NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

C.P. NO.16/2017
CA NO.

CORAM:

PRESENT: CHIEF JUSTICE M.M. KUMAR
Hon'ble President

SH. R. VARADHARAJAN
Hon'ble Member (J)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING BEFORE PRINCIPAL BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON24.05.2017

NAME OF THE COMPANY: Sunflag Iron and Steel Company Ltd.
Vs
Mass Metals Pvt. Ltd.

SECTION OF THE COMPANIES ACT: 433 (e), 434(1)(a) & 439

S. NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE

ORDER

1. This petition was originally filed in the Hon'ble High Court of Delhi under Section 433 (e), 434 (1) (a) and 439 of the Companies Act, 1956. On the enforcement of provisions of Insolvency and Bankruptcy Code, 2016 and in pursuance of notification dated 30.11.2016 (notification No. S.O. 3591(E)) the National Company Law Tribunal has been designated as

Adjudicating Authority in accordance with the provisions of Section 5 (1) of the Insolvency and Bankruptcy Code, 2016. A further notification for transfer of all such petitions pending before the High Court was issued on 07.12.2016. The cases where notice of the petition has not been served, have consequently been transferred by the High Court to this Tribunal. Accordingly, in pursuance of notification dated 07.12.2016 (notification No. G.S.R. 1119(E)) the petition has been transferred to this Tribunal.

2. The 'Operational Creditor'-applicant was required to comply with the provisions of Rules known as Companies (Transfer of Pending Proceedings) Rules, 2016 (for brevity 'Transfer Rules'). According to Rule 5 all petitions relating to winding up under clause (e) of section 433 of the Companies Act, 1956 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 it was required to be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Companies Act, 1956. Such petitions are required to be

treated as applications under sections 7, 8 or 9 of the Code. An obligation is cast on the applicant to submit all information 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 National Company Law Tribunal. Initially a period of sixty (60) days was fixed from the date of the notification i.e. 07.12.2016. However, vide notification dated 28.02.2017 the period of sixty (60) days has been extended to six (6) months from 07.12.2016.

3. This petition was listed after transfer vide order dated 13.01.2017 passed by the Learned Company Judge of the Hon'ble High Court of Delhi. Accordingly, the matter was listed for hearing before us on 16.03.2017 when time for two weeks was granted to furnish necessary information under the Code in accordance with the requirement of notification dated 07.12.2016. When the matter came up for consideration on 26.04.2017 it was claimed that the notice to the respondent have been served but no one had put in appearance on behalf of the respondent. We posted the matter for 02.05.2017 but it was adjourned for the reason that the noticeswere not served

on the respondent. The matter came up for hearing on 11.05.2017.

4. On behalf of the petitioner an affidavit of service has been filed showing that notice was sent along with a set of paper book on 11.05.2017 (Annexure-A) by email. A complete set of paper book was also sent through speed post (Annexure-B) which has been returned unclaimed on 06.05.2017 and attempt was made by the applicant on 08.05.2017 to serve the respondent by hand as per the direction issued by this Tribunal and the respondent refused to accept notice. On 09.05.2017 the applicant through its Marketing Head, Mr. Jitendra Singh served order dated 26.04.2017 issued by this Tribunal and also informed the respondent the next date of hearing through WhatsApp i.e. Mr. Rajesh Grover, Director (Mobile No. 9811049996) of the respondent Company. A perusal of the screenshot of the WhatsApp would show that the respondent had read the notice and the order passed by this Tribunal as is evident from the perusal of the document attached (Annexure-C). It is thus evident that the respondent has been served by various methods like email, by hand and by

WhatsApp. However, they are not interested in joining the proceeding and therefore, proceeded ex-partee.

5. Brief facts of the case necessary for disposal of the controversy raised in the application are that the applicant company (for brevity the 'Operational Creditor') was incorporated under the Companies Act, 1956 with its registered office at Delhi. Likewise, respondent company (for brevity 'Corporate Debtor') was incorporated on 28.08.1990 under the Companies Act, 1956. It also has its registered office at Delhi. From the period 25.04.2015 to 22.07.2015 the applicant company supplied in the usual course of business and as per the requirement of respondent company alloy steels at its various units in various quantities. The supplies were made at the requests and orders placed by the Corporate Debtor. The supplies have been duly accepted without raising any objections in respect of quality and/or quantity for the material supplied by the 'Operational Creditor'. Against the aforesaid supplies various tax invoices were raised by the applicant upon the 'Corporate Debtor' which amounted to a sum of Rs. 1,90,78,204/-. The aforesaid tax liability has been duly accepted by the 'Corporate Debtor'

without raising any objection, whatsoever. Between the period 21.08.2015 to 29.12.2015 the 'Operational Creditor' approached the Corporate Debtor by sending several emails for the release of its outstanding payment and false commitment were made by the 'Corporate Debtor'. Eventually on 07.11.2015 a joint meeting was held between the parties when the statement of accounts as on 31.10.2015 were reconciled and signed by both the parties. A part payment was made by the respondent company on 05.01.2016 for a sum of Rs. 16,03,517/-. However, the amount of Rs. 1,74,74,687/- has continued to remain unpaid. The Corporate Debtor in order to pay the debts issued 20 cheques in favour of Operational Creditor amounting to Rs.1,74,72,445/-. However, all the cheques were returned unpaid on 03.02.2016 with the remarks 'funds insufficient'. The applicant initiated criminal proceeding under Section 138 read with Section 142 of Negotiable Instrument Act, 1881 which are still pending consideration. In order to enable the 'Operational Creditor' to file a petition under Sections 433(e), 434(1)(a) and 439 of the Companies Act, 1956, a statutory notice was issued under

Section 433 of the Companies Act, 1956 but the same was not replied.

6. As stated above the petition was initially filed in the Hon'ble High Court of Delhi and the applicant has filed compliance affidavit dated 17.04.2017 and it has complied with all the requirements of the Code. A perusal of the affidavit shows that condition concerning default amount stand fulfilled. As per the requirement of the Code the minimum amount of default has to be Rs. One Lac before moving this Tribunal. The applicant also has met the requirement of Section 5 (20) and 5 (21) of the Code as the 'Corporate Debtor' owes a sum of Rs. 16,03,517/- which is more than Rs. 1 lakh and demand notice in terms of Section 8 (1) of The Code was issued on 17.03.2017 which has been attached with the compliance affidavit (Annexure A-9). An affidavit in terms of Section 9 (3) (b) has also been filed by the Operational Creditor deposing that there was no notice given by the Corporate Debtor to the Operational Creditor about the dispute of unpaid operational debt. As per the requirement of Section 9 (3) (b) of the Code the affidavit has also been placed on record (Annexure A-10).

The applicant has also declared on the basis of bank certificate dated 29.03.2017 that no payment of unpaid operational debt has been received from the Operational Creditor from the Corporate Debtor. The requirement of Section 9 (3) (c) of the Code stands also fulfilled as a certificate to that effect dated 29.03.2017 has been placed on record (Annexure A-11). The statement of bank account where the deposits are made or credits received by the 'Operational Creditor' has been enclosed (Annexure A-12). Accordingly, we find that no reply to the demand notice demanding unpaid operational debt has been sent by the Corporate Debtor nor anything else is available on record to conclude the Corporate Debtor has paid the unpaid operational debt. The application contains a copy of the invoices demanding payment and an affidavit has also been filed to the effect that no notice by the Corporate Debtor relating to a dispute of unpaid operational debt has been given. A copy of the certificate from the financial institution maintaining the accounts of the operational creditor has also been complied with. We are further of the view that the amount to tax liability which the 'Corporate

Debtor' owe is covered by expression 'operational debt' as defined by Section 5 (21) of the Code which reads as under:-

> "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

A perusal of the aforesaid provisions makes it patent that the claim in respect of the provision of goods or services means a claim in respect of the provisions of goods or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority as also regarded as operational debt. Accordingly, the debt is recoverable. Even the 20 cheques amounting of Rs. 1,74,72,445/- issued by Corporate Debtor in favour of the Operational Creditor in pursuance of joint meeting have been returned unpaid with the remarks 'funds insufficient' which also witness an

acknowledgment of debt and non-payment of 'Operational Debt'.

7. Despite various efforts, the 'Corporate Debtor' has failed to appear before this Tribunal to defend his position and has been proceeded ex-parte.

8. There is no opposition to the prayer made by the 'Operational Creditor' for initiation of Insolvency resolution process. A perusal of the record shows that before approaching the Hon'ble High Court of Delhi the applicant sent a legal notice dated 14.09.2016 under Section 433 (e) and 434 of the Companies Act, 1956 at the registered office of the Corporate Debtor and its two directors. No reply to the notice was received although it has been delivered to the addressee. Thereafter in compliance of Section 8 (1) of the Code again a demand notice for unpaid operational debt was issued on 17.03.2017 which has been delivered as per the tracking report on 18.03.2017. A copy of the certificate dated 29.03.2017 satisfying the requirement of Section 9 (3) (c) of

the Code has also been placed on record along with affidavit as postulate by Section 9 (3) (b) of the Code stating that the Corporate Debtor has not sent any notice with regard to raising of dispute to the unpaid operational debt. A copy of the bank statement has also been placed on record in satisfaction of the provisions of Section 9 (3) of the Code.

9. We are thus satisfied that the Operational Creditor has been able to show that the Operational Debtor owes the operational debt to it and there is a default committed by the operational debtor. The application satisfied all the requirements of the Code and the Rules framed there under.

10. As a sequel to the above discussion the application is admitted. As no insolvency professional has been proposed by the 'Operational Creditor' a reference is made to the Insolvency and Bankruptcy Board of India in term of Section 16 (4) of the Code for appointment of Interim Resolution Professional.

11. As a result of the admission a declaration of moratorium is given in terms of Section 13 (1) of the Code. The Interim Insolvency Professional shall comply with the provisions of Section 13 (2), 14, 15, 17 & 18 etc. of the Code. The directors

of the Corporate Debtor, its promoters or any person associated with the Management of the Corporate Debtor is expected to extend all assistance and cooperation to the Interim Resolution Professional as stipulated by Section 19 and 20 etc of the Code.

12. The Petition is disposed of in the above terms.

Sd/-

(CHIEF JUSTICE M.M. KUMAR)
PRESIDENT

Sd/-

(R.VARADHARAJAN)
MEMBER (JUDICIAL)

Date: 24 **/05/2017**
(Vineet)