

(2021) 01 NCLT CK 0012

National Company Law Tribunal New Delhi Bench

Case No: Company Petition No. 438/ND Of 2020

Arun K. Agarwal & Associates

APPELLANT

Vs

Allbest Offshore Marine (India)
Pvt. Ltd.

RESPONDENT

Date of Decision: Jan. 12, 2021

Acts Referred:

- Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 - Rule 5, 6
- Insolvency And Bankruptcy Code, 2016 - Section 7, 8, 9, 14, 15, 17, 18, 60(1)
- Companies Act, 2013 - Section 248(5), 248(6), 248(7), 248(8), 250, 250(3), 252(3)

Hon'ble Judges: Dr. Deepti Mukesh, J; Sumita Purkayastha, Member (Technical)

Bench: Division Bench

Advocate: Swarlipi Debroy, Amit Goel

Final Decision: Allowed

Judgement

1. The present application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the

Insolvency and Bankruptcy (Application to Adjudicating 'Authority), 2016 (for brevity the Rules') by Arun K Agarwal & Associates (for brevity

'Applicant') through Mr. Arun Kumar Agarwal (Founding Partner of Arun K Agarwal & Associates) with a prayer to initiate the Corporate

Insolvency process against Allbest Offshore Marine (India) private Limited (for brevity 'Corporate Debtor').

2. The Applicant Arun K Agarwal & Associates, claimed to be the Operational Creditor, is a Chartered Accountants Firm in existence since

01.09.1983 with the identification number being PAN card No. AAEEFA4648N1Z5 and GST No. 07AAEEFA4648N1Z5, having its registered office at 105, First Floor, South Ex Plaza-I 389, Masjid Moth, South Extn. Part II New Delhi 110049.

3. The Respondent Allbest Offshore Marine (India) Private Limited is a company incorporated on 22 November 2010 under the Companies Act, 1956

having its registered office at 105, First Floor, South Ex Plaza-I 389, Masjid Moth, South Extn. Part II New Delhi 110049 and CIN

U74999DL2010PTC210645 is engaged in the business of Providing service of Repairing Ship Services, Ship Engine Repair Services etc.

4. The Applicant herein the Operational creditor had rendered the professional services to the Corporate Debtor for which invoice dated 25.11.2016

was issued for an amount of Rs. 2,30,000/- The Applicant on 04.01.2020 sent a Demand Notice under Section 8 of the Insolvency and Bankruptcy

Code, 2016 read with Rule 5 of the Insolvency and Bankruptcy (Applications to Adjudicating Authority) Rules, 2016 through speed post to the

Corporate Debtor. The notice was also served through email at the registered mail id of the Corporate Debtor and its directors on 09.01.2020. As

submitted, after issuance of the Demand Notice and upto the date of filing of this application the Operational Creditor has neither received the

payment nor replied to the said demand notice. The applicant has complied with the provision of 9(3) (b) of the code.

5. The Applicant has therefore filed this petition as an Operational Creditor praying for initiation of Corporate Insolvency Resolution Process of the

Corporate Debtor for its inability to liquidate their claim of Rs. 2,30,000/.

6. Notice was issued to the Corporate Debtor vide order dated 07.02.2020 of the Adjudicating Authority and the reply was filed by the Corporate

Debtor as on 11.06.2020. The Corporate debtor admitted that the Applicant provided professional services and the amount to be paid is due, however

on receipt of the Demand Notice the Corporate Debtor had sought time of 6-9 months to make payment of the due amount as it is facing financial

difficulty, however the Applicant proceeded to file this application.

7. That during the course of hearing the Adjudicating Authority observed that the name of the Corporate Debtor has been struck off from the Register

of the companies. The order was reserved and the Counsels were asked to file appropriate documents. The Corporate Debtor has Filed Form No.

STK- 5, which is the public notice ROC-DEL/248/STK-5/2018/2912 dated 18.06.2018 issued by the Office of Registrar of Companies, NCT of Delhi

and Haryana, striking off the name of the Corporate Debtor Company from the Register of Companies.

8. In order to deal with the issue in hand we would like to refer to the Judgment of Mr. Hemang Phophalia Vs The Greater Bombay Co-operative

Bank Limited in Company Appeal (AT) (Insolvency) No. 765 of 2019 wherein this question arose for consideration ""whether an application under

Section 7 or 9 for initiating 'Corporate Insolvency Resolution Process' is maintainable against a Company; 'Corporate Debtor', if the name of the

Company/ 'Corporate Debtor' is struck-off from the Register of the Companies"".

9. The Hon'ble appellate Tribunal while analyzing the proviso Section 248(6) of the Companies Act, 2013 stated in Para 10 that ""not with standing

the undertakings referred to in sub-section (6), the assets of the Company are to be made available for payment or discharge of its liabilities

and obligations even after the date of the order removing the name of the Company from the Register of Companies.

Para 11 ""From sub-section (7) of Section 248, it is also clear that the liability, if any, of every director, manager or other officer who was

exercising any power of management, and of every member of the company dissolved under subsection (5) of Section 248, shall continue

and may be enforced as if the company had not been dissolved.

Para 12 "From sub-section (8) of Section 248, it is clear that Section 248 in no manner will affect the power of the Tribunal to wind up a

company, the name of which has been struck off from the Register of Companies

Para 13. Section 250 of the Companies Act, 2013 relates to effect of Company notified as dissolved and reads as follows: -

250. Effect of company notified as dissolved." Where a company stands dissolved under section 248, it shall on and from the date

mentioned in the notice under sub-section (5) of that section cease to operate as a company and the Certificate of Incorporation issued to it

shall be deemed to have been cancelled from such date except for the purpose of realizing the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.

The Honâ€™ble National Company Law Appellate Tribunal further observed that ""Para 16 - From sub-section (3) of Section 252, it will be

evident that the Tribunal, by the order, before expiry of twenty years from the publication in the Official Gazette of the Notice under sub-

Section (5) of Section 248, on an application made by a creditor or workman, may pass order and give such other directions and make such

provisions as deemed just for placing the name of the Company and all other persons in the same position as nearly as may be as if the

name of the Company had not been struck off from the Register of Companies.

Para 17- The Tribunal is the Adjudicating Authority in terms of Section 60(1) of the MB Code. Hence, on one side it plays role of

'Adjudicating Authority' and on the other 'Tribunal' under the Companies Act.

Therefore, if an application is filed by the 'Creditor' ('Financial Creditor' or ('Operational Creditor') or workman ('Operational Creditor')

before the expiry of twenty years from the publication in the Official Gazette of the Notice under subsection (5) of Section 248, it is open to

the Adjudicating Authority to give such directions and make such provisions as deemed just for placing the name of the Company and all

other persons in the same position nearly as may be as if the name of the Company had not been struck off from the Register of Companies

Para 21 In such a case and in view of the provisions of Section 250 (3) read with Section 248 (7) and (8), we hold that the application

under Sections 7 and 9 will be maintainable against the 'Corporate Debtor', even if the name of a 'Corporate Debtor' has been struck-off

Para 23 In view of the aforesaid provision, we hold that the Adjudicating Authority who is also the Tribunal is empowered to restore the

name of the Company and all other persons in their respective position for the purpose of initiation of 'Corporate Insolvency Resolution

Process' under Sections 7 and 9 of the MB Code based on the application, if filed by the 'Creditor' ('Financial Creditor' or 'Operational

Creditor') or workman within twenty years from the date the name of the Company is struck off under sub-section Company Appeal (AT)

(Insolvency) No. 765 of 2019 Page 10 of 10 (5) of Section 248.

10. We would like to draw conclusion as per the ratio laid down by the Hon-ble National Company Law Appellate Tribunal in Mr. Hemang Phophalia

Vs The Greater Bombay Co-operative Bank Limited in Company Appeal (AT) (Insolvency) No. 765 of 2019 and thereby, restore the name of the

Company and all other persons in their respective position for the purpose of initiation of 'Corporate Insolvency Resolution Process' In the above

circumstances this Tribunal initiates CIRP of the Respondent company.

A moratorium in terms of Section 14 of the Code is imposed forthwith in following terms:

(a) the institution of suits or continuation of pending suits or proceedings against the Respondent including execution of any judgment, decree or order

in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the Respondent any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the Respondent in respect of its property including any action under the

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Respondent.

(2) The supply of essential goods or services to the Respondent as may be specified shall not be terminated or suspended or interrupted during

moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any

financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.

11. The interim resolution professional ("IRP"), named in the list provided by the IBBI, is Ms. Preeti Jaiswal, IBBI/IPA-001/IP-P00523/2017-

2018/10948 mail id: capreetigoyal@gmail.com being confirmed by this Bench. She shall take such other and further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days before this Bench.

12. The Applicant shall deposit a sum of Rs. 2 lakhs to enable the IRP to meet the immediate expenses. The same shall be accounted for by the IRP and shall be reimbursed to the Applicant to be recovered as costs of the CIRP.

13. A copy of the order shall be communicated to the Applicant and the Corporate Debtor by the Registry. The said order shall be communicated to the INF above named and intimate of the said appointment by the Registry. Applicant is also directed to provide a copy of the complete paper book with copy of this order to the IRP. In addition, a copy of said order shall also be forwarded to IBBI for its records and to ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.