

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 105 of 2019

IN THE MATTER OF:

Mohan Kumar Chimar

...Appellant

Vs

Indian Base Metals Co. Ltd. & Anr.

....Respondents

Present:

**For Appellant: Mr. Vikram Pachnanda, Ms. Manisha Chaudhary,
 Mr. Mansumyer Singh, Advocates.**

For Respondents: Mr. Rajendra Singhvi, Advocate

O R D E R

01.02.2019: The grievance of the Appellant is that the Respondent – ‘Indian Base Metals Co. Ltd.’ issued demand notice under Section 8(1) and filed application under Section 9 of the I&B Code. Subsequently by order dated 13th December, 2018, the Adjudicating Authority (National Law Company Tribunal), Kolkata Bench while held that the Respondent is a ‘Financial Creditor’, also allowed the Respondent to change the format for treating application under Section 7.

2. Learned counsel for the Appellant submits that application under Section 9 cannot be changed to that of Section 7. However, we are of the view that for the purpose of application under Section 7 in the Form-1 no advance notice or demand notice is required to issue, like Section 8(1) notice. In such case, it is always open to the parties to file Format-1 i.e. application under Section 7 after serving a copy of the same to the other side. It is not in dispute that after change the copy was not served on the Corporate Debtor. Therefore, prima facie one may accept that the party can take leave of the Adjudicating Authority to file a separate application under Section 7 after service of the same.

3. However, even if it is accepted that such change cannot be permitted as suggested by learned counsel for the Appellant, in such case also liberty is given to the Respondent to file fresh application under Section 7, without notice, by serving a copy of same under Rule 4(3). Even if it is allowed, the Corporate Debtor may not get any advantage as they merely disputed the amount.

4. Learned counsel for the Appellant further submits that the debt is barred by limitation and therefore it can be argued that there is no debt payable in the eyes of law, thus application under Section 7 is not maintainable. However, we leave such question open.

5. In *“Innoventive Industries Ltd. Vs. ICICI Bank and Ors. – (2018) 1 SCC 407”*, the Hon’ble Supreme Court observed and held as under:-

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial

creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. *When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in*

part. V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”

5. In the aforesaid background, even if there is a dispute about debt amount, if it is rupees one lakh or more, Respondent may proceed for initiation of insolvency resolution process against the Corporate Debtor.

6. In the circumstance, we given one opportunity to the Appellant to state whether they intend to settle with the Respondent.

7. Post the case 'for orders' on **25th February, 2019**.
8. In the meantime, the parties may discuss and settle the dispute, if they so choose.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

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