

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

Company Appeals (AT) (Insol) No. 96 of 2017

Macquarie Bank Limited

.... Appellant

Vs.

Uttam Galva Metalics Limited

.... Respondent

Present: For Appellants: Mr. Vivek Sibal, Advocate

For Respondents: Mr. Puneet Singh Bindra and Mr. Arvind Gupta, Advocates

O R D E R

17.07.2017 - Appellant “Macquarie Bank Limited”, a company incorporated under the laws of Singapore, having its Office at 10, Marina Boulevard, # 17.01, Tower-2, Marina Bay Financial Centre, Singapore-018983 claiming to be the ‘Operational Creditor’, preferred the application under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I & B Code’) seeking to set in motion the Corporate Insolvency Resolution Process against the respondent “Uttam Galva Metalics Limited” (alleged to be the ‘Corporate Debtor’).

2. Learned Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench, Chandigarh, by impugned order dated 1st June 2017, having noticed that the demand notice under Section 8 of ‘I & B Code’ was issued through an Advocate of Singapore and that the appellant has not enclosed any certificate from a ‘Financial Institution’ maintaining the accounts of the ‘Operation Creditor’ in terms of Clause (c) of sub-section (3)

of Section 9 of the 'I & B Code' held that the petition preferred by appellant, a foreign company having office at Singapore, under Section 9 was not maintainable.

3. Before deciding the issue, it is desirable to notice the relevant facts and the provisions of 'I & B Code'.

4. The appellant, a foreign company is not constituted under Companies Act 1956 or/Companies Act 2013, having account with one 'Macquarie Bank', Australia. The appellant has no office in India, nor any account with any of the Bank or 'Financial Institution' as defined under sub-section (14) of Section 3 of 'I & B Code', which reads as follows:-

“Definitions: -

3. In the Code, unless the context otherwise requires: -

(14) financial institution” means—

(a) a scheduled bank;

(b) financial institution as defined in section

45-I of the Reserve Bank of India Act 1934

(2 of 1934);

(c) public financial institution as defined in

clause (72) of section 2 of the Companies

Act, 2013 (18 of 2013); and

(d) such other institution as the Central

Government may by notification specify

as a financial institution;”

5. Admittedly, Macquarie Bank, Australia is not a scheduled bank in India nor is a 'financial institution' as defined under Section 45-I of Reserve Bank

of India Act 1934 (2 of 1934). The Macquarie Bank, Australia also do not come within the meaning of 'Public Financial Institution' as defined in clause (72) of Section 2 of Companies Act 2013 (18 of 2013). The Central Government has also not issued any Notification specifying 'Macquarie Bank' for the purpose of sub-section (14) of Section 3 r/w Section 9 of 'I & B Code'.

6. Section 9 of 'I & B Code' deals with application for initiation of Corporate Insolvency Resolution Process by 'Operational Creditor'. Clause (c) of sub-section (3) of Section 9 mandate the 'Operational Creditor' to file the application 'in the form and manner accompanied with such fee as may be prescribed' and also directs the 'Operational Creditor' to furnish along with application a copy of the certificate from the 'Financial Institution' maintaining accounts of the 'Operational Creditor' confirming that there is no payment of unpaid operational debt by the 'Corporate Debtor', as apparent from the provision, as quoted below:-

"9. Application for initiation of corporate insolvency resolution process by operational creditor:

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) **shall** be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor **shall**, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, **may** propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority **shall**, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if-

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

- (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;*
- (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or*
- (e) any disciplinary proceeding is pending against any proposed resolution professional:*

*Provided that Adjudicating Authority, **shall** before rejecting an application under sub clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.*

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section”.

7. The question whether filing of a copy of certificate from the ‘Financial Institution’ maintaining accounts of the ‘Operational Creditor’ confirming that there is no payment of unpaid operational debt by the ‘Corporate Debtor’ as prescribed under clause (c) of sub-section (3) of Section 9 of the I & B Code is mandatory or directory was considered by this Appellate Tribunal in **“Smart timing Steel Ltd. Vs. National Steel and Agro Industries Ltd.”** – Company Appeal (AT) (Insol) No. 28 of 2017. The Appellate Tribunal by its judgement dated 19th May 2017 while held that certificate from the ‘Financial Institution’ maintaining accounts of the ‘Operational Creditor’ confirming that

there is no payment of unpaid operational debt by the 'Corporate Debtor', as prescribed under clause (c) of sub-section (3) of Section 9 of the 'I & B Code' mandatory, observed and held as follows: -

"11. On perusal of entire Section (3) along with sub-sections and clauses, inclusive of proviso, it would be crystal clear that, the entire provision of sub-clause (3) of Section 9 required to be mandatorily followed and it is not empty statutory formality.

12. Sub-section (2) stipulates filing of an application under Section (1) only in the form and manner and accompanied with such fees as may be prescribed. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (hereinafter referred to as 'Adjudicating Authority Rules 2016' for short) are also enacted in exercise of the power conferred by Clauses (c), (d), (e), (f), of sub-section 239 read with sections 7, 8, 9 and 10 of the 'I & B Code'. The rules provide the procedure required to be followed by filing an application by corporate insolvency resolution process. As per Rule 6 of the 'Adjudicating Authority' Rules 2016, an operational creditor shall make an application for initiating the corporate insolvency process under section 9, in Form 5 accompanied with documents and records required therein. As per sub-rule (2) of Rule 6 it is

mandatory again to dispatch a copy of application filed with the adjudicating authority, by registered post or speed post to the registered office of the Corporate Debtor.

13. *The provisions of sub-section (3) mandates the operational creditor to furnish copy of invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor, an affidavit to the effect that, there is no notice given by the corporate debtor relating to dispute of unpaid operational debt, a copy of the certificate from the 'Financial Institutions' maintaining accounts of the operational creditor confirming that, there is no payment of an unpaid operational debt by the corporate debtor and such other information as may be stipulated. Sub-section (5) of section 9 is procedure required to be followed by Adjudicating Authority. One can say that procedural part is not mandatory but is directory.*

14. *The provision being "directory" or "mandatory" has fallen for consideration before Hon'ble Supreme Court on numerous occasions. In Manilal Shah Vs. Sardar Sayed Ahmed (1955) 1 SCR 108, the Hon'ble Apex Court held that where statute itself provide consequences of breach or non-compliance, normally the*

provision has to be regarded as having mandatory in nature.

15. One of the cardinal principles of interpretation of statute is that, the words of statute must *prima facie* be given their ordinary meaning, unless of course, such construction leads to absurdity or unless there is something in the context or in the object of the statute to the contrary. When the words of statute are clear, plain and unambiguous, then, the courts are bound to give effect to that meaning, irrespective of the consequences involved. Normally, the words used by the legislature themselves declare the legislative intent particularly where the words of the statute are clear, plain and unambiguous. In such case, effort must be to give a meaning to each and every word used by the legislature and it is not sound principle of construction to brush aside words in statute as being redundant or surplus, and particularly when such words can have proper application in circumstances conceivable within the contemplation of the statute.

16. For determination of the issue whether a provision is mandatory or not, it will be desirable to refer to decision of Hon'ble Supreme Court in State of Mysore

Vs. V.K.Kangan (1976) 2 SCC 895. In the said case, the Hon'ble Supreme Court specifically held:

“10. In determining the question whether a provision is mandatory or directory, one must look into the subject-matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. No doubt, all laws are mandatory in the sense they impose the duty to obey on those who come within its purview. But it does not follow that every departure from it shall taint the proceedings with a fatal blemish. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law-maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.”

16. Therefore, it is clear that the word **‘shall’** used in sub-section (3) of section 9 of ‘I & B Code’ is mandatory, including clause 3 therein.”

8. Learned counsel appearing on behalf of appellant, tried to distinguish the judgement in '**Smart Timings Steel Ltd.**' on the ground that the said company had not enclosed any other evidence in support of the debt and default of debt. Reliance was placed on Form-5 enclosed with Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (hereinafter referred to as "Adjudicating Authority Rules"). As per Rule 6 of 'Adjudicating Authority Rules', the 'Operational Creditor' is required to make an application in Form-5. In the said Form-5 at Part V, particulars of operational debt (documents, records and evidence of default) have been mentioned, as quoted below: -

Part-V	
PARTICULARS OF OPERATIONAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]	
1	PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)
2.	DETAILS OF RESERVATION / RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS
3.	PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)
4.	RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)
5.	DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)
6.	PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH OPERATIONAL DEBT HAS BECOME DUE
7.	A STATEMENT OF BANK ACCOUNT WHERE DEPOSITS ARE MADE OR CREDITS RECEIVED NORMALLY BY THE OPERATIONAL CREDITOR IN RESPECT OF THE DEBT OF THE CORPORATE DEBTOR (ATTACH A COPY)
8.	LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF

9. It was contended that the record of default with the 'information utility' has been mentioned therein but not the record as a certificate for 'financial institution'. But such submission cannot be accepted for two reasons, the first being the appellant has not even enclosed 'record of default with the information utility', as mentioned therein and the second reason is that Form-5 cannot override the substantive provision of clause (c) of sub-section (3) of Section 9 of 'I & B Code' which mandates enclosure of certificate from 'Financial Institution' maintaining accounts of 'Operational Creditor' confirming that there is no payment of unpaid operational debt by the 'Corporate Debtor'.

10. We thereby, hold that 'Macquarie Bank', Australia not being a 'financial institution' within the meaning of sub-section (14) of Section 3 of the 'I & B Code', any certificate given by the said bank cannot be relied upon, to decide default of debt.

11. There is another reason to hold that the application under Section 9 is not maintainable. We find from the record that the so called application under Section 8 is not in accordance with law and is defective. The notice under sub-section (1) of Section 8 of 'I & B Code' was not issued by the 'Operational Creditor' but by a Lawyer of Singapore.

12. Section 8 of 'I & B Code' is as follows: -

"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. Persons who may initiate corporate insolvency resolution process. Initiation of corporate insolvency resolution process by financial creditor. Insolvency resolution by operational creditor.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the

corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.”

13. From the plain reading of sub-section (1) of Section 8 it is clear that on occurrence of default, the ‘Operational Creditor’ is required to deliver a demand notice of unpaid operational debt, copy of invoice, demanding payment of amount involved in the default to the ‘Corporate Debtor’ **“in such form and manner as prescribed.”**

14. Sub-Rule (1) of Rule-5 of the Adjudicating Authority Rules mandates the ‘Operational Creditor’ to deliver the ‘Corporate Debtor’ the demand notice in Form-3 or invoice attached with the notice in Form-4 as quoted below:-

“5. Demand notice by operational creditor. — (1) *An operational creditor shall deliver to the corporate debtor, the following documents, namely. –*

(a) a demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.”

15. Clause (a) & (b) of sub-Rule (1) of Rule-5 of the Adjudicating Authority Rules mandates the ‘Operational Creditor’ to deliver the ‘Corporate Debtor’ either the demand notice in Form – 3 or a copy of an invoice attached with a notice in Form – 4. If the Rule 5 is read with the demand notice Form – 3 or invoice in Form – 4, it is clear that who are persons authorized to give the notice under Section 8 of the ‘I & B Code’, as apparent from last portion of Form – 3 & Form – 4, as quoted below: -

“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>

16. From bare perusal of Form-3 and Form-4, read with sub-Rule (1) of Rule 5 and Section 8 of the ‘I & B Code, it is clear that the ‘Operational Creditor’ can apply himself or through a person authorized to act on behalf

of the 'Operational Creditor', who hold same position with or in relation to the 'Operational Creditor'. Thereby such person(s) authorized by 'Operational Creditor', holding position with or in relation to the 'Operational Creditor' can only apply.

17. In view of such provision we hold that an advocate/lawyer or Chartered Account or a Company Secretary or any other person in absence of any authority by the 'Operational Creditor', and if such person do not hold any position with or in relation to the 'Operational Creditor', cannot issue notice under Section 8 of 'I & B Code', which otherwise can be treated as a lawyer's notice/pleader's notice, as distinct from notice under Section 8 of 'I & B Code'.

18. The demand notice/invoice Demanding Payment under the I & B Code required to be issued in Form-3 or Form - 4. By the said notice, the 'Corporate Debtor' is to be informed of particulars of 'Operational Debt', with a demand of payment, with clear understanding that the 'Operational Debt' (in default), as claimed, is to be paid, unconditionally within ten days from the date of receipt of letter failing which the 'Operational Creditor' will initiate a Corporate Insolvency Process in respect of 'Corporate Debtor', as apparent from last paragraph no. 6 of notice contained in form - 3, and quoted above.

Only if such notice in Form - 3 or Form - 4 is served, the 'Corporate Debtor' will understand the serious consequences of non-payment of 'Operational Debt', otherwise like any normal pleader notice/Advocate notice or like notice under Section 80 of C.P.C. or notice for initiation of proceeding under Section 433 of the Companies Act 1956, the 'Corporate Debtor' may

decide to contest the suit/case if filed, as distinct Corporate Resolution Process, where such claim otherwise cannot be contested, except where there is an existence of dispute, prior to issuance of notice under Section 8.

19. In the present case, as the notice has been given by an advocate/lawyer and there is nothing on the record to suggest that the lawyer was authorized by the appellant, and as there is nothing on the record to suggest that the said lawyer/advocate hold any position with or in relation to the appellant company, we hold that the notice issued by the advocate/lawyer on behalf of the appellant cannot be treated as notice under Section 8 of the 'I & B Code'. And for the said reason also the petition under Section 9 at the instance of the appellant against the respondent was not maintainable.

18. We find no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances of the case there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Balvinder Singh)
Member(Technical)

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