

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW  
DELHI**

**Company Appeals (AT) (Insolvency) No.53 of 2017**

**IN THE MATTER OF:**

**Seema Gupta**

**...Appellant**

**Vs**

**Supreme Infrastructure India Ltd & Ors  
...Respondents**

**Present: Mr. P. Nagesh with Mr. Ashutosh Gupta and Mr.  
Dhruv Gupta, Advocates for the appellant.**

**ORDER**

**25.05.2017-** This appeal has been preferred by the appellant who claims to be the operational creditor against the order dated 10<sup>th</sup> March, 2017 passed by the Learned Adjudicating Authority (National Company Law Tribunal) Mumbai Bench whereby and whereunder the application preferred by appellant for initiation of Corporate Insolvency Resolution process under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") has been rejected.

Learned counsel for the appellant submitted that the application preferred by appellant under Section 9 cannot be rejected at the threshold on the ground of technicalities that the notice has not been issued under Section 8 of the I&B Code. It is contended that earlier a notice was issued under earlier Section 433 and 434 of the Companies Act, 1956 which provides for statutory period of 21 days as against notice period of 10 days enshrined under Section 8 of I&B Code. He placed reliance on

Section 6(B) of the General Clauses Act but it is not necessary to discuss all such submissions in view of the provisions of law, as discussed below.

Before filing of an application under Section 9 it is mandatory to issue a notice under Section 8 of I&B Code, 2016, relevant of which reads as follows:

*“8(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.”*

Section 9 mandates filing of the petition only after expiry of the period of 10 days from the date of delivery of notice or invoice demanding payment under sub-section (1) of Section 8, which reads as follows:

*“9(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.”*

From the aforesaid provisions it will be clear that without a notice under sub-section (1) of Section 8, no application can be preferred under Section 9 of I&B Code.

Similar question was considered by this Appellate Tribunal in **“Era Infra Engineering Ltd Vs Prideco Commercial Projects Pvt Ltd, Company Appeal (AT)(Ins) No.31 of 2017”**. In the said case the Appellate Tribunal vide judgement dated 3<sup>rd</sup> May, 2017

rejected the similar contentions that a notice issued to corporate debtor under provision of the Companies Act, 2013 for winding up and the Appellate Tribunal held as follows:-

*“On notice, the Respondent/Operational Creditor has appeared and filed reply affidavit. Ld. Counsel appearing on behalf of Operational Creditor while accepted that no notice under Section 8 of I & B Code, 2016 was served on the Appellant/Corporate Debtor, it is submitted that the other formalities were completed. It is further submitted that earlier a notice was issued to the Appellant/Corporate Debtor under Section 271 of the Companies Act, 2013 for winding up which should be treated to be a notice for the purpose of section 8 of the I&B Code, 2016. However, such submissions made on behalf of the Operational Creditor cannot be accepted in view of the mandatory provision under section 8 of the I & B Code read with Rule 5 of Insolvency and Bankruptcy, (application to Adjudicating Authority) Rules, 2016.”*

In view of the discussions made above, while we hold that giving a prior notice under Section 8 of I&B Code is mandatory before initiation of interim resolution process, such notice having not been issued in this case, the adjudicating authority rightly rejected the application.

We find no merit in appeal. It is accordingly dismissed.

(Justice S.J. Mukhopadhaya)  
Chairperson

(Mr. Balvinder Singh)  
Member (Technical)