

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI**

Company Appeal (AT) (Ins.) No. 976 of 2022

IN THE MATTER OF:

RAJEEV SRIVASTVA

Suspended Director of
M/s Assotech Milan Resorts Pvt. Ltd.
R/o A-60, Sector – 33,
Noida – 201301

.... Appellant

Vs.

1. AHLUWALIA CONTRACTS (INDIA) LTD.

A Company Having its Registered Office
And Head Office at:
A-177, Okhla Industrial Area, Phase I,
New Delhi – 110020

2. ASSOTECH MILAN RESORTS PVT. LTD.

Company Under CIRP having registered Office at:
07th Lane, Amlapara, Angul, Orissa – 759122
Through Its Interim Resolution Professional
Mr. Suresh Chandra Pattanayak,
GKV-38, Gati Krushna Villa,
Tankapani Road, Brahmeshwar Bagh
Bhubanerhwar, Khordha, Orissa – 751018

3. MR. SURESH CHANDRA PATTANAYAK

Interim Resolution Professional of M/s
Assotech Milan Resorts Pvt. Ltd.
R/o GKV-38, Gati Krushna Villa,
Tankapani Road, Brahmeshwar Bagh

Bhubanerhwar, Khordha, Orissa – 751018

.... **Respondents**

Present:

For Appellant: Mr. Ankur Goel, Advocate.

For Respondents: Mr. Anil K. Airi, Sr. Advocate with Mr. Mudit Ruhella, Mr. Mritunjay K. Singh, Mr. Karan Chhibber, Mr. Aman Dahiya, Advocates for R-1.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 07.07.2022, passed by the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench, Cuttack) in T.P. No. 211/CTB/2019 (Formerly COPET No. 26 of 2016 on the file of the High Court of Orissa) admitting an application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') in the matter of 'Ahluwalia Contracts (India) Limited (ACIL) (Operational Creditor) against Assotech Milan Resorts Pvt. Ltd. (Corporate Debtor). Suresh Chandra Pattanayak was appointed as an Interim Resolution Professional (in short 'IRP') and moratorium was imposed.

2. The brief facts of this case are that the Corporate Debtor awarded construction work through a contract agreement dated 02.02.2011 to the Operational Creditor. The construction work was suspended w.e.f. 13.01.2012 due to certain government restraints. However, the Operational Creditor, through its letters demanded compensation for idle cost, administrative cost, depreciation, losses etc. The Corporate Debtor vide its email dated 07.08.2013 settled the claim on account of salary, idle

equipment, rental and depreciation at Rs. 175 lakhs and outstanding payment against the verified bills of Rs. 40,26,474/-. Since the construction work did not start, therefore, the Operational Creditor sent a notice dated 28.12.2015 under Section 433 of the Companies Act, 1956 (in short 'the Act, 1956') to the Corporate Debtor and filed a Company Petition under Section 433 r/w Section 434 of the Act, 1956 on 12.04.2016 which was numbered as CP No. 26 of 2016. However, the Hon'ble High Court of Orissa transferred the said petition on 19.04.2019 to NCLT, Cuttack, after enforcement of the Code, which was assigned a new number bearing T.P. No. 211/CTB/2019. After the receipt of record, notices were given to both the sides. The Operational Creditor in compliance of proviso to Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 (in short 'Rules, 2016') presented a petition under Section 9 of the Code on 09.08.2021 in the prescribed format to which the Respondent filed the reply on 23.09.2021.

3. One of the objections to be petition was raised by the present Appellant (Respondent therein) that the application has been filed by the Operational Creditor without serving mandatory notice of demand in terms of Section 8 of the Code. However, the Adjudicating Authority, giving its reason as to why the notice under Section 8 of the Code was not required, admitted the application filed by the Operational Creditor and hence, the present appeal.

4. During the course of hearing of this appeal by a bench comprising two Hon'ble Members, the Appellant referred to three decisions rendered by this Tribunal, with the same bench strength, namely, '**Sabari Inn Pvt. Ltd. Vs.**

Rameesh Associates Pvt. Ltd.’, 2017 SCC Online NCLAT 350 decided on 17.11.2017, ‘Mosmetro Story (FZE) Vs. BASF India Ltd. & Anr.’ CA (AT) (Ins) No. 229 & 230 of 2017 decided on 28.11.2017 and ‘Shailendra Sharam, Director of R&M International Pvt. Ltd. Vs. Ercon Composites (Through IRP Mr. Nayana Premji Savala) & Anr.’, 2021 SCC Online NCLAT 3 decided on 13.01.2021, in which it has been held by this Tribunal that even if a winding up petition is transferred to the Adjudicating Authority for treating it as an application filed under Section 9, it has to be preceded by a notice under Section 8 of the Code. The decisions rendered in the aforesaid three cases have been doubted by a bench of the same strength by recording reasons in its order dated 25.11.2022, therefore, it referred this matter to the larger bench for considering the following two questions:-

“i. Whether after transfer of winding up proceeding as per the Companies (Transfer of Pending Proceedings) Rules, 2016 r/w amendments made in Section 434 of the Companies Act, 2013 as applicable to the I&B Code by Act 26 of 2018, the winding up petition which has been filed on the ground of company unable to pay its debt for treating the application under Section 9 of the Code notice under Section 8 of the Code is mandatory and without service of notice under Section 8 proceedings so transferred cannot be treated as proceedings under Section 9?

ii. Whether law laid down by this Tribunal in “Shailendra Sharma, Director of R&M International Pvt. Ltd. Vs. Ercon Composites (Through IRP Mr. Nayana Premji Savala) & Anr.”, “Sabari Inn Pvt. Ltd. Vs. Rameesh Associates Pvt. Ltd.” and Mosmetro Story (FZE) Vs. BASF India Ltd. & Anr.” lays down the correct law?”

5. Hence, this matter is placed before this bench to answer the aforesaid two questions.

6. As regard the first question, Counsel for the Appellant has vehemently argued that an application filed by the Operational Creditor under Section 9, after transfer of winding up petition, without serving notice under Section 8 of the Code, is not maintainable because prior notice under Section 8 of the Code is a mandatory requirement. It is further argued that even after filing the application under Section 9 of the Code in the prescribed format, the Respondent had submitted the documents provided in Section 9(3)(b)&(c) but for complying with Section 9(3)(a) which is again a mandatory requirement and if this requirement is done away with then Section 8 would become redundant. He has further argued that as per second proviso to Section 434(c) of the Companies Act, 2013 (in short 'the Act, 2013'), after the transfer of such proceedings to the Adjudicating Authority, it is required to be dealt with by the Adjudicating Authority as an application for initiation of Corporate Insolvency Resolution Process (in short 'CIRP') under the Code which means all the mandatory requirements for maintaining an application under Section 9 have to be complied with. He has also submitted that as per first proviso to Rule 5 of the Rules, 2016, it was incumbent upon the Operational Creditor to submit all information which includes the mandatory notice provided under Section 8 as well. He has thus relied upon the decisions rendered by this Tribunal in the case of **Sabari Inn Pvt. Ltd. (Supra)**, **Mosmetro Story (FZE) (Supra)** and **Shailendra Sharma (Supra)**

and submitted that the aforesaid decisions have rendered the correct interpretation of law.

7. On the other hand, Counsel for the Operational Creditor has submitted that there is no requirement of a notice under Section 8 of the Code when a winding up petition is transferred to the Adjudicating Authority. It is further submitted that the relevant information submitted by the Operational Creditor was to be treated as an application under Section 9 on which the Adjudicating Authority is to take a decision. In so far as the prior notice is concerned, it is submitted that not only a legal notice was served but a statutory notice required under Section 434(1) of the Act, 1956 dated 28.12.2015 was also served and after the expiry of three weeks as provided therein, the Company Petition was filed on 12.04.2016 which takes care of the notice, much less mandatory, as argued by Counsel for the Appellant. It is further submitted that as per Section 434(1)(c) of the Act, 2013 all proceedings under the Companies Act, 1956, including winding up petition was statutorily transferred to the Tribunal and was required to be dealt with from the stage before their transfer. It is argued that as per Rule 5 of the Rules, 2016, referred to by the Appellant, the Respondent was to furnish information which does not contain the issuance of a fresh notice in terms of Section 8 of the Code. He has further submitted that even otherwise the language used in Section 8 is that the Operational Creditor may on the occurrence of default deliver a demand notice which means that it has to be delivered on the occurrence of default which is in presenti and not in the past. It is further argued that in so far as the requirement of

Section 9(3)(a) is concerned, it has also been fulfilled when the petition under Section 434 of the Act, 1956 was filed. It is further argued that the decisions rendered in the aforesaid three cases which have been doubted by the order dated 25.11.2022 are not laying down the correct law.

8. We have heard Counsel for the parties and perused the available records with their able assistance.

9. Before we advert to the respective submissions made by Counsel for the parties, it would be relevant to refer to the scheme of the Code in so far as an application under Section 9 is to be filed and maintained. Section 9 of the Code deals with the initiation of the CIRP by an Operational Creditor. However, before filing an application under Section 9, it is imperative on the part of the Operational Creditor to resort to Section 8 of the Code which provides for a demand notice of the unpaid operational debt with copy of the invoice of the amount involved in default in such form and manner as may be prescribed. Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provides for the documents to be served by the Operational Creditor to the Corporate Debtor i.e. a demand notice in form-3 in terms of Rule 5(1)(a) and copy of invoice attached with the notice in form-4 in terms of Rule 5(1)(b). After the service of the notice under Section 8(1), the Corporate Debtor, in terms of Section 8(2), within a period of 10 days, bring to the notice of the Operational Creditor about the existence of a dispute and payment of unpaid operational debt. In case, despite the expiry of period of 10 days from the date of delivery of the notice or invoice demanding payment under Section 8(1), the Operational Creditor

do not receive the payment from the Corporate Debtor or a notice of the dispute under Section 8(2), then the Operational Creditor may file an application to the Adjudicating Authority for the initiation of CIRP. As per Section 9(2), the application under sub-section (1) has to be filed in such form and manner and shall be accompanied with such fee as may be prescribed. The manner in which the application under Section 9 is to be filed is provided in Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which says that it has to be in form -5 accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016. Section 9(3) further provides for the documents to be appended with the application. The aforesaid procedure is apparently for an application which is filed in terms of the provisions of the Code but the legislature perceived another situation in respect of a winding up petition, already filed before the High Court, on account of non-payment of debt and in this regard Section 434 of the Act, 2013 may be referred to which is reproduced as under: -

Section 434: Transfer of certain pending proceedings. (1) *On such date as may be notified by the Central Government in this behalf,—*

(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 10E of the Companies Act, 1956 (1 of 1956), immediately before such date shall stand transferred to the Tribunal and the

Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;

(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:

Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days; and

(c) all proceedings under the Companies Act, 1956 (1 of 1956), including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:

Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government.

[Provided further that any party or parties to any proceedings relating to the winding up of companies pending before any Court immediately before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, may file an application for transfer of such proceedings and the Court may by order transfer such proceedings to the Tribunal and the proceedings so transferred shall be dealt with by the Tribunal as an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016.]

[Provided further that only such proceedings relating to cases other than winding-up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal:

[Provided also that-]

(i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or

(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts;

shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959.]

[Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959.]

(2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.]

10. Besides the aforesaid provision, Rules were also provided and in this regard Rule 5 of the Rules, 2016 needs to be highlighted which is reproduced as under: -

“5. [Transfer of pending proceedings of Winding up on the ground of inability to pay debts.— (1) All petitions relating to

winding up of a company 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 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 Companies Act, 2013 exercising territorial jurisdiction to be 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 upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.]”

11. There is no dispute that a demand notice was served under Section 434(1)(a) of the Act, 1956 and despite receipt of demand notice and the expiry of statutory period, the Company Petition was filed under Section 433(e) of the Act, 1956 presumably on the ground that the Company is

unable to pay its debt. The contention of Counsel for the Appellant that notice under Section 8 of the Code was also required to be served because of the first proviso to Rule 5 of the Rules, 2016 as per which the Operational Creditor was to submit all information, other than information forming part of the records transferred, required for admission of the petition under section 9 of the Code is not well founded because the language of this proviso does not contemplate issuance of a fresh notice under Section 8 albeit before filing of the application under Section 9. The other two documents referred to in Section 9(3)(b)&(c) have rightly been filed but for complying with Section 9(3)(a) because statutory notice had already been served by the Operational Creditor to the Corporate Debtor in terms of Section 434(1)(a) of the Act, 1956 before filing the petition for winding up of the company and cannot be repeated. Further, Counsel for the Appellant has laid unnecessarily emphasis on the word to be dealt with occurring in Rule 5(1) of the Rules, 2016 to contend that it would embrace the issuance of notice under Section 8 as well.

12. On the other hand, Section 434(c) of the Act, 2013 rather provides that “the Tribunal may proceed to deal with such proceedings from the stage before their transfer” and in that regard the stage of issuance of notice under Section 8 had already been over because the statutory notice under Section 434(1)(a) of the Act, 1956 had already been given by the Petitioner before filing the petition under Section 433(e) of the Act, 1956.

13. Although, Counsel for the Respondent has referred to two decisions of the Hon’ble Supreme Court in the case of **‘Kaledonia Jute & Fibers Pvt.**

Ltd. Vs. Axis Nirman and Industries Limited & Ors., (2021) 2 SCC 403 and ***'Action Ispat and Power Pvt. Ltd. Vs. Shyam Metalics and Energy Limited'***, (2021) 2 SCC 641, but both the decisions are deciding different issues not relevant for the present controversy.

14. Thus, in our considered opinion, looking from any angle, there is no requirement of issuance of a fresh notice under Section 8 of the Code as it cannot be read as a part of the 'submission of information' as provided in first proviso to Rule 5 of the Rules, 2016.

15. Consequently, the first question is answered to the effect that after the transfer of winding up proceedings as per Rules 2016 read with amendments made in Section 434 of the Act, 2013 as applicable to the Code by Act 26 of 2018, if the winding up petition has been filed on the ground that the Company is unable to pay its debt, for treating the application under Section 9 of the Code, notice under Section 8 of the Code is not necessary or mandatory and a petition under Section 9 shall be maintainable without service of notice under Section 8 of the Code.

16. In so far as the second question is concerned, it pertains to the correctness of the law laid down in the cases of ***Sabari Inn Pvt. Ltd. (Supra)***, ***Mosmetro Story (FZE) (Supra)*** and ***Shailendra Sharma (Supra)***. The first decision is in the case of ***Sabari Inn Pvt. Ltd.*** came on 17.11.2017. In this case, the Appellant (Corporate Debtor) entered into a contract with the Respondent Contractor therein. Although, according to the Appellant therein, pursuant to the contract, entire amount was paid but the

Respondent issued a legal notice dated 07.09.2013 calling upon the Appellant to pay the outstanding sum of Rs. 12,06,508/- and thereafter filed a company petition under Section 433 & 434 of the Act, 1956 before the High Court of Madras. After constitution of the Tribunal and Adjudicating Authority, the said case was transferred to the Adjudicating Authority, Chennai Bench and was renumbered. In the said case, the Appellant therein raised an issue that no notice under Section 8(1) of the Code was served prior to treating the application as filed under Section 9 of the Code. It was held that no notice was issued under Section 8(1) and as per Rule 5 other informations were also not placed on record. It was thus held that the application filed under Section 433 and 434 of the Act, 1956 cannot be treated to be an application under Section 9 of the Code and hence, the application was abated.

17. The second decision in ***Mosmetro Story (FZE) (Supra)*** was delivered on 28.11.2017. In this case, the Appellant was the Corporate Debtor who used to purchase chemicals from the Operational Creditor. The Appellant therein had alleged that the he had already made the payment and settled the account but the Operational Creditor issued a legal notice on 19.08.2015 and 09.09.2015 for the payment of the outstanding sum of Rs. 1,98,75,342/- and thereafter filed the petition under Section 433 & 434 of the Act, 1956 before the High Court of Madras. However, after constitution of Tribunal, winding up petition was transferred to the Adjudicating Authority, Chennai and was renumbered. In this case also the Corporate Debtor had taken a plea that since no notice under Section 8 (1) of the Code

was served prior to treating the application under Section 9 of the Code, therefore, the application was not maintainable. In this case same view was expressed as has been expressed in the case of **Sabari Inn Pvt. Ltd. (Supra)** holding that neither the notice was issued under Section 8(1) nor other informations were placed before the Adjudicating Authority, therefore, the Company Petition stood abated.

18. The case of **Shailendra Sharma (Supra)** was decided on 13.01.2021, in which same issue was raised that before the petition is treated as an application filed under Section 9 of the Code, mandatory notice under Section 8(1) of the Code, should have been served and reference has been made to the aforesaid two decisions.

19. It is needless to mention that since we have already held, while deciding the first question, that service of the notice under Section 8(1) of the Code is not a mandatory requirement, therefore, the decisions rendered in aforesaid three cases are held to be not a good law and are thus accordingly over ruled. The second question is accordingly decided.

20. Although, this case was placed before this bench to answer the aforesaid two questions but keeping in view the very fact that there is no other issue involved in the main appeal itself except that a notice under Section 8(1) of the Code was not served before the petition filed under Section 433(e) & 434 of the Act, 1956 is treated as an application under Section 9 which has been answered against the Appellant, therefore, in order to save the time of court, we hereby hold that there is no merit in the

present appeal as well and the same is thus dismissed though without any order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Justice Rakesh Kumar Jain]
Member (Judicial)**

**[Mr. Barun Mitra]
Member (Technical)**

New Delhi

21st February, 2023.

Sheetal