

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
C. P. NO. 17/I & BP/NCLT/MAH/2017**

Coram: B.S.V. Prakash Kumar, Member (Judicial) &
V. Nallasenapathy, Member (Technical)

In the matter under Section 9 of Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules 2016)

And

Mrs. Seema Gupta

..... Applicant

V/s.

M/s. Supreme Infrastructure India Ltd. & Ors.

.....Corporate
Debtor

Applicants' Counsel: Mr. Zain Mookhi, Mr. Nau Ali Rizvi, Advocates for the Applicant.

Respondent Counsel: Mr. Farhan Dubash, Mr. Rohaneel Mohite, Advocates for the Corporate Debtor/ Respondent.

ORDER

(Heard & Pronounced on 10.03.2017)

The petitioner filed this Company Petition u/s.9 of the I&B Code stating that this Petition is filed basing on statutory notice issued on 6.10.2016 u/s.434 (1) (a) of the Companies Act, 1956 stating that Debtor Company agreed that it would construct residential house (farm house) as well as other ancillary building for a total amount of ₹7crore, for which, at request of the Corporate Debtor, the petitioner advanced ₹5crores out of total amount of ₹7crore through RTGS payments on 19.3.2013, 25.5.2013 and 19.10.2013. When the Corporate Debtor failed to undertake construction of the farm house as agreed between them, the Operational Creditor i.e. Petitioner herein made several requests asking the Corporate Debtor to start work immediately or else return the entire amount of ₹5crore to them immediately along with interest at the rate of 24% p.a.

2. As the Corporate Debtor failed to construct the Farm House as agreed between the parties, the Corporate Debtor made part payments of ₹88lakhs by a demand draft and ₹26lakhs through RTGS as part refund towards the money paid by Petitioner herein. As to remaining balance of ₹3.86crore along with interest, for there being no response from the Corporate Debtor, the Petitioner issued this statutory notice dated 6.10.2016 u/s.434 of the Companies Act, 1956, calling upon the petitioner to repay the debt or else the petitioner would seek remedy for winding up of the company by invoking sections 433 & 434 of the Companies Act 1956.
3. For no repayment being made, the Petitioner on 4.1.2017 filed before winding up petition u/s 271(1) & 271(2) r/w section 272 of the Companies Act, 2013 before this Tribunal for winding up of the company for the Corporate Debtor is unable to discharge the debt of the Petitioner herein.
4. Soon thereafter, the Petitioner, on 21.2.2017, filed an Application Form u/s.9 of I&BP Code for initiating the insolvency resolution process against the Corporate Debtor in continuation of the petition already filed u/s.271 and Sec.272 of the Companies Act, 2013.
5. Now the objection from the Corporate Debtor side is that this Company Petition was initially filed u/s.271 & 272 of the Companies Act, 2013 basing on the statutory notice dated 6.10.2016 issued u/s.434(1A) of Companies Act, 1956, therefore, this Petition sans cause of action that is required for filing petition u/s.9 of I&BP Code, because the cause of action for initiating insolvency resolution process will arise on the notice given u/s 8 of I&B Code, 2016, for no notice has been given before filing this Application Form u/s 8 of the code, no petition will lie u/s.9 of I&BP Code 2016, henceforth the counsel for corporate debtor submits, this Petition is liable to be dismissed in limine.
6. On hearing the submissions from Corporate Debtor Counsel, the Petitioner Counsel propounded his argument stating on two points,

one – that non-issuance of notice u/s 8 for filing petition u/s 9 is a curable defect in contemplation of the proviso to Sec.9 (5) of I&BP Code, because this Tribunal shall before rejecting this petition under sub-clause (a) of clause (ii) give notice to the petitioner to rectify the defect in the petition within 7 days of the date of such notice from this Tribunal. For an opportunity shall be given to rectify the defect in the petition before rejecting it, if time is given to the Petitioner Counsel as stated in the proviso, the Petitioner will issue notice u/s 8 of I&BP Code and file the same before this Bench.

Two – since the Petitioner on 6.10.2016 issued notice u/s.434 (1) (a) of the Companies Act 1956 when old Act was in force, the issuance of such notice shall be construed as continuation of cause of action to filing this petition u/s 9 of the Code as all the legal consequences that flow from the above notice issued on 6.10.2016 will remain in force even after repeal of the Companies Act 1956 or after amendments to section 271 & 272 of the Companies Act 2013. To say that all legal consequences flow from notice issued under old enactment are saved by saving and repeal section 465 of the Companies Act 2013 and section 6 of the General Clauses Act, for which, the counsel relied upon the citation **Universal Imports Agency v/s. The Chief Controller of Imports & Exports and Others. (1961 AIR 41)**

7. Basing on these two grounds the petitioner counsel submits that this maintainable u/s. 9 of I & B Code despite no notice has been issued under section 8 of the Code.

8. On perusal of the submissions placed by either side, this Bench has noticed that this Petitioner initially issued notice on 6.10.2016 under section 434 (1) (a) of the Companies Act, 1956 to move petition u/s.433 & 439 of Companies Act, 1956. But instead of filing winding up petition u/s.439 of the Act 1956 after completion of three weeks' notice time given to the company to repay the due mentioned in notice, in the month of January, this petitioner,

on the strength of the notice dated 6.10.2016 issued to the debtor company, mistakenly filed winding up Petition before this Bench u/s 272(1) (b) of the Companies Act, 2013. The Petitioner might not be aware of the fact, by the time this winding-up petition was filed u/s.272(1) (a) of the Companies Act, 2013, legislature, on 1st December 2016, already amended section 272 (1) (a) of the companies Act 2013 converting winding up proceedings into insolvency and bankruptcy proceedings by simultaneously bringing Insolvency and Bankruptcy Code 2016 into force on 1st December 2016. By virtue of this notification, from 1st December 2016, the creditors or debtors, who were to initiate winding-up proceedings should initiate Insolvency Resolution Process as envisaged under I & B Code, not either under the Companies Act 1956 or under section 272 of the Companies Act 2013. The petitioner, knowingly or unknowingly, filed this Winding-Up Petition u/s 272 of the Companies Act, which was not in existence by the time this petition was filed. The outcome is, the petitioner filed it under a section that was not in force by the time of filing. Therefore, the Petition filed u/s 272 cannot be treated as petition remained in force until form has been filed under IB Code. In between filing petition u/s 272 and filing form under section 9 of IB Code, limitation for filing case has been expired, therefore, the Petition filed u/s.271(1) will not give any life to the form filed under IB Code.

9. Thereafter the petitioner having realized that the Petitioner could not file this Petition u/s.272 of the Companies Act 2013, she filed Form – 5 under I & B Code to show this Petition as continuation to the petition filed u/s.272 of the Companies Act, 2013. We must also make it clear that issuing notice under old Act could not be considered as thing done to save the limitation, limitation will be saved only when legal proceeding is initiated within limitation. The petitioner has never initiated any valid proceeding till date, she could not have filed it under section 272, which had never come into force. No valid proceeding had been initiated before limitation, the form filed

u/s 9 of IB Code after expiry of limitation is also not backed by notice under section 8 of IB Code.

10. It is a fact known to everybody, that since 1st December 2016, whoever has been felt aggrieved to move winding up proceedings is supposed to move I & B petition before NCLT save and except the cases remain continuing u/s 439 of the Companies Act 1956. The procedure that applied for transfer of the winding up petitions from the High Courts to NCLT is that the cases where court notice has not been issued were transferred to NCLT to take up the same under Insolvency & Bankruptcy Code by taking forms under the Code. The present case is not a transferred case from High Court.

11. If at all grievances to raise u/s 9 of I&BP Code, the Operational Creditor has to issue notice u/s.8 of the I&BP Code and he has to remain waited for 10 days after issuing notice, if no reply has come from Corporate Debtor to the notice sent by the Petitioner or if reply has come from Petitioner, then creditor is entitled to move Petition u/s.9 of the I&BP Code. Here, no notice has been given u/s.8 of I&BP Code, therefore, no cause of action arose to file Operational Creditor Company Petition u/s. 9 of I&B Code.

12. To get over this defect, the Petitioner counsel relied upon Section 6 (b) of General Clauses Act 1897 to state that the repeal shall not affect the previous operation of any enactment so repealed or anything **duly done** or suffered there under. Since notice being given under repealed Act, it has met the requirement of giving notice u/s 8 of I & B Code, therefore this petition, the counsel says, shall not be dismissed on the ground notice not given under section 8 of the Code. He submits that since notice has been given u/s 434 (1) (a) of the repealed Act, it has to be treated as an act or thing done when repealed enactment was in force in respect to these sections, therefore the **thing done** under repealed Act is saved under section 6 (b) of the General Clauses Act 1897 and under section 465 of the Act 2013 and shall be treated as continuation of the proceedings before NCLT.

13. The Petitioner's Counsel further relied upon two more citations, namely *Balasaheb Anantrao Bahirat v/s. Rohidas Bapusaheb Tupe (2007 (3) MH L.J.) and D. Prema Jhansi Rani 2.D. Raja Sampath Kumar 3. Selvi Estero/s. N. Shrivijaum (2012 (4) CTC 481)* to say that filing a case under wrong provisions of law will not make the case invalid if the substance of the case reveals that the facts can be taken in to cognizance under new provision of law. It is true wrong provision of law will not make any case invalid, but if the case filed by the party is hit by the Limitation and new section of law demands compliance different from the old section of law and such application cause prejudice to the right of the adverse party then wrong filing is certainly a material defect and that has to be treated as filed without accrual of any cause of action.

14. If the facts of the present case are seen in the light of the section 6 of the General Clauses Act, the Petitioner since issued a notice on 6.10.2016 by the time old Act was in force, he was very much entitled to file Company Petition u/s. 433 of the repealed enactment after completion of three weeks' notice time, but she did not avail that opportunity. From 1.12.2016 onwards, the petitioner was also entitled to file Bankruptcy Petition basing on the cause of action arose under the old Act that has also not been done. Instead of initiating proceedings under I&BP Code, she filed CP u/s 272 of Companies Act, 2013 without any backing of law in force, because by the time the right for creditor to file winding up Petition u/s.271 and 272 of the Companies Act 2013 was already taken away, therefore, as said above, this petition has no force in the eye of law.

15. The petitioner when filed the present petition u/s. 272 of the Companies Act 2013, that petition is invalid for it has been filed under invalid law. By the time Form-5 filed under section 9 of the code, the claim is already time barred, it goes without saying that no cause of action continuing by the time Form-5 filed. This application is not only not backed by notice

under section 8 but also barred by limitation. It is a known proposition that the aggrieved party is under obligation to initiate legal proceedings within the limitation envisaged under Limitation Act. It need not be said separately that even if notice given under 434 (1) (a) of the Companies Act 1956 is assumed as valid, such notice will not save the limitation unless petition is filed within limitation.

16. This Bench makes it clear that cause of action arose u/s.9 only after issuing notice u/s.8 of the I&BP Code, unless such cause of action is arisen, the Petitioner is not entitled to file petition, therefore it cannot be labeled as curable defect to take time to give notice after filing u/s.9 of I&BP Code. As soon as the Petition is filed, within 14 days from thereof, this Bench has to declare moratorium if at all petition is maintainable, if for any reason mentioned u/s 9 (2) of the Code the petition is short of compliance, this Bench may give 7 days' time under proviso to section (9) (5) (ii) of the Code to cure that defect if the application made under subsection (2) of the section 9 is not complete. This time of 7 days can be given only in a case when application is not filed in the form and manner and not accompanied with fee prescribed, not in respect to other aspects mentioned in section 9 (5) (ii) (b-e) of the Code. Therefore, the defect falling under section 9 (5) (ii) (a) is only curable defect; the time given for such curation cannot be extended to other situations. When explicit mandate is there u/s.9 saying that party is entitled to file petition u/s.9 only after issuing notice, such party cannot now come to say before this Bench that since she has already filed the Company Petition, she will give notice to the Corporate Debtor if at all the Petitioner is given time to give such notice to other side.

17. For filing petition u/s 9 of the code, section 8 notice shall be given, for that reason only, section 9 starts with saying "after the expiry of the period of 10 days from the date of delivery notice or invoice", it cannot be assumed as application u/s 9 can be filed without giving notice or invoice demanding payment u/s 8 (1) of the code.

18. If we look into section 243 of the IB Code speaking about Repeal of certain enactments and savings, it speaks about repealing Presidency Town Insolvency Act 1909 and Provincial Insolvency Act 1920 in subsection -1 and in subsection -2 &3 speaks about repealed enactments and enactments mentioned in Schedule to this Code, it has not been mentioned about the repealed Companies Act 1956. The only silver lining is application of section 6 of the General Clauses Act 1897, but that application has already been distinguished stating that by the time IB proceeding is initiated the claim has gone beyond limitation, issuing legal notice on 6.10.2016 will not save the limitation and the petitioner did not initiate legal proceeding in continuation to the notice issued u/s 434 of the old Act.

19. Here, issuing legal notice cannot be seen as document to support the claim of the Petitioner, issuance of a notice u/s 8 of the Code is an act that has to be done before filing the Petition u/s.9, therefore, non-filing of a notice will not come within the sub-section (5) of section 9, therefore, this Petition is not maintainable and it is also further held that issuance of notice on 6.10.2016 u/s.433 (1)(a) cannot not be construed as an action saved u/s. 6 of General Clauses Act for the reasons mentioned above, therefore, Petition is dismissed.

20. If any other application is pending before this Bench, that is hereby closed.

Sd/-

B.S.V. PRAKASH KUMAR
Member (Judicial)

Sd/-

V. NALLASENAPATHY
Member (Technical)