

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insol) No. 8 of 2017

IN THE MATTER OF:

Rubina Chadha & Anr.,

... Appellant

Vs.

M/s. AMR Infrastructure Ltd.

... Respondents

Present: For Appellants:- Mr Swapnil Gupta, Ms Shabdita Singh and Ms Shivambika Sinha, Advocates.

ORDER

24.03.2017 — There appears to be some ambiguity in the notification dated 7th December, 2016 contained in GSR No. 1119 (E) issued by the Ministry of Corporate Affairs, Government of India in exercise of powers conferred under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 (18 of 2013) read with sub-section (1) of Section 239 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (hereinafter referred to as Code). Under the said Notification, a Rule has been framed by the Central Government.

Rule 5 relates to transfer of pending proceedings of winding up on the ground of inability to pay debts, which 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 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 as required 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 Act, exercising territorial jurisdiction and such petitions shall be treated as applications under Sections 7, 8 or 9 of the Code, as the case may be, and 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 within sixty days from date of this notification, failing which the petition shall abate.

(2) All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to Section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act.”

In view of such provision when the matter was transferred before the Principal Bench, National Company Law Tribunal, New

Delhi, the Tribunal by impugned order dated 16.2.2017 held that the Appellant is neither 'financial creditor' nor 'operational creditor' within the meaning of the Code and dismissed the petition.

Sub-section (1) and (2) of Section 434 of Companies Act, 2013 relates to transfer of certain pending proceeding and to frame Rules for that purpose, the relevant of which reads as follows:-

Section-434 – Transfer of certain pending proceedings –

- (1) On such date as may be notified by the Central Government in this behalf,-

XXXXXXXX

(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;

XXXXXXXX

- (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 court, to the Tribunal under this section."

From a bare perusal of Section 434, it would be evident that the cases including case of winding up are to be transferred from the High Courts to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer.

The provision do not envisage conversion of such proceeding as a proceeding under Section 7, 8 or 9 of the Insolvency and Bankruptcy Code, 2016.

Section 239 of the Insolvency and Bankruptcy Code, 2016 empowers the Central Government to frame rule for carrying out the provisions of the said Code. Sub-section (1) of Section 239 of the Code of which reference has been given in notification dated 7th December, 2016, reads as follows:-

"239. (1) The Central Government may, by notification, make rules for carrying out the provisions of this Code.

XXXXXXXX
XXXXXXX
XXXXXXX"

The Rules framed under sub-section (1) of Section 239 of the Code does not empower the Central Government to frame Rule in regard to cases, including cases of winding up filed under the Companies Act.

In the circumstances, it is not clear as to how the Central Government while framing the Rule under sub-section (1) of Section 239 of the Code can transfer a pending proceeding of winding up, pending before the High Court, for treating the cases as an application under Section 7,8 or 9 of the Code ?

For the reasons aforesaid, we direct the appellant to implead Central Government i.e., Government of India, through the Secretary, Ministry of Corporate Affairs, 'A' wing, 5th floor, Shastri Bhawan, New Delhi-110001 as 2nd Respondent.

Let notice be issued on Respondents. Requisites with process fee, if not filed, be filed by tomorrow. If e-mail address of the Respondents are available, let notices be also issued through e-mail.

It is expected that Secretary, Ministry of Corporate Affairs, will personally go through the matter, as it is of great importance and may obtain legal opinion. It will be also desirable, if the Central Government assists this Court through an eminent Counsel.

Registry is directed to communicate a copy of this Order to the Secretary, Ministry of Corporate Affairs, Government of India, 'A' wing, 5th floor, Shastri Bhawan, New Delhi-110001 through e-mail and also by hand.

A copy of this Order be also forwarded to the Hon'ble President, National Company Law Tribunal, Principal Bench, New Delhi.

Post the matter on 3rd April 2017.

Sd/-
(Justice S.J. Mukhopadhaya)
Chairperson

Sd/-
(Mr. Balvinder Singh)
Member (Technical)