

In the National Company Law Tribunal,
Kolkata Bench, Kolkata

CP (IB) No.313/KB/2017

In the matter of:

SMTC Steel & Power Pvt. Ltd.Applicant/Operational Creditor

-Versus-

AK Power Industries Pvt. Ltd.Corporate Debtor/Respondent

Order Delivered on 11th August 2017

Coram:

Vijai Pratap Singh, Member (J)

For the Petitioner : 1. Mr. Ajay Gaggar, Advocate
2. Ms. Rakhi Purnima Paul, Advocate

For the Respondent : 1. Ms. Micky Chowdhury, Advocate
2. Mr. Rohit Jalan, Advocate

ORDER

The Petitioner SMTC Steel & Power Pvt. Ltd. has filed this application under Sec.8 and 9 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate corporate insolvency resolution process against AK Power Industries Pvt. Ltd., a debtor.

2. The brief facts of the case, as stated in the application, are that the Operational Creditor sold consignment of metal angle and channel to the Corporate Debtor on 8/7/2014 amounting to Rs.8,95,581/- on credit which is the amount due and payable to the Operational Creditor along with interest @ 24% per annum from 8/7/2014 till the date of actual payment by the Corporate

Debtor. The goods were supplied on credit as the Corporate Debtor was a regular customer of the Petitioner. In spite of repeated reminders the respondent failed to make such payment to the petitioner.

3. The petitioner through its Accountant Rahul S & Associates by a letter dated 4/1/2017 requested the respondent to make payment. The respondent in reply by letter dated 9/1/2017 stated that the amount requires checking and reconciliation and the total amount due has to be stated by the petitioner. Thereafter, the petitioner served notice dated 12/1/2017 to the corporate debtor under the Insolvency and Bankruptcy Code, 2016. The petitioner claims that total amount due on corporate debtor as on 22/4/2017 including interest was Rs.14,95,645/-. A copy of the work sheet showing working for computation of default with respective dates is enclosed along with the petition at page 12, 13 and 14.

4. The Corporate Debtor AK Power Industries Pvt. Ltd., Identification No. is U40104WB2008PTC130530.

5. The petitioner has annexed following documents along with the petition:-

- a) Invoice dated 8/7/2017.
- b) Letter dated 4/1/2017 issued by Rahul S and Associates.
- c) Letter dated 9/1/2017 by the corporate debtor in reply to the notice dated 4/1/2017.
- d) Notice dated 12/1/2017 issued under Form 4 of the IBC, 2016 along with evidence of delivery of the said notice at the office of the corporate debtor.
- e) Board Resolution dated 2/1/2017.
- f) Statement of account maintained by the petitioner company.

6. The petitioner has filed certificate from Postal Department wherein it is stated that registered letter transaction No.RW804643435IN was delivered on 18/1/2017. The petitioner has also filed copy of Board resolution dated

2/1/2017 whereby Shri Swapan Kumar Pal, an employee of operational creditor was authorized to file corporate insolvency proceedings under I & B Code, 2016 against A.K. Power Industries Pvt. Ltd. The said authorization letter is annexed with the application at page 19. The petitioner has also attached copy of ledger account of the corporate debtor which is attached with the application at page 20. The ledger account shows that a sum of Rs.8,95,581/- was due and payable. The petitioner has also attached copy of the bank account statement which is from pages 21 to 31 of the petition. Shri Swapan Kumar Pal has filed affidavit to certify the contents of the petition which is at page 33 and 34 of the petition. The petitioner has also filed authorization letter issued in favour of Advocate Rohit Jalan to perform all acts concerning the insolvency proceedings. The petitioner has also filed affidavit of service on the corporate debtor which shows that the petitioner has informed the corporate debtor through registered post that he has filed a petition before the NCLT. The petitioner has also filed copy of the postal receipt along with Track Report showing that information was given to the corporate debtor regarding filing of the case on 23/5/2017.

7. In view of the law laid down by Hon'ble NCLAT in the case of Innovative Industries that the adjudicating authority is duty bound to give notice to the corporate debtor before admission of a petition under Sec.7 to 9 of the I & B. Code, 2016.

8. In the light of law laid down by Hon'ble NCLAT before admission of the case it is necessary to give notice on the corporate debtor. In this case the corporate creditor has informed about filing of the case on the corporate debtor but it cannot be treated as a notice issued by Adjudicating Authority against corporate debtor.

9. On perusal of the record it also appears that operational creditor has not complied with the provision of clause (b) and (c) of sub-section (3) of Sec.9 of the I & B Code, 2016. Operational creditor has not annexed an affidavit to the effect

that there is no notice given by the corporate debtor relating to dispute of unpaid operational debt. Operational creditor has also not filed copy of certificate from the financial institution maintaining account of the operational creditor confirming that there is no payment of unpaid operational debt by the corporate debtor.

10. In view of the judgment of the Hon'ble NCLAT reported in (2017) 139 CLA page 1 Smart Timing Steel Ltd. vs. National Steel Agro Industries Ltd. it is mandatory to follow entire provision of sub-clause (3) of section 9 and it is not empty statutory formality. In this case operational creditor has not complied with the provisions of sub-clause (a) and (b) of sub-section (3) of Sec.9 of I & B Code, 2016 and notice has not been served upon the corporate debtor. Therefore, it is necessary to give time to the corporate debtor to comply with the requirement of Sec.8 and 9 of the I & B Code, 2016.

11. It is also pertinent to mention that Hon'ble NCLAT in Appeal No.39/2017 Uttam Galva Steel Ltd. has reiterated the earlier finding given in Smart Timing Steel Ltd. and has further held that compliance of statutory provision are mandatory in nature without that no petition can be admitted under Sec.9 of the IB Code.

12. In the light of the above circumstances following directions are being issued:-

i) Registrar is directed to issue copy of notice on the corporate debtor within two days from the date of order.

ii) Notice will be handed over to the operational creditor for service on the corporate debtor by hand or through speed post and operational creditor shall file affidavit of service of notice along with postal receipt.

iii) It is further directed that operational creditor to comply with the provisions of clause (a) and (b) of sub-section (3) of Sec.9 of I & B Code, 2016

and file affidavit along with certificate of bank in compliance of the statutory provisions within seven days from the date of order.

List the matter on 28/8/17


Vijai Pratap Singh,
Member (J)

Signed on 11th August 2017