

**IN THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”**

**CP No.01/2017
RT CP No.92/Chd/Hry/2017**

**Under Sections 433(e), 434 & 439
of the Companies Act, 1956**

In the matter of:

DF Deutsche Forfait AG.

a company incorporated under the laws
Of Germany having its office at Kattenbug
18-24, 50667, Cologne, Germany.

...Petitioner/Operational Creditor

Vs

Uttam Galva Metalics Ltd.

Having its registered office at
Global Foyer Building, Sector-43,
Golf Course Road, Gurgaon-122002,
Haryana, India.

...Respondent/Corporate Debtor

Judgment delivered on: 22.09.2017

Coram: Hon’ble Mr.Justice R.P.Nagrath, Member (Judicial)

For the Petitioner : Mr.Kanwalvir Singh Kang, Advocate

For the Respondent : Mr.Anand Chhibbar, Senior Advocate with
Mr.Dhiraj Mhetre, and Mr.Tarun Vir Singh
Lehal,Advocates.

Judgement (Oral)

This petition was originally filed before the Hon’ble High Court of Punjab and Haryana under Section 433 (e) of the Companies Act, 1956 for winding up of the respondent company for its inability to pay the debt. The respondent was not served while the matter was pending before the Hon’ble High Court and the petition was transferred to this Tribunal in terms of Rule 5 of Companies (Transfer of Pending Proceedings) Rules, 2016. Rule 5 of the

aforesaid Rule as amended vide notification dated 29.06.2017 reads as under: -

“5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts –

(1) All petitions relating to winding up of a company 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 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 Companies Act, 2013 exercising territorial jurisdiction to be 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 and 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017 failing which the petition shall stand abated:

Provided further that any party or parties to the petition shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to winding up of a company is not transferred under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016 such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.”

2. Accordingly, the petitioner sent a Demand Notice / Invoice dated 02.06.2017 (Annexure-17) in terms of Rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by attaching the necessary documents.

3. The service of this notice is admitted by the respondent and reply dated 14.06.2017 (Annexure R-11) was sent by the respondent-corporate debtor raising dispute which is attached to the reply to this petition filed by the respondent. Even before the filing of the petition for winding up under Section 433 (e) of the Companies Act, 1956, the petitioner had sent a notice dated 11.10.2016 under Section 434 of the Companies Act, 1956 (Annexure P-12), to which the respondent sent a reply dated 07.11.2016 (Annexure P-13). Copies of these documents are also attached with the written reply of the respondent.

4. The amount having not been paid, the petitioner filed an application in Form No.5 as required by Rule 6(1) of the Rules. Learned counsel for respondent admits that copy of the application and the entire paper book was received by the respondent on 24.08.2017.

5. In this regard the petitioner's counsel filed his own affidavit dated 01.09.2017 along with postal receipt and track report of the post office. Notice of this petition was issued to the respondent and the learned counsel representing the respondent-corporate debtor accepted the notice.

6. The petitioner company was incorporated under the laws of Germany having its office at Kattenbug 18-24, 50667 Cologne, Germany and the petition was filed through Mr.Pankaj Sachdeva, the Attorney. The respondent is a limited company incorporated on 13.09.2007 having its

registered office at 502, Global Foyer Building, Sector-43, Golf Course Road, Gurgaon-122002, Haryana, India and therefore, the matter falls within the territorial jurisdiction of this Tribunal.

7. The respondent approached AIC Handels GmbH, having its office at Menzeistrasse 7, 14467 Potsdam, Germany for supply of Prime Steel Billets and entered into a sales contract dated 20.08.2013 copy of which is at Annexure P-4 with the petition filed in the High Court. As per the terms of the contract, the payment for the supply was to be made within 180 days from the date of Bill of Lading. Goods were supplied vide Invoice No. H-0-11/13-IIIR dated 18.09.2013 worth USD 53,54,240.00 and copy of this invoice is at Annexure P-5. Two Bills of Exchange were drawn by AIC Handels GmbH dated 15.03.2014 in respect of aforesaid supply. Bills of Exchange were payable at Punjab and Maharashtra Co-operative Bank Limited, Bhandup West, Mumbai. These Bills of Exchange were accepted by the respondent. The respondent acknowledged the receipt of the goods as per the contract without any demur. The said acknowledgement is dated 21.09.2013 at Annexure P-7.

8. The supplier AIC Handels GmbH executed a Forfeiting Agreement dated 09/10.10.2013 with the present petitioner which is engaged in the business of banking and providing several banking solutions to the companies engaged in the export business. The petitioner, therefore, claims itself to be an Operational Creditor on the basis of an assignment in favour of the petitioner by the supplier. Copy of the Agreement aforesaid is at Annexure P-8. The factum of assignment of rights was conveyed to the

respondent vide letter dated 04.10.2013 which was received and duly acknowledged by the respondent company.

9. The respondent, in reply to this petition, has contested the claim. It is stated in the reply that the respondent disputed the claim at various stages. Going into the dispute, respondent has also filed several suits in the Bombay High Court which are still pending. The claim is also opposed on other grounds that there is no privity of contract between the parties and that the petitioner is not an Operational Creditor, apart from other averments, though these are not being discussed in this case because of the settled legal position.

10. I have heard learned counsel for the parties and perused records.

11. The first legal issue is whether there is a valid demand notice in terms of Section 8 of the Code. The notice in this case was sent to the respondent-corporate debtor through Mr. Kanwalvir Singh Kang, Advocate and not by the Operational Creditor individually. There was no specific document of authority executed by the petitioner in favour of Mr. Kanwalvir Singh Kang, Advocate for issuance of demand notice to the corporate debtor on its behalf. It was held by the Hon'ble National Company Law Appellate Tribunal in **Uttam Galva Steels Limited Vs. DF Deutsche Forfait AG & Anr. Compnay Appeal (AT) (Insolvency) No.39 of 2017** that an 'Advocate/Lawyer' or 'Chartered Accountant' or 'Company Secretary' in absence of any authority of the Board of Directors, and holding no position with or in relation to the Operational Creditor cannot issue any notice under Section 8 of the I&B Code. It was observed in the said case that there was

nothing on record to suggest that the lawyer holds any position with or in relation with the Respondents and such a notice cannot be treated as a notice under Section 8 of the Code. It would be seen that even the statutory notice dated 11.10.2016 under Section 434 of the Companies Act, 1956 was sent through the advocate.

12. The other issue pertains to non-filing of the copy of statement of the Bank Account where deposits are made or credits received normally by the Operational Creditor in respect of the debt of the Corporate Debtor as per requirement of serial No.7 of Part V of Form No.5 or the Certificate from the Financial Institution in terms of Section 9(3)(c) of the Code. The filing of the certificate from the financial institution under Section 9(3)(c) of the Code has been held mandatory by the Hon'ble National Company Law Appellate Tribunal in **Smart Timing Steel Ltd. Vs. National Steel and Agro Industries Ltd. Company Appeal (AT) (Insolvency) No.28 of 2017**. Section 9(3)(c) of the Code requires the Operational Creditor to furnish along with the application copy of the certificate from the financial institutions maintaining the accounts of the Operational Creditor confirming that there is no payment of unpaid operational debt made by the corporate debtor. The term 'Financial Institution' is defined in Section 3(14) of the Code and meaning –

" (a) a scheduled bank; (b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934; (c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013; and (d) such other institution as the Central Government may by notification specify as a financial institution."

13. In this case the petitioner has relied upon a document Annexure-17 dated 06.03.2017 issued by Misr Bank, Europe GmbH stating that the amount of disputed transaction has not been received from the respondent-corporate debtor. Exactly same was the situation with regard to the certificate in **Uttam Galva Steels Limited** (supra). The Hon'ble National Company Law Appellate Tribunal held that the certificate dated 06.03.2017 issued by Misr Bank which is a foreign Bank and is not recognised as a 'Financial Institution' being foreign Bank, it was held that in the absence of such a certificate from a 'notified Financial Institution', the application under Section 9 of 'I&B Code' is not maintainable.

14. It was also observed by the Hon'ble Appellate Tribunal in **Smart Timing Steel Ltd.**(supra) that the argument that operational creditor having no office in India or having no account in India with any of the Financial Institution will suffer to recover the debt as due from Corporate Debtors cannot be accepted. It was observed that apart from the Insolvency and Bankruptcy Code, 2016, there are other provisions for recovery like suit which can be preferred by any person.

15. In view of the above categorical findings, there is no need for having detailed discussion on the other aspects of the case especially to discuss whether there is an existence of a dispute. The instant petition is thus rejected. Copy of this order be communicated to the parties.

Sd/-
(Justice R.P.Nagrath)
Member (Judicial)

September 22, 2017
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