

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 46 of 2018

IN THE MATTER OF:

Sriram Compounds Pvt. Ltd.

...Appellant

Vs.

Shiva Drums Pvt. Ltd. & Ors.

...Respondents

Present: For Appellant: - Mr. H.K. Chaturvedi with Mr. Sagar Chaturvedi, Advocates.

For Respondents: - None.

ORDER

05.03.2018— This appeal has been preferred by Appellant- Sriram Compounds Pvt. Ltd. against order dated 26th July, 2017 along with the petition for condonation of delay on the ground that the Appellant earlier wrongly moved before the Hon'ble Delhi High Court. Prayer has been made to exclude the period when the matter was pending before the Hon'ble High Court of Delhi.

2. Apart from the fact that this Appellate Tribunal has already held that the provisions of 'Limitation Act, 1963' are not applicable to the application for 'Corporate Insolvency Resolution Process' under

Insolvency and Bankruptcy Code, 2016, even then if the period as claimed is excluded for the purpose of condonation of delay, the appeal cannot be allowed for the grounds mentioned below.

3. The Appellant preferred the application under Sections 433 (e), 434 (1) (a) & (b) and 439 of the Companies Act, 1956 before the Hon'ble Delhi High Court for winding up of Shiva Drums Pvt. Ltd. ('Corporate Debtor'). The case was transferred from the Hon'ble High Court to the 'Adjudicating Authority' pursuant to Rule 5 of "the Companies (Transfer of Pending Proceedings) Rules, 2016" framed by the Central Government, Ministry of Corporate Affairs in exercise of powers conferred by 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'.

4. The aforesaid Rule 5 was amended on 29th June, 2017 by "Companies (Transfer of Pending proceedings) second Amendment Rules, 2017", 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 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 stand abated.

Provided further that any part 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 relation 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 per Rule 5, after transfer of the case, the Appellant was required to serve notice under sub-section (1) of Section 8 of the 'I&B Code' and to submit all information in terms of Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. But no notice under sub-section (1) of Section 8 of the 'I&B Code' was issued by the Appellant, nor necessary information were furnished as per Rule 5. In this background, the Adjudicating Authority dismissed the application.

6. Similar issue fell for consideration before this Appellate Tribunal in **“M/s. Sabari Inn Pvt. Ltd. Vs. M/s. Rameesh Associates Pvt. Ltd.—**

Company Appeal (AT) (Insolvency) No. 117 of 2017”, wherein this Appellate Tribunal by its judgment dated 17th November, 2017 held as follows:-

“11. From the aforesaid Rule 5, it is clear after transfer of the case the Applicant (Respondent herein) was required to submit all information, other than information forming part of the records transferred from the High Court, for admission of the petition under Sections 7, 8 or 9 of the ‘I&B Code’, including details of the proposed ‘Insolvency Professional’ within sixty days, failing which, the petition shall stand abated.

12. As per Section 9 of the ‘I&B Code’, before admission of application and its filing, a demand notice under sub-section (1) of Section 8 is required to be issued on the ‘Corporate Debtor’, as quoted below: -

“8. Insolvency resolution by operational creditor. – (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the

corporate debtor in such form and manner as may be prescribed.”

13. *It is only on receipt of such notice under sub-section (1) of Section 8 of the ‘I& B Code’, the ‘Corporate Debtor’ may either pay the amount or may dispute the claim in terms of sub-section (2) of Section 8 of the ‘I&B Code’.*

14. *Clause (a) and (b) of sub-rule (1) of Rule 5 of the ‘Adjudicating Authority Rules’ provides the format in which the demand notice/invoice demanding payment in respect of unpaid ‘Operational Debt’ is to be issued by ‘Operational Creditor’. As per Rule 5(1) (a) & (b), the following person (s) are authorised to act on behalf of operational creditor, as apparent from the last portion of Form-3 and 4 which reads as follows: -*

“6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [name of corporate debtor].

Yours sincerely,

<i>Signature of person authorised to act on behalf of the operational creditor</i>
--

<i>Name in block letters</i>

<i>Position with or in relation to the operational creditor</i>
<i>Address of person signing</i>

”

16. *Form-5 is the format for filing application under section 9, as per which the following details are to be provided: -*

“Part I- particulars of applicant

Part II- particulars of corporate debtor

Part III- particulars of the proposed interim resolution professional (if proposed)

Part IV- particulars of operational debt

Part V- particulars of operational debt [documents, records and evidence of default]

As per the instructions, the following documents are required to be attached:

Annex I Copy of the invoice/ demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the Corporate debtor.

Annex II Copies of all documents referred to in this application.

Annex III Copy of the relevant accounts from the banks/financial institutions maintaining accounts of the operational creditor confirming that there is no

payment of the relevant unpaid operational debt by the operational debtor, if available.

Annex IV Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Annex VI Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Annex VI Proof that the specified application fee has been paid.”

17. *Admittedly, no notice was issued under subsection (1) of Section 8 of the ‘I&B Code’. In terms with Rule 5, other informations were also not placed before the Adjudicating Authority.*

18. *The Respondent having failed to provide all the details as required under Form-5 as noticed above, the application under sections 433 and 434 of the Companies Act, 1956 cannot be treated to be an application under section 9 of the ‘I&B Code’ in terms of Rule 5 of Transfer Rules, 2016. In such circumstances, in view of proviso to Rule 5 of the*

Transfer Rules, the application under Sections 433 and 434 of the Companies Act, 1956 stands abated.”

7. Learned counsel appearing on behalf of the Appellant placed reliance on Hon’ble Supreme Court decision in “**L. Chandra Kumar Etc. Etc. Vs. The Union of India and Ors. Etc. Etc. (1997) 2 S.C.R 1186**” and submitted that the Hon’ble High Court has given certain findings which is binding on the Tribunal. In the present case, we do not feel necessity to deal with such arguments based on judgment in “**L. Chandra Kumar Etc. Etc. (Supra)**” as the application being incomplete in more than one aspect and the Appellant having not completed the same within the time frame as stipulated by Rule 5, the application preferred by Appellant stood abated.

8. For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 26th July, 2017 passed by the Adjudicating Authority, Principal Bench, New Delhi. However, the order passed by the Adjudicating Authority will not come in the way of Appellant to issue notice under sub-section (1) of Section 8 of the ‘I&B Code’ to the ‘Corporate Debtor’, and to file an application under Section 9 of the ‘I&B Code’, if there is a debt and default by the ‘Corporate Debtor’. In such case, the Adjudicating Authority may decide the application uninfluenced by the impugned Order dated 26th July, 2017 and the judgment passed by this Appellate Tribunal. The appeal is dismissed with aforesaid

observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

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