

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 210 of 2017

IN THE MATTER OF:

T. Sreemannarayana

...Appellant

Versus

Magnifico Minerals Pvt. Ltd. & Ors.

...Respondents

Present:

For Appellant :

**Shri B.B. Pradhan and Shri Kishor Kumar
Behuria, Advocates**

For Respondent No. 1:

Shri Rishabh Gupta, Advocate

O R D E R

04.12.2017 The Appellant, a shareholder/Director of Sai Balaji Sponge Iron India Pvt. Ltd. (Corporate Debtor) has challenged the order dated 22nd June, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad, whereby and whereunder the application preferred by the Respondent- Magnifico Minerals Pvt. Ltd. ('Operational Creditor') under Sections 433, 434 and 439 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 (hereinafter referred to as "Adjudicating Authority Rules, 2016"), order of admission and Moratorium has been passed and 'Interim Resolution Professional' has been appointed.

2. The main plea taken by the Appellant is that before treating the application as under Section 9 of the 'I&B Code', and its admission 1st Respondent (Operational Creditor) has not complied with the provisions of the 'I&B Code'. No notice of demand under sub-section (1) of Section 8 in Form 3 or 4 was given by 'Operational Creditor' to the Corporate Debtor.

3. The brief facts of the case are that the 'Corporate Debtor' entered into a contract with Respondent 'Operational Creditor' and pursuant to the contract entire amount was not been paid and post-dated cheques were issued which were dishonoured. However, in spite of the same the 1st Respondent (Operational Creditor) issued a legal notice on 10th December, 2015 calling upon the Corporate Debtor to pay the outstanding sum of Rs. 4,25,10,464/-. Subsequently, the 1st Respondent (Operational Creditor) filed a Company Petition under Sections 433 & 434 of the Companies Act, 1956 before the Hon'ble High Court of Andhra Pradesh in Company Petition No. 360/2016.

4. After constitution of the Tribunal, pursuant to the Notification No. G.S.R. 1119(E) dated 7th December, 2016, issued by Central Government 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 case was transferred to the Adjudicating Authority, Chennai Bench and re-numbered as TCP/263/(IB)/2017. On 6th July, 2017, the Corporate Debtor came to know that Adjudicating Authority had passed the ex-parte order on 22.06.2017.

5. According to Appellant, no opportunity was given by the Adjudicating Authority to the Corporate Debtor and the transferred petition under Sections 433 and 434 was treated to be an application under Section 9 of the 'I&B Code'

and was admitted by the impugned order dated 22nd June, 2017 giving rise to the present appeal.

6. Learned counsel appearing on behalf of the Appellant submitted that no notice under sub-section (1) of Section 8 was issued to the Corporate Debtor in Form-3 or 4 prior to treating the application as under Section 9 of the 'I&B Code' or before the admission. The application was also not filed in the proper format i.e. Form 5, as required under Section 9 of the 'I&B Code' read with Rule 6 of the Adjudicating Authority Rules, 2016. In terms of Rules details of records of debt and default etc. were not provided.

7. The aforesaid stand taken by the Appellant has not been disputed by the learned counsel for the respondent.

8. Learned counsel for the Appellant brought to our notice 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-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', the Central Government framed "The Companies (Transfer of Pending Proceedings) Rules, 2016".

9. 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 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 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.”

10. From the aforesaid Rule 5, it is clear after transfer of the winding up case the Applicant – 1st 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.

11. 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.”

12. 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 and reply in terms of sub-section (2) of Section 8 of the ‘I&B Code’.

13. 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, who is also required to state, the action as may be taken in case of failure to pay the dues, 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>

14. 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]*

15. 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.”

16. Admittedly, no demand notice was issued by 1st Respondent to the Corporate Debtor in term of sub-section (1) of Section 8 of the 'I&B Code'. In terms with Rule 5, other informations were also not brought to the notice of the Adjudicating Authority.

17. The 1st Respondent (Operational Creditor) having failed to provide all the details as required under Form-5 and 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.

18. For the reasons aforesaid, while we set aside the impugned order dated 22nd June, 2017 passed by the Adjudicating Authority, Hyderabad Bench in C.P. No. 360/2016, also declare that the application preferred by Respondent under Sections 433 and 434 of the Companies Act, 1956 stood abated.

19. In effect, order (s) passed by the Adjudicating Authority appointing '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 'Resolution Professional', including the advertisement published in the newspaper calling for applications and all such orders and actions are declared illegal and are set aside. The application

preferred by the 1st Respondent is dismissed as abated. The Adjudicating Authority will now close the proceeding. The Corporate Debtor is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

20. The Adjudicating Authority will fix the fee of Interim Resolution Professional and the Corporate Debtor 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.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member(Judicial)

/ns/uk