THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH – I, MUMBAI

CP (IB)-229/MB/2018

CORAM : SHRI V.P. SINGH, MEMBER (J)
SHRI RAVIKUMAR DURAISAMY, MEMBER (T)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON **31.10.2018**

NAME OF THE PARTIES: **SMART TIMIMG STEEL LTD.**

v/s

NATIONAL STEEL & AGRO INDUSTRIES LTD.

SECTION 9 OF INSOLVENCY & BANKRUPTCY CODE, 2016

ORDER

24. CP (IB)-229/MB/2018

CP 229/2018 has been filed by the Operational Creditor, Smart Timing Steel Ltd., for initiation of CIRP against the Corporate Debtor, namely, National Steel & Agro Industries Ltd. It is stated in the application itself that Operational Creditor would deliver a demand notice dated 23.12.2016 of demanding the payment of the amounts involved in default to the Corporate Debtor at the Corporate Debtor's registered office. Due to failure of the Corporate Debtor to bring to the notice of the Operational Creditor the existence of dispute and record of the pendency of suits or arbitration proceedings filed before the receipt of the demand notice in relation to such dispute, or the repayment of the unpaid operational debt, Operational Creditor filed a Petition 06/I&BP/NCLT/MAH/2017 before this Tribunal under Section 9 of the IBC, 2016.**However, the Operational Creditor was unable to produce a copy of the certificate from the Financial Institution defined under Section 3(14) of the IBC, 2016 since the Operational Creditor does not maintain accounts with such financial institutions**. The Tribunal vide order dated 30.1.2017 rejected the Company Petition and held that "**on perusal of Section 9 of IBC, 2016, it is evident, that it is mandatory to file copy of the certificate from the Financial Institutions reflecting non-payment of the**

operational debt impugned, for the Operational Creditor has filed to annexe copy of the said certificate as required under Section 9(3)(c) of the Code, this petition is liable to be rejected". Against the Order of NCLT dated 31.1.2017, Company Appeal (AT)(Insolvency) No.28/2017 before the NCLAT was filed which was dismissed, vide order dated 19.5.2017. Against the order passed by the Hon'ble NCLAT, Civil Appeal No.9813/2017 was filed before the Hon'ble Supreme Court of India which also came to be dismissed for the reason that certificate as required under Section 9(3)(c) of the Code is mandatory.

Hon'ble Supreme Court in the case of Macquarie Bank Ltd vs Shilpi Cable Technologies Ltd., Civil Appeal No.15135/2017, passed a judgement dated 15.12.2017 while dealing with the issue whether about the operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory or not. Hon'ble Supreme Court has held that "**when we come to sub-clause(c) of Section 9(3), it is equally clear that a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is certainly not a condition precedent to trigger the insolvency process of the code.**

The Code cannot be construed in a discriminatory fashion so as to include those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code.

...... a so called condition precedent impossible of compliance cannot be put as a threshold bar to the processing of an application under Section 9 of the Code."

The Hon'ble Supreme Court also considered the order of Hon'ble NCLAT in the instant matter, i.e. Smart Timing Ltd Vs. National Steel & Agro Industries Ltd. It is pertinent to mention that Hon'ble Supreme Court in the above mentioned case in Para 28 has held that “whether or not there is a merger, it is clear that the order dated 18.8.2017 is not “law declared” within the meaning of Article 141 of the Constitution and is of no precedential value. Suffice it to state that the said order was also a threshold dismissal by the Supreme Court, having heard only the Learned Counsel appearing for the Appellant.”

On perusal of the order of the Hon’ble Supreme Court in the case of Macquarie Bank Ltd vs. Shilpi Cable Technologies Ltd. supra, it is clear that Hon’ble Supreme Court has discussed the judgement of Hon’ble NCLAT passed in the case of Smart Timing Ltd. **However, Hon’ble Supreme Court has not overruled its earlier judgement and the judgement of NCLAT, whereby the SLP was dismissed. It is clear that this case has been based on the same cause of action. This case has been finally decided by the Hon’ble Supreme Court by order dated 18.8.2017 whereby the appeal filed against the Hon’ble NCLAT has been dismissed.**

It is also clear that Hon’ble Supreme Court has further laid down the law in case of Macquarie Bank Ltd vs. Shilpi Cable Technologies Ltd., but Hon’ble Apex Court has not overruled the judgement passed in case of Smart Timimg supra.

Given the above, it is clear that second petition on the same cause of action is not maintainable, therefore, this petition is dismissed on the threshold.

Sd/-	Sd/-
RAVIKUMAR DURAISAMY Member (Technical)	V. P. SINGH Member (Judicial)