is accordingly dismissed. 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)