

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 11 of 2018****IN THE MATTER OF:****Mr. Pradeep Dayanand Kothari****...Appellant****Vs.****A Pandian & Anr.****...Respondents****Present: For Appellant: - Mr. S. Sivaraman, Ms. Shalini Kaul and Ms. Shabnam, Advocates.****For Respondents:- Mr. Rohan Rajasekaran, Mr. S. Santanam Swaminadhan and Ms. Nishtha Khurana, Advocates for Respondent no.1.****Mr. E. Omprakash, Senior Advocate with Ms. Madhusmita Bora, Advocate for Intervenor.****ORDER**

**07.02.2018-** This appeal has been preferred by Mr. Pradip Dayanand Kothari, Director of M/s. Kothari Industrial Corporation Limited against order dated 19<sup>th</sup> December, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai in Company Petition No. 649/(IB)/CB/2017, whereby and whereunder application preferred by 1<sup>st</sup> Respondent- Mr. A. Pandian under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") has been admitted, order of moratorium has been passed and an 'Interim Resolution Professional' has been appointed.

2. Learned counsel appearing on behalf of the Appellant submits that the 1<sup>st</sup> Respondent-Mr. A. Pandian is not a 'Financial Creditor' as he does not come within the meaning of 'Financial Creditor' as defined in sub-section (7) of Section 5 of the 'I&B Code' read with sub-section (8) of Section 5 of the 'I&B Code'.

3. Learned counsel for the Appellant placed reliance on demand notice dated 19<sup>th</sup> April, 2017 given by Mr. A. Pandian under sub-section (1) of Section 8 of the 'I&B Code', whereby the Respondents demanded a sum of Rs. 68,61,012/- (Rupees Sixty-Eight Lakh Sixty-One Thousand and Twelve only) as due amount of 'Operational Debt' purported to have been defaulted by M/s. Kothari Industrial Corporation Limited ('Corporate Debtor'), the relevant portion of which reads as follows: -

“PARTICULARS OF OPERATIONAL DEBT

1.	TOTAL AMOUNT OF DEBT	<b>Rs. 68,61,012/- (Rupees Sixty Eight Lakhs Sixty One Thousand and Twelve only)</b>
	DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE	<p>1. The operational creditor is in the business of fertilizers and possesses an excellent reputation in the market. He has maintained a healthy balance sheet throughout, that he has accumulated over a period of time through his sheer hard work and business acumen.</p> <p>2. In the course of his business, on several occasions, the corporate debtor had approached the</p>

		<p>operational creditor stating that they required short term loans for the purpose of trading operations in Rock and Super Phosphate. That based on the assurances and representations of the corporate debtor, the operational creditor had advanced several short term loans between 04.01.2013 to 19.06.2014 repayable with interest.</p> <p>3. After giving due credit to the amounts received by the corporate debtor, there arose a total due of Rs. 49,20,305/- payable to the operational creditor as on 31.12.2014. several reminders had been made to the corporate debtor and the same were answered with a plea for further time to make payments. In fact, vide letter dated 07.03.2014 issued by the corporate debtor to the operational creditor, they had admitted that the debt of Rs. 44,00,000/- (Rupees forty four lakhs only) was payable to the operational creditor and promised to clear all the dues along with interest as soon as possible. In spite of several requests, reminders and admissions the corporate debtor had not made any payments for several months and did not honor their commitment.</p> <p>4. Thereafter towards discharge of the abovementioned liability, the corporate debtor had issued two cheques bearing Nos. 437421 and 437422 dated 30.09.2014 for a sum of Rs. 28,00,000/- and Rs. 16,14,210/- (totalling to Rs. 44,14,210/-) respectively both drawn on M/s. Axis Bank Ltd.,</p>
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	AND THE DATE FROM WHICH SUCH DEBT FELL DUE	<p>Mylapore Branch, Chennai. That when the cheques were presented on 23.12.2014, the same were returned on the same day citing reasons 'Funds Insufficient'.</p> <p>5. It is further understood through reliable sources that the substratum of the company has been eroded and the corporate debtor is unable to make payment of amounts to the creditors and are highly indebted.</p> <p>23-12-2014</p>
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF DEFAULT IN TABULAR FORM)	An admitted sum of Rs. 44,14,210/- plus interest amounting to Rs. 24,46,803/- calculated from 23.12.2014 @ 24% p.a. stood due, outstanding and payable to the Operational Creditor.
3.	PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS ESTIMATED VALUE AS PER THE CREDITOR	Nil
4.	DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS	Nil
5.	RECORD OF DEFAULT WITH THE INFORMATION UTILITY (IF ANY)	Nil
6.	PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER	1.Dishonored Cheques dated 30.09.2014.

	WHICH DEBT HAS BECOME DUEQ	2. Chapter II OF THE INSOLVENCY AND BANKRUPCTY CODE, 2016.
7.	LIST OF DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT	1. Letter from corporate debtor dated 07.03.2014. 2. Dishonored Cheques dated 30.09.2014. 3. Cheque return memo dated 23.12.2014. 4. Loan amount statement dated 31.12.2014.

4. It is submitted that Mr. A. Pandian was employee of the 'Corporate Debtor' but later on he made certain transactions with regard to trading operations in 'Rock' and 'Super Phosphate'. The aforesaid notice was replied by the 'Corporate Debtor' disputing the claim. It is only thereafter, he changes his stand, and filed an application under Section 7 of the 'I&B Code' now claiming him to be a 'Financial Creditor', which has been admitted by the impugned order dated 19<sup>th</sup> December, 2017.

5. Learned counsel for the Appellant referring to Form 1 i.e. the application under Section 7 of the 'I&B Code', submitted that the relevant portion of the financial transaction has been kept blank and no details have been shown therein.

6. It is further submitted that the parties have also settled the dispute and the Respondent has been paid the amount.

7. Mr. Rohan Rajasekaran, learned counsel appearing for the 1<sup>st</sup> Respondent, while does not dispute the aforesaid fact accepts the terms

of the settlement and the total due amount has been paid to the 1<sup>st</sup> Respondent.

8. Mr. E. Omprakash, learned Senior counsel appearing on behalf of the Intervenor/ 'Financial Creditors', submits that the Appellants have suppressed certain facts. After the impugned order, the appellant filed certain application before the Adjudicating Authority, which has not been brought to the notice of this Appellate Tribunal. However, as the subsequent orders are not under challenge, we do not intend to pass any observation in respect of the same.

9. The only question arises for determination in this appeal is whether the application under Section 7 of the 'I&B Code' filed by 1<sup>st</sup> Respondent was maintainable or not.

10. We have noticed that the 1<sup>st</sup> Respondent- A. Pandian himself was not clear as to whether he is an 'Operational Creditor' or 'Financial Creditor'. This is evident from the fact that he issued demand notice under sub-section (1) of Section 8 of the 'I&B Code' and claiming him to be the 'Operational Creditor' and having found that there is an 'existence of dispute', he filed incomplete application under Section 7 of the 'I&B Code'.

11. The aforesaid fact has not been disputed by learned counsel for the 1<sup>st</sup> Respondent. The Adjudicating Authority also failed to notice the aforesaid fact and failed to notice whether the 1<sup>st</sup> Respondent is a

'Financial Creditor' or not. In such circumstances, we have no other option but to set aside the impugned order. We accordingly set aside the order dated 19<sup>th</sup> December, 2017 passed by the Adjudicating Authority, Chennai Bench in Company Petition No. 649/(IB)/CB/2017.

12. In effect, order (s), passed by the Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, taken by the 'Interim Resolution Professional', including the advertisement, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by 1<sup>st</sup> Respondent under Section 7 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The appellant 'Corporate Debtor' (company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

13. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional', and the 'Corporate Debtor' will pay the fees for the period the 'Resolution Professional' has functioned. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

However, this order will not come in the way of 'Financial Creditors' to move their respective separate in accordance with law, if there is a debt and default.

(Justice S.J. Mukhopadhaya)  
Chairperson

(Justice Bansi Lal Bhat)  
Member(Judicial)

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