

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 106 of 2018

IN THE MATTER OF:

R. B. Synthetics & Anr.

...Appellants

Vs

Bee Ceelene Textile Mills Pvt. Ltd.

....Respondent

Present:

For Appellant: Mr. Dhiren R. Dave, Advocate.

For Respondents: Mr. C. S. Manoj Harkat, PCS.

ORDER

02.07.2018: The Appellant – ‘Financial Creditor’ filed 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 the Respondent - ‘Corporate Debtor’, which has been rejected by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench by impugned order dated 31st January, 2018 on the ground that the Authorisation by ‘M/s R. B. Synthetics’ and HUF of Radhakishan Bhagwandas Ruchandani has not been filed.

2. The Adjudicating Authority perused the audited account for the years 2006 to 2011 to find out whether there are some Unsecured Loans from Radhakrishan Bhagwandas Ruchandani or not. The Adjudicating Authority also perused Annexure ‘E’ to the petition i.e. ‘Audited Financial Statement’ which shows that the loan amounts and advances received from related parties amounting to Rs.8,35,944/- as on 31.03.2012, but nowhere the loan and advances has been shown as payable to any of the Petitioners.

3. On notice, the Corporate Debtor has appeared and taken similar plea that the balance sheets do not disclose as to how balances were created and amount are payable and receivable. It is also submitted that authorization letter by Financial Creditor was not filed.

4. Section 7 of I&B Code reads as follows:

“7. Initiation of corporate insolvency resolution process by financial creditor.- (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.”*

5. From the aforesaid provision it is clear that if the application is incomplete in such case, the Adjudicating Authority is required to allow time to the ‘Financial Creditor(s)’ to remove the defects. If the authorisation letter was not enclosed by the Petitioners, the Adjudicating Authority should have allowed sufficient time to the ‘Financial Creditor(s)’ to complete the record. Without asking to complete the record, it was not open to the Adjudicating Authority to reject the application on the ground that the authorisation letter has not been enclosed.

6. So far as the question whether there is ‘debt’ and ‘default’ is concerned, such question can be looked into only if the Corporate Debtor disputes the ‘debt’ or takes the plea that there is no default though there is a debt.

7. In “*Innoventive Industries Ltd. Vs. ICICI Bank and Ors.*” – (2018)1 SCC 407, Hon’ble Supreme Court observed and held as follows:

“28. *When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to*

Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to

point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”

8. From the aforesaid provision it is clear that if the application is filed under Section 7, default in respect of a ‘financial debt’ owed to any of the ‘Financial Creditors’ of the corporate debtor, it need not be a default of debt owed to the particular Financial Creditor and may be a Co-Financial Creditor under Section 7(2). Application made under Sub-section (1) in the form prescribed required to accompany the documents and records therein. If the authorization letter was not accompanied or other record relating to debt or a default was not enclosed, as pleaded by learned counsel appearing on behalf of Corporate Debtor, which requires to be mentioned in Part-IV and Part-V of Form 1, it was duty on part of the Adjudicating Authority to allow time to the ‘Financial Creditor(s)’ to remove the defects and should not have rejected the application on the ground that the loan amount of certain ‘Financial Creditor’ is not clear from the record.

9. For the reasons aforesaid, we set aside the order dated 31.01.2018 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad in CP(IB) No. 158/7/NCLT/AHM/2017 and allow Appellant to remove all the defect as pointed out by learned counsel for the Corporate Debtor and enclose the authorization letter by the Financial Creditor(s), providing all the detailed material required under Part-IV and Part-V of Form 1 within three weeks. After completing the defect, the Appellant will forward a copy of the same to the Corporate Debtor whereinafter it will be open to the Corporate Debtor to settle the claim if there is any debt and default. Otherwise, the Adjudicating Authority will take up the matter within three weeks, thereof after notice to the parties.

10. It is needless to say that if defect is not removed by the Financial Creditor(s), it will be open to the Adjudicating Authority to dismiss the application pointing out the defects to the Financial Creditor(s). The appeal is allowed with aforesaid observations and directions. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansilal Bhat]
Member (Judicial)

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