

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

**Company Appeal (AT) (Insolvency) No. 315 of 2017**

**IN THE MATTER OF:**

**M/s. Karismaa Foundations Pvt. Ltd. ...Appellant**

**Vs.**

**M/s. Indust Cityscapes Constructions Pvt. Ltd. ...Respondent**

**Present: For Appellant:- Shri Shivam Singh, and Ms. Apoorva  
Srivastava, Advocates**

**O R D E R**

**04.01.2018—** The appellant filed an application under Section 433(e) of the Companies Act, 1956 before the Hon'ble High Court of Madras which stood transferred pursuant to 'The Companies (Transfer of Pending Proceedings) Rules, 2016' framed by the Central Government in exercise of the powers conferred under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of Section 239 of the Insolvency and Bankruptcy code, 2016 notified on 7<sup>th</sup> December, 2016. Rule 5 framed therein reads as follows:

*“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 15<sup>th</sup> day of July, 2017, failing which the petition shall stand abated:*

*Provided further that any party or parties to the petitions shall, after the 15<sup>th</sup> 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 15<sup>th</sup> December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.”*

2. In view of the aforesaid Rule 5 and amended notification dated 29.06.2017, the appellant was required to comply with the requirement by 15<sup>th</sup> July, 2017 but failed to comply with the same. In view of the non-compliance, the application preferred under Section 433(e) of the Companies Act, 1956, was not treated to be an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the ‘I & B Code’) and the case stood abated.

3. Learned Adjudicating Authority by the impugned order dated 6<sup>th</sup> July, 2017 rejected the application in view of the aforesaid provisions and for non-compliance of the order passed by the Adjudicating Authority on 2<sup>nd</sup> June, 2017.

4. Learned counsel for the appellant submitted that the appellant was entitled to comply with the provision by 15<sup>th</sup> July, 2017 but it was rejected much prior to the same. He also referred to the decision of this Appellate Tribunal in ***M/s. Paharpur Colling Towers Limited vs. Dalmia Cement (Bharat) Limited – Company appeal (AT) (Insol.) No. 127 of 2017***

wherein by order dated 31<sup>st</sup> August, 2017 the Appellate Tribunal observed as follows :

- “9. *Taking into consideration the totality of the case, while we accept the stand taken by Ld. Counsel for the appellant that it should have been allowed time till 15<sup>th</sup> July, 2017 to take steps in terms of Second Amended Rules published on 29<sup>th</sup> June, 2017 i.e. prior to the impugned order, but setting aside of the impugned order will be of no avail as no further time can be granted to the appellant to act in terms of Rules aforesaid which is not in force after 15<sup>th</sup> July, 2017.*
10. *In the circumstances, in terms of Second proviso to Second Amendment Rule 5, the appellant is allowed to file a fresh application under Section 7 or Section 9 of the Insolvency and Bankruptcy Code, 2016, as the case may be, in accordance with the provision of the I & B Code. It is for the appellant is to decide whether it comes within the meaning of ‘Financial Creditor’ or ‘Operational Creditor’. If the appellant feels that if the company is an ‘Operational Creditor’ then before filing application under section 9, it will provide notice under section 8 to the ‘Corporate Debtor’ and follow all*

*conditions of the Insolvency and Bankruptcy Code and Rules framed thereunder.*

11. *In such case, the application cannot be decided on the ground of limitation taking into consideration that the appellant originally preferred a petition under section 433(e) of the Companies Act, 1956, for the purpose of counting delay and laches.*
12. *It will also be open to the respondent to raise all the objections at the stage of giving reply to Section 8 notice or at the time of admission of the application.”*

5. In view of the fact that the case of the appellant is covered by this Appellate Tribunal order in ‘*M/s. Paharpur Cooling Towers Limited*’, we are not inclined to interfere with the impugned order dated 6<sup>th</sup> July, 2017 but give liberty to the appellant to file fresh application under Section 9 of the I & B Code after complying with the provisions of sub-section (1) of Section 8. In such case, the Adjudicating Authority will not reject the application on the ground that the application under Section 433(e) of the Companies Act, 2016 abated and/or earlier application was rejected. The appeal stands disposed of with the aforesaid liberty and observations.

(Justice S.J. Mukhopadhaya)  
Chairperson

/ns/gc