

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL (AT)(INSOLVENCY) NO.155 OF 2017

IN THE MATTER OF:

MSP Paper Mill Pvt Ltd.

Appellant

Vs

Arjun Chemicals Pvt Ltd

Respondent

Present:

For Appellant:-Mr. Kumarpal R. Chopra, Advocate.

For Respondents: - Mr. A.K. Mishra, Advocate.

ORDER

06.12.2017 - Mr. M.S. Palanivel, Ex-Director of M/s MSP Paper Mill Pvt Ltd (Corporate Debtor) has challenged the impugned order dated 28th July, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai, whereby and whereunder the application preferred by Respondent M/s Arjun Chemicals Pvt Ltd (operational creditor) under Section 433(e) and 434 of the Companies Act, 1956 has been treated to be an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as I&B Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, and the application has been admitted with order of moratorium. Name of the Interim Resolution Professional has been called for from the Insolvency and Bankruptcy Board of India (IBBI).

2. Learned counsel for the appellant submitted that before treating the petition for winding up as an application under Section 9 of the I&B Code the respondent has not complied with the provisions of the I&B Code as no notice under sub-section (1) of Section 8 of the I&B Code was issued in Form 3 or 4 and the application has been admitted though there is existence of a dispute.

3. Learned counsel appearing on behalf of the respondent (operational creditor) submits that there is no dispute in existence and in fact part of the payment was made when the matter was pending before the Hon'ble High Court. However, he accepts that no notice was issued under sub-section (1) of section 8 in Form 3 or Form 4 and the application has been admitted.

4. Similar issue fell for consideration before this Appellate Tribunal in ***M/s Sabari Inn Pvt Ltd Vs Rameesh Associates Pvt Ltd, Company Appeal (AT) (Insolvency) No.117 of 2017***. In the said appeal this Appellate Tribunal vide judgement dated 17th November, 2017 having noticed the Rule 5 of ***"The Companies (Transfer of Pending Proceedings) Rules, 2016*** and other provisions observed and held as follows:

"9. Learned counsel for the Appellant has enclosed the Central Government notification dated 7th December, 2016 issued from the Ministry of Corporate Affairs. By the said notification, in exercise of the powers conferred under sub-section (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of Section 239 of the 'I&B Code', the Central Government framed "The Companies (Transfer of Pending Proceedings) Rules, 2016."

10. Rule 5 relates to transfer of pending proceedings of winding up on the ground of inability to pay debts which are to be transferred from the Hon'ble High Court's to the respective Tribunal and 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 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 abate.

2. All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act.”

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’.

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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 V 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.”

5. In the present case as notice under sub-section (1) of Section 8 of I&B code has not been issued by the Respondent (operational creditor), we hold that the application preferred by the Respondent was incomplete. In this circumstances, we have no other option but to set aside the impugned order dated 28th July, 2017 passed by the National Company Law Tribunal, Chennai Bench, Chennai and declare that the application preferred by the Respondent under Section 433 of the Companies Act, 1956 stands abated.

6. In effect, order (s) passed by Ld. Adjudicating Authority appointing any 'Interim Resolution Professional' declaring moratorium, freezing of account and all other order (s) passed by Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent is dismissed. Learned Adjudicating Authority will now close the proceeding. The appellant company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

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

8. However, this order will not come in the way of the respondent, operational creditor, to issue fresh notice under sub-section (1) of Section 8 of I&B Code and if there is debt and default and there is no dispute in existence, the respondent may file an application under section 9 of the I&B Code.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member (Judicial)

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