

In the National Company Law Tribunal
Mumbai Bench.

TCP No. 430/I&BP/NCLT/MB/MAH/2017

Under Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicate Authority) Rules 2016) and Under Section 9 of the I & B Code 2016.

In the matter of

D.S.Q. ARCHITECTS PRIVATE LIMITED : Petitioner

V/s

PATEL REALTY (INDIA) LIMITED : Respondent

Order delivered on: 11.12.2017

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)
Hon'ble Shri Bhaskara Pantula Mohan (Judicial)

For the Petitioner(s): : 1. Mr. Sanjay Jain along with
2. Ms. Voshiki, Advocates.

For the Respondent(s): : 1. Mr. Dakshesh Vyas;
2. Mr. Nishant Vyas, Advocates;
3. Mr. Simran Gurnani, Solicitor

Per M.K. Shrawat, Member (Judicial).

ORDER

1. This is the Petition transferred from the Hon'ble High Court and thereafter on 14.7.2017 the Petitioner in the capacity of "Operational Creditor" has filed Form No.5 wherein made a claim of **Operational Debt of ₹ 18,69,575/-** (inclusive of Interest) against the Corporate Debtor viz. M/s. Patel Realty (India) Ltd.
2. On receiving the Petition, the Respondent Debtor has raised a preliminary legal objection that **no Notice of Demand under section 8** of the Insolvency Code had been served upon the Corporate Debtor which is a mandatory requirement in respect of a Petition under section 9 of the Code.
3. From the side of the Petitioner Learned Counsel Mr. Sanjay Jain appeared and stated that the Respondent was associated with the Petitioner from the year 2010. The Respondent had entered into a "Service Agreement" of 7th December, 2010

whereby it was agreed upon to provide Architectural Consultancy Services related to Architectural Design for the Respondent's Project namely "Smondo 3.0" (Residential Building situated at Electronic City, Hosur Road, Bangalore ("**the said project**"). As per the terms of the said Agreement the Respondent had agreed to pay the Petitioner professional fees of ₹1,56,26,885/-. The Petitioner as a Professional Consultant has provided consultancy services and raised Invoices.

3.1 The details are on record as under:-

SR No.	STAGES OF PAYMENTS	INVOICE NO. & DATE	AMOUNT IN RUPEES	AMOUNT RECEIVED	BALANCE
1	Appointment Letter	Invoice No. 15/DSQ/A1-PRIL/06/10 Dt. 29.12.2010	1567970.00	1567970.00	0
2	Conceptual Design stage:	Invoice No. 21/DSQ/A1-PRIL/06/10 Dt. 24.02.2011	2351954.00	2351954.00	0
3	Approval Drawing Stage	Invoice No. 21/DSQ/A1-PRIL/06/10 Dt. 24.02.2011	1567970.00	1567970.00	0
4	Tender Drawing stage	Invoice No. 04/DSQ/A1-PRIL/06/11 Dt. 05.04.2011	2038360.00	2038360.00	0
5	GFC Stage 13%	Invoice No. 21/DSQ/A1-PRIL/06/11 Dt. 03.10.2011	2195157.00	2195157.00	0
6	GFC stage 13%	Invoice No. 29/DSQ/A1-PRIL/06/11 Dt. 28.11.2011	2038361.00	2038361.00	0
7	Construction stage 5%	Invoice No. 02/DSQ/A1-PRIL/06/12	798627.00	798627.00	0

me

		Dt. 09.04.2012			
8	Construction stage 5%	Invoice No. 08/DSQ/A1-PRIL/06/12 Dt. 03.09.2012	798627.00	798627.00	0
9	Construction Stage 5%	Invoice No. 01/DSQ/A1-PRIL/06/13 Dt. 01.07.2013	798627.00	798627.00	0
10	Change in Fees (Difference amount)	Invoice No. 02/DSQ/A1-PRIL/06/14-15 Dt. 02.07.2014	1405444.00	1405444.00	0
11	(a) Construction stage 5% (b) On Completion Of Work And handing Over Of Built Drawings To Client	Invoice No. 07/DSQ/PRIL/06/15-16 Dt. 01.01.2016	1789278.00	0	1789278.00

4. Attention was drawn on the details of the Invoices and the work done by the Petitioner. The Respondent had received those Invoices without any objection and never raised any question about the quality of the services rendered, pleaded by the Petitioner. The Corporate Debtor has also not objected about the Fees demanded in those Invoices. Against the outstanding payment as per the Invoices of ₹ 1,73,50,375/- , the Respondent had paid an amount of ₹ 14,04,988/- including Service Tax after deduction of TDS. Thereafter, despite repeated reminders, the Corporate Debtor had failed to make the payment of the outstanding amount to the Petitioner. The Learned Counsel has drawn our attention on the dates of several reminders. According to him, the Debt is admitted by the Respondent because a part payment had already been made. The Petitioner, through his Advocate, sent notice dated 10.05.2016 under section

433 and 434 of Companies Act, 1956 to pay the **outstanding amount of ₹17,86,607/- and Interest of ₹80,297/- totalling ₹18,69,575/-**.

Admittedly a reply of the Debtor dated 01.06.2016 was received by the Petitioner. Due to failure of payment the Petitioner had submitted a Petition bearing No. CPL 899 of 2016 under section 433 and 434 of Companies Act, 1956 before the Hon'ble High Court.

5. However, On account of a Notification No. GSR 1119(e) dated 07.12.2016 of Government of India, the said Company Petition was transferred to NCLT. As per the requirement of the Insolvency Code the **Petitioner had submitted Form No.5 on 14.07.2017**. He has pleaded that the Petition is maintainable because the required Notice had already been served upon the Corporate Debtor and there is no denial of this fact.
6. From the side of the Respondent Debtor it is pleaded that even in a situation when the Petition is transferred from the Hon'ble High Court, the Petitioner is required under section 8 of the Code to deliver Demand Notice. This statutory requirement was not fulfilled, hence the Petition is to be dismissed at the very threshold.
7. From the side of the Petitioner, Ld. Counsel has vehemently pleaded that in a situation when a Petition is transferred from the Hon'ble High Court, the requirement of Section 8 Notice of Demand is not at all required as prescribed by the Notification of Government of India. He has referred to the Notification No. GSR 1119 (e) dated 07th December, 2016 and a Notice in this regard dated 17th May, 2017 wherein matters relating to winding up and amalgamation being transferred from the Hon'ble High Court to NCLT are clarified. The Procedure laid down and the compliance to be made are made clear in the Notification. According to the Ld. Advocate the relevant guidelines vide Notification are as under:

"NOTICE

Government of India vide Notification No. GSR 1119 (e) dated 07th December, 2016 has notified Companies (Transfer of Proceedings) Rules

WV7

2016. Through these rules all matters relating to winding up and amalgamation has been transferred from High Courts to national Company Law tribunal.

Rule 5 of the aforesaid Rules, 2016 states that –

"All petitions relating to winding up under clause (e) of section 433 of the Companies act, 1956 filed on the ground of inability to pay its debt pending before a High Court and where the petition has not been served on the respondent as required under rule 26 of the Company (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 and exercising territorial jurisdiction and such petition shall be treated as an application under section 7,8 or 9 of the insolvency and bankruptcy Code, 2016, as the case may be, and dealt with in accordance with part II of the Code.

Provided that the petitioner shall submit all information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under section 7,8, or 9 of the code, as the case may be, including details of the proposed insolvency professional to the tribunal within 60 days from the date of notification, failing which the petition shall abate."

*The time for compliance of rule 5 of the Companies (Transfer of Proceedings) Rules, 2016 has been **extended** to **six months** from 15th December 2016 vide Notification No. GSR 175€ dated 28th February, 2017 to six months from 15th December, 2016.*

*In accordance with the aforesaid notifications, the period of **six months** shall elapse on 14th June, 2017."*

8. Argument of the Ld. Representative is that this Notification has clearly used to terminologies namely "**Petition**" and "**Application**". He has pleaded that the "**Petitions**" filed under the Companies Act, under Section 433(e) are to be treated as "**Application**" under Section 7, 8 or 9 of the Insolvency Bankruptcy Code, 2016. According to the arguments, those "Petitions" are required to be considered as the 'Application' under the Insolvency Court, hence, there was no requirement of issuance of any fresh Notice of Demand U/s 8 under the provisions of the Insolvency Code if a statutory Notice have already been issued under the old provisions of Companies Act, 1956. He has further elaborated that Petitioner is, therefore, required to submit "All information forming part of the records transferred". For the purpose of admission of those Petitions as an Application, the only requirement is that all the information should be forwarded or placed as record transferred from the Hon'ble High Court. He has further elaborated that

"all information forming part of the records" includes the Statutory Notice issued under the provisions of section 433 of the Companies Act, 1956. As a result, the transferred Petitions are not to be treated as a "Fresh Application under the Insolvency Code." Rather, it is not at all a "Fresh Application" because the requisite condition of payment of "Filing fees" is also waived in respect of such cases transferred from the Hon'ble High Court. Had it been a new / fresh Petition / Application the condition of payment of statutory Fees ought to have been applied but it is not so. As a consequence, it is wrong and illegal to enforce an additional responsibility on such Petitions to serve another Notice under Section 8 of the Code, although a Notice of Demand had already been served under the old provisions. In concluding remark, the Ld. Representative has contested that the decisions on this controversy, either decided by Respected NCLT or Respected NCLAT, have not considered the applicability of the said Notification as cited *supra*, therefore, those decisions can be said to be *per incuriam* qua the Notification. Ld. Advocate has thus concluded that this is being a fresh argument based upon the latest development of Law hence needed due consideration while deciding this Petition.

9. Having heard the submissions of both the sides, prima facie, we are of the conscientious view that the issue of delivery of Notice of Demand as prescribed under **section 8 has been held as a mandatory pre-requisite condition for admission of section 9 Petition under the Insolvency Code.** As far as the facts of this case are concerned, undisputedly, this Petition is a transferred Petition from the Hon'ble High Court by virtue of the Notification GSR 1119(e) dated 07.12.2016 (*supra*). Another admitted factual is that the Petitioner had served upon the Respondent Debtor Notices under the old provisions of Companies Act, 1956 under section 433 and 434. The Respondent had also issued a reply on receiving those Notices. On account of these facts, although the admitted factual position was that the Respondent was aware about the claim of the Petitioner which is the purpose of serving of Notice on the 'Other Side', in this case the alleged Debtor, but under the changed circumstances of law, the Petitioner was

required to issue once more a Notice under section 8 even in cases where the Petition is transferred from the Hon'ble High Court, as held in the case of **Era Infra Engineering Limited Vs. Prideco Commercial Projects Pvt. Ltd. Company Appeal (AT) (Ins) No.31 of 2017, Order dated 03.05.2017** wherein the Hon'ble Appellate Tribunal has made certain observations as follows:-

"3. On notice, the Respondent/Operational Creditor has appeared and filed reply affidavit. *LT.* Counsel appearing on behalf of Operational Creditor while accepted that no notice u/s 8 of I&B Code, 2016 was served on the Appellant/Corporate Debtor, it is submitted that the other formalities were completed. It is further submitted that earlier a notice was issued to the Appellant/Corporate Debtor u/s 271 of the Companies Act, 2013, for winding up which should be treated to be a notice for the purpose of section 8 of the I&B Code, 2016. However, such submissions made on behalf of the Operational Creditor cannot be accepted in view of the mandatory provision u/s 8 of the I&B Code read with Rule 5 of Insolvency & Bankruptcy, (Application to Adjudicating Authority) Rules 2016 (hereinafter referred to as I&B 'Rules' for short).

4.

5.

6. The application for initiation of corporate insolvency resolution process, thereafter can be filed by Operational Creditor after expiry of period of 10 days from the date of delivery of the notice or invoice demanding payment, as provided under sub-section (1) of section 9.

7.

8. Admittedly, no notice was issued by Operational Creditor under section 8 of the I & B Code, 2016. Demand notice by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of any expiry period of tenure of 10 days there was no question of preferring an application under section 9 of I & B Code, 2016.

9. The Adjudicating Authority has failed to notice the aforesaid facts and the mandatory provisions of law as discussed above. Though the application was not complete and there was no other way to cure the defect, the impugned order cannot be upheld.

10. For the reasons aforesaid, we set aside the order dated 12th April 2014 passed by the Adjudicating Authority. The application preferred by Operational Creditor under section 9

11/11

stands dismissed being incomplete. All orders, interim arrangement etc as has been made are vacated, moratorium as declared earlier is quashed, appointment of interim resolution professional also stands quashed. All action taken by interim resolution profession is declared illegal. The appeal is allowed with the aforesaid observations."

10. In a latest decision the Respected Coordinated Bench, NCLT, Mumbai in the case of **M/s. Inject Care Parenterals Private Limited (Operational Creditor) Vs. M/s. Vexta Laboratories Private Limited (Corporate Debtor) in TCP No.260/I&BC/NCLT/MB/MAH/2017 Order dated 01.12.2017** has held in the case of a Transferred Petition from the High Court as under :-

"8.10. Further that, regards to the question of issuance of Notice is raised by the Debtor, we have perused the Notice sent by the Operational Creditor under section 434 of the Companies Act, 1956 and also the R.P.A.D. slip to that effect and we are of the opinion that, the Notice under section 434 of the Companies Act, 1956 is duly received by the Debtor.

8.11. As regards the question of issuance of Demand Notice under section 8 of The Code it is admitted fact that, the Operational Creditor has not issued the Demand Notice under section 8 of the Code after transfer of Winding-up Petition from the Hon'ble High Court as against the Debtor.

8.12 Accordingly, we have perused the decision of Hon'ble NCLAT in "Era Engineering Ltd. v. Prideco Commercial Projects Private Ltd. (Company Appeal) (AT) (Ins.) No.31/2017 wherein it is held as follows:

"8. Admittedly, no notice was issued by Operational Creditor under section 8 of the I&B Code, 2016. Demand notice by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of any expiry period of tenure of 10 days there was no question of preferring an application under section 9 of I&B Code, 2016."

*8.13. Hence, in the light of above judgment we are of the opinion that, this matter also deserves **Rejection** in absence of issuance of Demand Notice U/s 8 of the Code."*

11. One more decision of the Respected Principle Bench, New Delhi dated **12.05.2017** has also been cited, pronounced in the case of **Prem Sarup Narula Vs. Bycell Telecommunications (I) Pvt. Ltd. in CP No. 790/2016**

wherein after narrating the contents of NCLT Order (as cited supra) a conclusion was drawn as under:-

"A perusal of the aforesaid paras would make it patent that the provisions concerning inability to pay its debts as incorporated under section 271(2) under the 2013 Act or in section 433 (e) stand deleted. The aforesaid provisions have now been substituted for paving the way and to allow access to a financial creditor or to an operational creditor to approach the adjudicating authority under the Code i.e. (NCLT) either under Sections 7,8 or 9. It was with this object in view that Transfer Rules (supra) were notified with a specific provisions in Rule 5 (1) stipulating that all petitions, relating to winding up under clause (e) of section 433 of the 1956 on the ground of inability to pay its debts pending before the High Court and where the petition has not been served on the respondent as required under rule 26 of the Companies (Court) rules, 1959, were to be transferred to the Bench of the Tribunal established under sub-section (4) of Section 419 of the Act exercising territorial jurisdiction and such petitions are to be treated as applications under section 7, 8 or 9 of the Code. It further provides that all such petitions were required to be dealt with in accordance with part II of the Code.

23. *It was in pursuance of the amendment made in Section 271 and 272 of the Companies Act, 2013 and Rule 5 of the Transfer rules that this petition has been transferred by Hon'ble High Court of Delhi to the NCLT which is adjudicating authority. On behalf of the petitioner, firm reliance has been placed on para 3 of the judgment rendered in the case of R. Radhakrishnan & others (supra) by Hon'ble the Supreme Court. In para 3 their Lordships have placed reliance on earlier judgment of the Constitution Bench of the Supreme Court rendered in Shyam Sunder v. ram Kumar, (2001) 8 SCC 24 and on behalf of the petitioner reliance has been placed on the proposition culled out in that judgment which is evident from the following paras:-*

28. *From the aforesaid decisions the legal position that emerges is that when a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties on the date of suit or adjudication of suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment*

appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of suit. However, the position in law would be different in the matters which relate to procedural law but so far as substantive rights of parties are concerned, they remain unaffected by the amendment in the enactment. We are, therefore, of the view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act, such legislation is prospective in operation and does not affect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment. We are further of the view that there is a presumption against the retrospective operation of a statute and further a statute is not to be constructed to have a greater retrospective operation than its language renders necessary, but an amending Act which affects the procedure is presumed to be retrospective, unless amending Act provides otherwise."

A perusal of the aforesaid para makes it evident that new legislation cannot be presumed to apply retrospectively if it affects the substantive or vested rights of the parties unless it is expressly provided or it becomes evident from necessary intendment. In case the new legislation is procedural then it is presumed to operate retrospectively. In the present case, the petitioner has filed the company petition before the Hon'ble High Court of Delhi on 16.10.2016 and therefore, it is claimed that the petition continued to be one for winding up under Section 433 (e) of the Companies Act, 1956 as all the rights of the petitioner are deemed to have crystalized and vested on the aforesaid date.

24. *We are afraid that no such interpretation of general application as sought to be claimed on behalf of the petitioner is acceptable because there is no substantive or vested right with the petitioner to seek winding up of the respondent company till the time the process of winding up has been initiated. The aforesaid aspect has been taken care of by the Transfer rules which provide that all those cases where notices have been served were to be retained by the Hon'ble High Court and in rest of the cases where notices could not be served were to be transferred to this tribunal. Moreover, the nature of the remedy in sum and substance continues to be available in the form of Insolvency and Bankruptcy, which may eventually result into liquidation of the respondent company. Thus the result is similar to the one which would be achieved in case of winding up. It needs to be further*

added that right becomes a vested right only when its acquired and is enjoyed by a litigant. Merely by filing a petition no right is acquired leave aside the enjoyment of such a right. Therefore, we are, unable to persuade ourselves to accept first contention raised by the petitioner.

.....

It is thus evident in the absence of demand notice under Section 8(1) of the Code, the petitioner could not have approached this tribunal for initiation of insolvency resolution process against the respondent company. In the present case, there are many other defects pointed out by the learned counsel for the respondent. Therefore, we find that the present application is incomplete as the same is liable to be dismissed.

27. As a sequel to the above discussion this application fails and the same is dismissed as being premature. The petitioner is at liberty to file fresh application after complying with all the statutory provisions including the one stipulated in the Code, 2016."

12. Respectfully following the decision of the Hon'ble NCLAT and the view taken by the Hon'ble Principal Bench, we have no option but to refuse this Petition to be "Admitted" being a defective Petition on the ground of non-issuance of Notice U/s 8 of the I & B Code, however, hereby grant a liberty to file a fresh Petition under the Code. This liberty is inbuilt as provided under the Notification dated 29.06.2017 [F. No. 1/5/2016-CL-V] (GSR 732(E) as under, relevant paragraph reproduced below :-

"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".

13. Petition is dismissed subject to the above observations. To be consigned to Records.

Sd/-

BHASKARA PANTULA MOHAN
Member (Judicial)

Date : 11.12.2017

RK

Sd/-

M.K. SHRAWAT
Member (Judicial)