

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

(Arising out of Order dated 22.09.2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai in TCP No. 77/(IB)/CB/2017)

(Company Appeal (AT) (Insolvency) No. 247 of 2017)

IN THE MATTER OF:

Mr. Karthikk Elangovan

...Appellant

Vs

M/s. Metal Gems and Anr.

...Respondents

Present: For Appellant:- Shri Gautam Singh and Shri Amol Dhadrak, Advocates.

For Respondents:- Shri R.K.Bachchan, Advocate.

J U D G E M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant/shareholder of the 'Corporate Debtor' has challenged the order dated 22nd September, 2017 passed by Adjudicating Authority (National Company Law Tribunal), Chennai Bench, Chennai, whereby and whereunder the application preferred by the Respondent- M/s. Metal Gems. ('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”), admitted the application, passed order of Moratorium and name of ‘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 application as under Section 9 of the ‘I&B Code’, Respondent- ‘Operational Creditor’ 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 there is an ‘existence of dispute’.

3. The brief facts of the case is that “M/s. Saranya Forging & Engineers India Private Limited” (‘Corporate Debtor’) is involved in manufacturing of components made up of aluminium, copper, brass & steel and part of pump, automobile and machinery and also supply components to spare manufacturing industries. The 1st Respondent “M/s. Metal Gems” (‘Operational Creditor’) is engaged in business of manufacturing and selling of all kinds of copper and copper alloys. According to Appellant, the Respondent- ‘Operational Creditor’ supplied copper rods and other products to ‘Corporate Debtor’ during the years 2012 and 2013, however, the goods were of sub-standard quality, which was informed by the ‘Corporate Debtor’ to the Respondent by e-mails dated 27th February, 2013 and 3rd August, 2013, but no step was taken by the Respondent- ‘Operational Creditor’ to replace the materials supplied.

4. The 1st Respondent-‘Operational Creditor’ initially send an Advocate notice on 28th November, 2014 to the ‘Corporate Debtor’ claiming the amount, which was disputed by the ‘Corporate Debtor’ by letter dated 20th December, 2014 informing the sub-standard quality of goods supplied by the 1st Respondent. Thereafter, the 1st Respondent send a statutory notice to the ‘Corporate Debtor’ on 1st June, 2015 under sections 433 and 434 of the Companies Act, 1956, followed by filing of a winding up petition before the Hon’ble High Court of Madras under Sections 433 and 434 of the Companies Act, 1956. In the said case, notice was issued on 7th December, 2016 but before notice could be served and the ‘Corporate Debtor’ could appear before the Hon’ble High Court, the Central Government from its Ministry of Corporate Affairs issued a notification dated 7th December, 2016 transferring pending winding up cases from the High Courts to the respective Tribunal.

5. On notice, the ‘Corporate Debtor’ appeared and disputed the liability and brought to the notice of the Tribunal that no notice under sub-section (1) of Section 8 of the ‘I&B Code’ has been received. On hearing the parties, the Adjudicating Authority treated the petition as an application under Section 9 of the ‘I&B Code’ and admitted the application by impugned order dated 22nd September, 2017.

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. 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 Adjudicating Authority Rules, 2016 in terms of which details of record of default etc. were required to be provided were not provided.

7. Learned counsel appearing on behalf of the Respondent submitted that statutory notice under Sections 433 and 434 of the Companies Act, 1956, having issued no further notice was required to be issued under sub-section (1) of Section 8 of the 'I&B Code', which is also accepted by the Adjudicating Authority.

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 whereunder 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'. The said notice is to be given in Form 3 or Form 4.

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 VII Proof that the specified application fee has been paid.”

From the aforesaid instructions, it is evident that copy of the invoice/demand notice as in Form 3 of Adjudicating Authority Rules served on the 'Corporate Debtor' is to be enclosed.

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. 1st 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 order dated 22nd September, 2017 passed by the Adjudicating Authority, Chennai Bench in T.C.P No. 77/(IB)/CB/2017, also declare that the application preferred by Respondent under Sections 433 and 434 of the Companies Act, 1956 stands abated.

18. 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 Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution

Professional', including the advertisement published in the newspapers 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 'Corporate Debtor' is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

19. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional', which the 'Corporate Debtor' will pay. 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 Bansi Lal Bhat)
Member (Judicial)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

13th December, 2017

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