

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION**

Company Appeal (AT) (Insolvency) No. 71 of 2017

(Arising out of Order dated 6th June, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in Company Petition No. 292/I&BP/NCLT/MAH/2017]

In the matter of :

Bharti Defence and Infrastructure Limited ... Appellant

Vs.

**Edelweiss Asset Reconstruction
Company Limited ... Respondent**

**Present : For Appellant : Shri Arun Kathpalia, Senior Advocate
assisted by Ms. Saumya, Ms. Nidhi Nagpal and Ms.
Tanushree Nigam, Advocates.**

**For Respondent : Shri Ramji Srinivasan, Senior Advocate
assisted by Shri Animesh Bisht, Shri Karan Khanna, Shri
Sohil Yadav and Shri Tushar Bhardwaj, Advocates.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Respondent- M/s. Edelweiss Asset Reconstruction Company Limited ('Financial Creditor') filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of 'Corporate Insolvency Resolution Process' against Appellant-M/s. Bharti Defence and Infrastructure Limited- ('Corporate Debtor'). After notice and hearing the parties, the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai by impugned

order dated 6th June, 2017 admitted the application, declared the Moratorium, appointed 'Interim Resolution Professional' and passed prohibitory orders in terms of 'I&B Code'. The said order is under challenge in this appeal.

2. Learned counsel appearing on behalf of the Appellant-'Corporate Debtor' submitted that the application under Section 7 was not maintainable as the Respondent-'Financial Creditor' failed to produce the record or evidence of default in terms of Clause (a) of sub-section (3) of Section 7 of the 'I&B Code'.

3. It was submitted by learned counsel for the Appellant-'Corporate Debtor' that by virtue of Notification dated 30th March, 2017, the provisions contained in Chapter-V of Part- IV of 'I&B Code' relating to information utility has been notified. The 'information utility' is to be registered under Section 210 of the 'I&B Code'. Under Section 215 of the 'I&B Code', a 'Financial Creditor' is required to submit in a prescribed form to the 'information utility', financial information and information relating to assets in relation to which any security interest is created. Upon such financial information being submitted by the 'Financial Creditor', an application is maintainable to the 'information utility' under Section 216 of the 'I&B Code' for modification and/or rectification of error in such financial information. Such application for modification/rectification can be filed by "a person" (which expression necessarily includes a 'Corporate Debtor'). These provisions provide an

opportunity to a 'Corporate Debtor' to apply and/or seek modification/rectification in case of an error in the financial information submitted by 'Financial Creditor' under Section 215 of the 'I&B Code' before the same is regarded by the Adjudicating Authority as record of default for the purpose of Section 7(3)(a) thereof. Accordingly, in the absence of record of the default recorded with the information utility, no application can lie before the Adjudicating Authority.

4. According to learned counsel for the Appellant- 'Corporate Debtor', in the present case, the 'Financial Creditor' has merely recorded in its application alongside column at Serial No.3 of Part-V of Form-1 (framed under Rule 4 of Insolvency Rules) that it is not applicable, without stating any reason in support thereof.

5. It was further contended that no regulations have been framed by the Insolvency and Bankruptcy Board of India ("Board") under Clause (f) of sub-section (2) of Section 240 of the 'I&B Code' for specifying "such other record of evidence of default" for the purpose of Clause (a) of sub-section (3) of Section 7 and therefore, in the absence of such regulations specifying any "record or evidence of default" as contemplated under Clause (a) of sub-section (3) of Section 7, the petition was not maintainable.

6. Reliance was also placed on Rule 239(1)(c) of the 'I&B Code' whereunder the Central Government is empowered to frame rules only with respect to the form, manner and fee for making application before

the Adjudicating Authority for initiating 'Corporate Insolvency Resolution Process' by 'Financial Creditor'. According to Learned Counsel for the appellant, the power under Section 239 cannot be construed to include specification of the records of default, which are required to be submitted to the Adjudicating Authority under sub-section (3) of Section 7. The power is conferred only with the Board under Clause (f) of sub-section (2) of Section 240. Therefore, Regulation 8 of the Insolvency Regulations, which specify the records of default to be submitted to the 'Insolvency Resolution Process' at a later stage, cannot be made applicable in the pre-admission stage of furnishing evidence before the Adjudicating Authority.

7. Furthermore, according to the learned counsel for the Appellant- 'Corporate Debtor', sub-section (2) of Section 7 cannot be read in isolation with sub-section (3) of Section 7 of the 'I&B Code', Parliament has explicitly conferred separate powers, on one hand to the Central Government under clause (c) of sub-section (1) of Section 239 to frame Rules and to the Board under Section 240 to frame Regulations specifying the 'other record' or 'evidence of default'.

8. It was further contended that the details in terms of Form 1 prescribed under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "Adjudicating Authority Rules") is required to be given, the provision being mandatory.

9. In reply, learned counsel appearing on behalf of the Respondent-‘Financial Creditor’ submitted that the Adjudicating Authority is required to ascertain only the existence of default from the documents filed by the ‘Financial Creditor’ by way of an application filed under Section 7 in Form 1. Sub-section (2) of Section 7 provides that such an application must be in the form and manner as may be prescribed. Therefore, according to the learned counsel for the Respondent-‘Financial Creditor’, the form and manner of such application and the documents to be supplied therewith have, as prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 are required to be followed.

10. It was further contended that Form 1 of the ‘Adjudicating Authority Rules’ set out the form and manner in which an application under Section 7 is required to be filed. The said Form 1 expressly and unambiguously lists out the content of the application including, Part V of Form 1 and the documents that are to be annexed to the application as the evidence of default.

11. It was also submitted that the Respondent-‘Financial Creditor’ has filed an application under section 7 of the ‘I&B Code’ in Form-1 of the ‘Adjudicating Authority Rules’ and enclosed the records in terms of said Rules and therefore, the Form was complete and the Adjudicating Authority rightly admitted the application.

12. Similar issue fell for consideration before this Appellate Tribunal
“Neelkanth Township and Construction Pvt. Ltd. Vs. Urban

Infrastructure Trustees Limited” in Company Appeal (AT) (Insolvency)

No. 44 of 2017, this Appellate Tribunal by Judgment dated 11th August,

2017 observed and held as follows: -

“16. ‘Financial Creditor’ along with the application required to be furnished information and other facts as prescribed under sub-section (3) of Section 7. Where the Adjudicating Authority is satisfied that a default has occurred and the application under sub-section (2) is complete, and there are no disciplinary proceedings pending against the proposed resolution professional, it can admit such application and in case the application is incomplete, required to provide 7 days’ time to complete the record and on failure is to dismiss the application.

17. The aforesaid facts are to be considered from the procedure for initiation of corporate insolvency resolution process by ‘financial creditor’ as mandated under Section 7 of ‘I & B Code’, and quoted below: -

“7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation. —For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

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

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

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days 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).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.”

18. *It is well settled that rules of procedure are to be construed not to frustrate or obstruct the process of adjudication under the substantive provisions of law. A procedural provision cannot override or affect the substantive obligation of the adjudicating authority to deal with applications under Section 7 merely on the ground that Board has not stipulated or framed Regulations with regard to sub-section 3(a) of Section 7. The language of Section 240, whereby Board have been empowered to frame regulations is clear that the said regulation should be consistent with the 'I & B' Code and the rules made thereunder by the Central Government.*

20. *The rules framed by the Central Government under Section 239 having prescribed the documents, record and evidence of default as noticed above, we hold that in absence of regulation framed by the Board relating to record of default recorded with the information utility or other record of evidence of default specified, "the documents", 'record' and 'evidence of default' prescribed at Part V of Form-1, of the Adjudicatory Rules 2016 will hold good to decide the default of debt for the purpose of Section 7 of the 'I & B Code'.*

21. We further hold that the 'Regulations framed by the Board' being subject to the provisions of 'I & B Code' and rules framed by the Central Government under Section 239, 'Part V of Form - 1' of Adjudicating Authority Rules, 2016 framed by Central Government relating to 'documents', 'record' and 'evidence of default', will override the regulations, if framed by the Board and if inconsistent with the Rule. However, it is always open to Board to prescribe additional records in support of default of debt, such as records of default recorded with the information utility or such other record or evidence of default in addition to the records as mentioned in Part V of Form-I.

22. At this stage, it is pertinent to note that the Board has also framed Insolvency Resolution Process for Corporate Persons, Regulations, 2016 ('Corporate Persons Regulation' for short). It has come into force since Notification dated 30th November 2016 was issued. Regulation 8 of 'Corporate Persons Regulation', 2016 relate to claims by 'Financial Creditor'. Regulation 11(2) relates to existence of debt due to 'Financial Creditor', which is to be proved on the basis documents mentioned therein and quoted below: -

“8. Claims by financial creditors.

(1) A person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the interim resolution professional in electronic form in Form C of the Schedule:

Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(2) The existence of debt due to the financial creditor may be proved on the basis of -

(a) the records available with an information utility, if any; or

(b) other relevant documents, including -

(i) a financial contract supported by financial statements as evidence of the debt;

(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;

(iii) financial statements showing that the debt has not been repaid; or

(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.”

23. *‘Form – C’ attached to the Regulation relates to proof of claim of ‘Financial Creditor’ whereunder at Serial No. 10, the ‘Financial Creditor’ is supposed to refer the list of documents in proof of claim in order to prove the existence and non-payment of claim dues to the ‘Operational Creditor’.*

Therefore, the stand of the appellant that the Board has not framed any Regulations, relating to clause (a) of sub-section (3) of Section 7, cannot be accepted.”

13. In the present case, the Appellant-‘Corporate Debtor’ has enclosed the application preferred by the Respondent-‘Financial Creditor’ under Section 7 in Form 1 as Annexure-A-13 (Colly.). Therein the Respondent-‘Financial Creditor’ at Part V has given the details of the particulars of the ‘Financial Debt’ (Documents, Records and Evidence of default). In support of the details of security held by or created for the benefit of the ‘Financial Creditor’ ‘mortgages’, ‘guarantees’, ‘share pledge’ etc. has been shown.

In support of record of default though nothing stated against Serial No.3- ‘Record of default with the information utility, if any’, but against

Serial Nos. 7 and 8, the details of record of debt and default has been mentioned, as quoted below: -

7.	<p>COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891) (ATTACH A COPY)</p> <p>Copies of entries in the bankers book in accordance with the Bankers Book Evidence Act, 1891 have been annexed at Exhibit- '13'</p>
8.	<p>LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND DATE OF DEFAULT</p> <p>The other documents that prove the existence of financial debt have been listed below:</p> <ol style="list-style-type: none"> 1) Letter dated August 21, 2014 issued by the Corporate Debt Restructuring ("CDR") cell mentioning the failure of CDR approved package (pursuant to which the MRA was executed and the MRA Facilities were granted) in relation to the Company/Respondent 2) Letter dated June 09, 2015 issued by IDBI Bank Limited revoking the reliefs and sanctions provided to the Company/respondent. 3) Recall notice dated August 05, 2015 issued by IDBI Bank (the assignor) to the Company/Respondent directing the Company/Respondent to <i>inter alia</i> make payment of the dues owed it in relation to the Facilities to IDBI Bank; 4) Letter dated August 25, 2016 issued by EARC instructing SBICAP Trustee Company Ltd. (in its capacity as a Security Trustee) to invoke pledge of shares of Nirupam Energy Projects Private Limited, Bharti Defence and Infrastructure Limited, Dhanashree Properties Private Limited, GOL Offshore Limited, Natural Power Ventures Private Limited, made in favour of <i>inter alia</i> IDBI Bank;

- 5) Letters dated August 25, 2016 issued by SBICAP Trustee Company Ltd. (the Security Trustee appointed to hold securities, on behalf of *inter alia* IDBI Bank, created by the Company) to respective shareholders for invoking pledge of shares of Nirupam Energy Projects Private Limited, Bharti Defence and Infrastructure Limited, Dhanashree Properties Private Limited, GOL Offshore Limited, Natural Power Ventures Private Limited, made in favour of *inter alia* IDBI Bank;
- 6) Order dated September 03, 2016 passed in the Notice of Motion (L) No. 92 of 2016 in Commercial Suit (L) No. 133 of 2016 filed before the Hon'ble Bombay High Court; and
- 7) Order dated September 20, 2016 passed in the Commercial Appeal (L) No. 26 of 2016 in Notice of Motion (L) No. 92 of 2016 in Commercial Suit (L) No. 133 of 2016 filed before the Hon'ble Bombay High Court.
- 8) The annual report of the Company for the financial year 2015-2016.

The copied of the aforementioned documents proving existence of financial debt have been annexed herewith at **Exhibit- "14 Colly"**.

14. From the aforesaid fact, as we find that the application preferred by the Respondent-'Financial Creditor' under section 7 in Form 1 is complete and there are records of debt and records of default, we hold that the Adjudicating Authority rightly admitted the application and passed the order of moratorium and prohibitory orders in accordance with 'I&B Code'.

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

(Justice S.J. Mukhopadhaya)
Chairperson

(Balvinder Singh)
Member(Technical)

NEW DELHI

17th October, 2017

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