

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**Company Appeals (AT) (Insolvency) Nos. 229 & 230 of 2017****IN THE MATTER OF:****MosmetroStroy (FZE)****...Appellant****Vs.****BASF India Ltd. & Anr.****...Respondents****Present: For Appellant: - Ms. Shalini Kaul, Advocate.****For Respondents:- Mr. Rajendra Beniwal, Advocate for Respondent no.1.****ORDER**

28.11.2017- The Appellant-'Corporate Debtor' has challenged the orders dated 1st September 2017 and 29th September 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai, whereby and whereunder the application preferred by the Respondent-M/s. BASF India Ltd. ('Operational Creditor) under Sections 433 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 (hereinafter referred to as "Adjudicating Authority Rules, 2016"), the order of admission and Moratorium has been passed, name of 'Interim

Resolution Professional' has been called for from the 'Insolvency and Bankruptcy Board of India' (hereinafter referred to as "Board") with further prohibitory orders in terms of 'I&B Code'.

2. Learned counsel for the Appellant-'Corporate Debtor' submitted that before treating the application as under Section 9 of the 'I&B Code', Respondent has not complied with the provisions of the 'I&B Code'. No notice under sub-section (1) of Section 8 was issued in Form-3 or 4 and the application has been admitted though the Appellant is denying the existence of the alleged debt.

3. On notice learned counsel for the Respondents has appeared but has not disputed the statement made in the appeal.

4. The brief facts of the case is that the Appellant-'Corporate Debtor' used to purchase chemicals against invoices from the Respondent 'Operational Creditor'. According to Appellant, pursuant to the contracts, the entire amount payable by the 'Corporate Debtor' has already been paid and settled. Further, for various reasons including serious physical threat to its employees in India, the 'Corporate Debtor' had to vacate its office in mid May 2015 and left India and returned to Russia. However, in spite of that the Respondent issued a legal notice on 19th August, 2015 and on 9th September, 2015 through a lawyer to the Appellant-'Corporate Debtor' office at Chennai, knowing fully well that the Appellant-

'Corporate Debtor' had vacated the said office premises and called upon the Appellant to pay the outstanding sum of Rs. 1,98,75,342/-. Thereafter, the Respondent filed a Company Petition under Sections 433 & 434 of the Companies Act, 1956 before the Hon'ble High Court of Madras in C.P.No. 495 of 2015 claiming a sum of Rs. 1,98,75,342/- from the Appellant-'Corporate Debtor'.

5. 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 Adjudicating Authority, Chennai and re-numbered as TCP/528/(IB)/2017.

6. It was submitted on behalf of the Appellant that the Appellant-'Corporate Debtor' did not receive any notice of the transfer of the proceedings from the Hon'ble High Court to the Adjudicating Authority. The 'Corporate Debtor' learnt about the pendency of the application only when its advocate handling other cases in the Hon'ble High Court, Madras, chanced upon the case being listed before the Adjudicating Authority on 21st August 2017 and he immediately entered appearance and sought time to file reply. Accordingly, one-week time to file reply was granted till 29th August 2017. On 29th August 2017 the 'Corporate Debtor' filed its reply and the counsel also sought another date for arguing the

same but that no such opportunity was given and the transferred application has been treated to be an application under Section 9 of the 'I&B Code' and was admitted by impugned order dated 1st September, 2017 giving rise to the present appeal. Subsequently on 29th September 2017, the 'Interim Resolution Professional' was appointed, which order is also challenged in the present appeals.

7. Learned counsel for the Appellant submitted that no notice under sub-section (1) of Section 8 was issued by Respondent 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 which details of record of default etc. were required to be provided.

8. The aforesaid stand taken by the Appellant has not been disputed by the Respondent.

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-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".

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 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.”

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. 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.”*

15. Admittedly, no notice was issued under sub-section (1) of Section 8 of the 'I&B Code'. In terms with Rule 5, other informations were also not placed before the Adjudicating Authority.

16. 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.

17. For the reasons aforesaid, while we set aside the impugned orders dated 1st September, 2017 and 21st September, 2017 passed by the Adjudicating Authority, Chennai Bench in T.C.P No. 528/(IB)/2017, also declare that the application preferred by Respondent under Sections 433 and 434 of the Companies Act, 1956 stood abated.

18. However, liberty is given to the Respondent to issue fresh notice under sub-section (1) of Section 8 of the 'I&B Code' and on receipt of service of such notice if there is a debt and default and no dispute is

raised, it will be open to the Respondent to file fresh application under Section 9 of the 'I&B Code' after ten days of service of such notice. It may be decided by the Adjudicating Authority uninfluenced by the Orders dated 1st September, 2017 and 21st September, 2017 and the judgment passed by this Appellate Tribunal.

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

20. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed, and the Appellant will pay the fees of the Interim Resolution Professional, for the period she 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)

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