

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 248 of 2017****IN THE MATTER OF:****Raj Hari Eswaran****...Appellant****Vs.****M/s. CMI India Pvt. Ltd. & Anr.****...Respondents****Present: For Appellant: - Mr. Amit Sibal, Senior Advocate with Mr. Aditya Verma, Mr. Aditya Gupta, Mr. Avinash Amarnath, Mr. Vinay Tripathi and Mr. Ambar Doshan, Advocates.****For Respondents:- Tasneem Ahmadi, Mr. Sudhir Kumar Gupta, Mr. R.k.Gupta, Ms. Shubhi Khare and Mr. Abhinav Gupta, Advocates.****ORDER**

**28.11.2017-** The Appellant, who is a Shareholder and the promoter of 2<sup>nd</sup> Respondent ('Corporate Debtor') has challenged the order dated 12<sup>th</sup> October, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai, whereby and whereunder the application preferred by the 1<sup>st</sup> Respondent- M/s. CMI India Pvt. 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 application has been admitted, order of Moratorium has been passed and 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. The main plea taken by the learned counsel for the Appellant/shareholder that the 1<sup>st</sup> Respondent has not complied with the provisions of the ‘I&B Code’ before treating the application under Section 9. No notice under sub-section (1) of Section 8 was issued in Form-3 or 4 and the application has been admitted though there is an existence of dispute.

3. The brief facts of the case are that the 2<sup>nd</sup> Respondent-‘Corporate Debtor’ placed various purchase orders during the years 2012-13 and 2013-14 with the 1<sup>st</sup> Respondent ‘Operational Creditor’ for the supply of cables. The 1<sup>st</sup> Respondent was then known as ‘General Cable Energy (India) Ltd’. The Appellant is a Shareholder and Managing Director of the ‘Corporate Debtor’. According to the Appellant, as per the purchase orders the 1<sup>st</sup> Respondent ‘Operational Creditor’ was required to provide a warranty for 36 months, and that during 2015, the ‘Corporate Debtor’ came to know that it was not going to be possible for the Respondent ‘Operational Creditor’ to provide the warranty. According to Appellant, the ‘Corporate Debtor’ clearly indicated the 1<sup>st</sup> respondent that in case

warranty was not possible, so the 1<sup>st</sup> Respondent 'Operational Creditor' was free to take away the cables. However, in spite of that the 1<sup>st</sup> Respondent 'Operational Creditor' issued a legal notice on 15<sup>th</sup> September, 2016 through a lawyer calling upon the 'Corporate Debtor' to pay the outstanding sum of Rs. 7,88,54,073/-, to which the 'Corporate Debtor' replied by letter dated 17<sup>th</sup> October, 2016 denying any liability. Thereafter, the 1<sup>st</sup> Respondent 'Operational Creditor' filed a Company Petition under Sections 433 & 434 of the Companies Act, 1956 before the Hon'ble High Court of Madras bearing S.R No. 46897 of 2016 claiming a sum of Rs. 7,88,54,073/- (plus interest) from the 'Corporate Debtor'.

4. After constitution of the Tribunal, pursuant to the Notification No. G.S.R. 1119(E) dated 7<sup>th</sup> 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 Bench and re-numbered as TCP/4/(IB)/CB/2017.

5. On notice, the 'Corporate Debtor' appeared on 13<sup>th</sup> June, 2017 and disputed the liability. On 31<sup>st</sup> July, 2017, the 'Corporate Debtor' filed reply. The transferred application was treated to be an application under Section 9 of the 'I&B Code' and was admitted by impugned order dated 12<sup>th</sup> October, 2017 giving rise to the present appeal.

6. Learned counsel for the Appellant submitted that no notice under sub-section (1) of Section 8 was issued in Form-3 or 4 prior to treating the application as under Section 9 of the 'I&B Code' or before the admission of the application. It is also submitted that the application was also not filed in Form 5, as required under Section 9 of the 'I&B Code' read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 as per which records of dues and default were required to be provided.

7. The aforesaid stand taken by the Appellant has not been disputed by the 1<sup>st</sup> Respondent ('Operational Creditor').

8. Learned counsel for the Appellant has brought to our notice the Central Government's notification dated 7<sup>th</sup> 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 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.

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 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, 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 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.

17. The 1<sup>st</sup> Respondent ('Operational Creditor') 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. For such failure to provide the

information, in view of proviso to Rule 5 of the Transfer Rules, the application under Sections 433 and 434 of the Companies Act, 1956 filed by 1<sup>st</sup> Respondent stands abated.

18. For the reasons aforesaid, while we set aside the impugned order dated 12<sup>th</sup> October, 2017 passed by the Adjudicating Authority, Chennai in T.C.P No. 4/(IB)/CB/2017, also declare that the application preferred by the 1<sup>st</sup> Respondent under Sections 433 and 434 of the Companies Act, 1956 stood abated.

19. However, liberty is given to the 1<sup>st</sup> Respondent to issue fresh notice under sub-section (1) of Section 8 of the 'I&B Code' and on service of such notice if there is a debt and default or no dispute is raised, it will be open to the 1<sup>st</sup> Respondent to file fresh application under Section 9 of the 'I&B Code' after ten days of service of such notice. In such case, the Adjudicating Authority may decide the application uninfluenced by the impugned Order dated 12<sup>th</sup> October, 2017 and the judgment passed by this Appellate Tribunal.

20. 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, if any, taken by the '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 the 1<sup>st</sup> Respondent is dismissed as abated. Learned Adjudicating Authority will now close the proceeding. The 2<sup>nd</sup> Respondent company ('Corporate Debtor') is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

21. The Adjudicating Authority will fix the fee of 'Resolution Professional', and the Appellant will pay the fees 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)

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