

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (Court-II)

(IB)-219/ND/2021

IN THE MATTER OF:

Tudor India Pvt. Ltd.

704-A, Synergy, Corporate Road

Prahlad Nagar, Ahemdabad

Gujarat-380015

...Operational Creditor

VERSUS

Servotech Power Systems Limited

806, 8th Floor, Crown Heights

Hotel Crown Plaza

Sector 10, Rohini

New Delhi-110085

... Corporate Debtor

Section: 9 of IBC, 2016

Order Delivered on : 02.07.2021

CORAM:

SH. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Petitioner : Mr. Ramakant Rai, with Mr. Yashish Chandra Advocates

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

The present petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity '**IBC, 2016**') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity '**the Rules**') by M/s Tudor India Pvt. Ltd. (for brevity '**Operational Creditor**') through its authorized representative Mr. Gunjan Johri, who is duly authorized vide Board Resolution with a prayer to initiate the Corporate Insolvency process against M/s Servotech Power Systems Ltd. (for brevity '**Corporate Debtor**').

2. The Operational Creditor namely, M/s. Tudor India Pvt. Ltd is a Private Company incorporated under the provisions of the erstwhile Companies Act, 1956 on 03.01.1986 with CIN No. U31109GJ1986 PTC038908, having its registered office at 704-A, Synergy Corporate Road, Prahlad Nagar, Ahmedabad, Gujarat - 380015.

3. The Corporate Debtor namely, M/s Servotech Power Systems Ltd. is a Private Company incorporated under the erstwhile Companies Act, 1956 with CIN No. L31200DL2004PLC129397, having its registered office at 806, 8TH Floor, Crown Height, Hotel Crown Plaza, Sector-10 Rohini, New Delhi-110085.

4. The Authorized Share Capital of the Corporate Debtor is Rs. 19,00,00,000/- and Paid-up Share Capital of the Company is Rs.18,31,00,000/- as per the Master Data of the Corporate Debtor.

5. That this Petition filed under Section 9 of IBC, 2016 was listed for the first time before this Adjudicating Authority on 16.04.2021.

6. That on the preliminary hearing, it was observed that the Demand Notice issued by the Petitioner under Section 8 of IBC 2016 is based on invoices and is sent in Form 3 and not in Form 4. Therefore, a specific query was raised from the Operational Creditor as to how the Demand Notice based on invoices issued in Form 3 is in compliance of Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

7. That before looking into other aspects of the Petition, it was decided to examine the validity of the demand notice that was issued by the Operational Creditor. Accordingly, the arguments were heard on this limited aspect and order was reserved on the issue : “Whether the Demand Notice based on invoices sent by the Operational creditor was in compliance of Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ?”

8. That during the course of hearing, it was submitted by the Ld. Counsel appearing for the Operational Creditor that the Demand Notice dated 22.04.2020 sent in Form 3 on the basis of invoices is in terms of Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the contents of which reads as below -

Demand notice by operational creditor

5. (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely :-

(a) a demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

9. In the light of the above provision, it was submitted by the Ld. Counsel for the Operational Creditor that the Legislature has cast the word 'or' between the options provided at serial (a) and (b) under Rule 5(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which gives a choice to the Operational Creditor for selecting an appropriate Form.

10. That while arguing his case, the Counsel for the Operational Creditor dwelt on the para 37 of the Judgement of Hon'ble NCLAT in the matter of **Neeraj Jain Vs Cloudwalker Streaming Technologies Private Limited in Company Appeal (AT) (Insolvency) No. 1354 of 2019, which reads as :**

“37 Thus if the demand notice is sent in Form 3, then the Operational Creditor has to submit the

document to prove the existence of operational debt and the amount in default along with the notice. The said document may either be invoice or any other document to prove the existence of the operational debt and the amount in default. This situation may arise when the operational debt, is of such nature where no invoice is generated. For example, if an operational debt is relating to the salary dues of an employee, then, in that case, the operational creditor will not have any invoice.”

11. In the light of the above Judgement, it was submitted further by the Ld. Counsel for the Operational Creditor that when the Demand Notice under Section 8 of IBC, 2016 is sent in Form 3, either invoice or other document is necessary to be annexed.

12. At this stage, we feel it necessary to go through the **Judgement of the Hon’ble NCLAT dated 24.02.2020** passed in the matter of **Neeraj Jain Vs Cloudwalker Streaming Technologies Private Limited in Company Appeal (AT) (Insolvency) No. 1354 of 2019** (for brevity, hereinafter referred as Neeraj Jain Case).

13. However, before discussing the principles laid down by the Hon’ble NCLAT in the aforesaid Judgement, it is necessary to visit the facts of the of Neeraj Jain case The relevant facts as narrated in the Judgement are reproduced below :

“7. The instant Appeal is filed mainly on the following grounds; that the Impugned Order has been passed without appreciating the fact that the Operational Creditor has not produced any

documentary evidence, including but not limited to purchase orders, acceptance letters, invoices and proof of any intimation of sale to the end customers or any post-delivery services with specific reference to the amounts sought to be claimed by the Respondent; that the Learned Adjudicating Authority has ignored the settled position of law that a claim for damages cannot amount to an operational debt; that the Learned Adjudicating Authority has failed to appreciate that a mere claim for damages, does not even amount to “operational debt” within the meaning of the debt and so the Corporate Debtor can’t be treated to have committed default; that the Adjudicating Authority has failed to determine, whether such an amount claimed, was due and payable, under the terms of the Supply Agreement.

8. Ld. Counsel for the Operational Creditor submits that it is the discretion of the Operational Creditor, to either send the demand notice under Form 3 or send an invoice demanding payment of the amount due as per Form 4 of the Adjudicating Authority Rules, 2016. In case, the operational creditor prefers for the first option; then in that situation, it is not required to send a copy of the invoice along with the Demand Notice. It is further contended by him that if notice is sent in Form 3, then it is also not necessary to submit the invoice along with the Application in Form 5.”

14. From the aforesaid facts of the case, it can be inferred that the Demand Notice in the Neeraj Jain case was sent in Form 3 and no invoice was annexed along with the Demand Notice. A further plea was taken by the Operational Creditor in that case that it was the discretion of the Operational Creditor to either send the demand notice in Form 3 or send a copy of an invoice along with the Demand Notice in Form 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. In

case the operational creditor prefers to exercise the first option and decides to send demand notice in Form 3, it is not required to send a copy of the invoice along with the Demand Notice.

15. Now, after having gone through the background facts of the Neeraj Jain case, we visit the major findings of the Hon'ble NCLAT in the said Judgement, which are reproduced below :

*"43. However, it cannot be the discretion of the Operational Creditor to deliver the Demand Notice in Form 3 even if the operational debt involves transactions **where corresponding invoices are generated but are not filed in court on the pretext that the Operational Creditor has chosen to send the Notice in Form 3.**"*

*"44. The use of the phrase, 'deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved' in Section 8(1) does not provide the Operational Creditor, with the discretion to send the demand notice in Form 3 or Form 4 as per its convenience. **Rather, it depends directly on the nature of the operational debt and applicability of Form 3 or Form 4 as per the nature of the transaction.**"*

*"45. It is important to mention that legislative provisions are made with a larger perspective to deal with all the eventualities that may arise in the implementation of the said provisions. **Therefore, the use of the word "OR" in Section 8 cannot be interpreted as such, that the Insolvency and Bankruptcy Code has provided a choice or a discretion to an Operational Creditor, to provide an escape route from submission of the invoice, which can be treated as the most relevant document to prove the debt and amount in default.**"*

16. That now, if we compare the facts of the aforesaid case with the facts of the present case in hand, the major difference we find is that no invoice was ever attached with the demand notice by the Operational Creditor in the Neeraj Jain case, whereas the Operational Creditor in the present case has annexed the invoices as 'document' along with the demand notice sent in Form 3 prescribed under Rule 5(1) of the Rules, 2016, as required in column 7 of the Form 3.

17. At this juncture, we also consider it proper to refer to the Judgement of Hon'ble NCLAT passed subsequently on **15.02.2021** in the matter of **Aparna Enterprise Ltd. Vs SJR Prime Corporation Pvt. Ltd.** in **Company Appeal (AT) (Insolvency) No. 632 of 2020**, wherein discussion is made as to which of the judgements including the **Neeraj Jain case** shall not be applicable in that case. That the facts regarding 'annexing of invoices' was held as one of the exception in the aforesaid discussion. The relevant extract of the aforesaid Judgement are reproduced below :

"5.....

The Appellant has also clarified the inapplicability of the judgements cited by the Respondent and the same are reproduced below :

Neeraj Jain Vs. Cloudwalker Streaming Technologies Pvt. Ltd and Ors, Company Appeal (AT) (Ins) no. 1354 of 2019.

Facts : the said appeal was filed by the erstwhile director of the Corporate Debtor. The present appeal arose out of an order passed by the ld. Adjudicating Authority, wherein the ld

Adjudicating Authority had admitted the application under section 9 of IBC, 2016.

Distinguishing note:

Hon'ble NCLAT in the present judgment had set aside the judgment Passed by the ld. Adjudicating Authority wherein the CIRP was initiated against the Corporate Debtor.

Hon'ble NCLAT held that the operational Creditor failed to submit any documents to prove the existence of the operational debt and the amount in default. Furthermore, the operational creditor had also failed to submit the copies of the invoice, copy of bank statement and relevant documents. (Para 79 @ 34-35 of judgment). *The Operational Creditor had issued a notice for payment of due, failing which the dispute shall be referred to arbitration. (Para 79 @ 34 – 35 of judgment).*

Whereas, the said case is not applicable in the present proceedings since, the debt herein is due, admitted and defaulted:

- *The Respondent provided a Reconciled balance confirmation vide emails dated September 21, 2019 and September 25, 2019 for Rs. 6,80,57,809 (Page No. 68 – 70 of Appeal)*
- ***Appellant has attached the Invoices for Rs.7,46,286 raised by the Appellant between the period of September 18, 2019 to October 10, 2019 – invoices duly acknowledged by the Respondent (Page No. 8-9; 144-169 of Appeal)."***

18. Keeping in mind the facts of the instant case, we come across other subsequent Judgements of Hon'ble NCLAT, where CIR Process has been initiated on the basis of the Demand Notice issued in Form-3 attaching therewith invoices. The examples of such Judgements worth quoting are:

a) **Anil Duggal Vs Roofs and Ceilings Pvt. Ltd. Judgement
Dated 02.03.2020 Company Appeal (AT) (Insolvency)
No. 189 of 2020**

"2. The brief facts as stated in the petition are as follows;

*The Applicant contends that the Corporate Debtor approached the operational creditor for the supply of material for roofing etc., carpet export mart, BIDA Carpet City, Bhadohi, UP, and accordingly issued the purchase order No. 37 dated 18th October 2016. Under the said purchase order, the Applicant supplied the materials at the said site as per terms of the purchase order, and further **invoices** were raised by the Applicant/operational creditor."*

"20. In the circumstances, it is clear that the Corporate Debtor failed to make the payment despite service of the demand notice issued under Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority Rules, 2016). The Corporate Debtor neither made the payment nor sent any notice of dispute and the alleged outstanding amount of more than Rs 1,00,000/- (Rupees one lac). There is sufficient evidence on record to prove the amount due and payable against the Corporate Debtor in the circumstances.

21. In the circumstances stated above, we are of the considered opinion that the service of the demand notice on the corporate debtor was proper. Despite service of notice

under Section 8(1) of the I & B Code, 2016 the Corporate Debtor neither made the payment not raised any dispute of the outstanding amount....”

b) **SMS Integrated Facility Services Private Limited Vs
Expat Educational Institute Order dated 23.04.2021
Company Appeal (AT) (CH) (Insolvency) No.41 of 2021,**

where the Chennai Bench of Hon’ble NCLAT held that :

*“6. It is also relevant to point out here that consideration of mere debt and default in question, without knowing/serving notice on the information notice on even the Corporate Debtor, would be futile exercise. Even the information furnished on behalf of the Petitioner, as stated supra, would be of no use. The Adjudicating Authority cannot come to conclusion basing on one side version of the Petitioner. And the Corporate Debtor is stated to have cleared all the invoices of the Operational Creditor till the month of February, 2017. As stated supra, claim in question relates to the year 2017, for which the Petitioner issued **Demand Notice in Form 3** only on 12th June, 2019 and thereafter filed the instant Petition. Though **invoices** in question contemplate payment within 10 days, failing which it carries an interest @24% p.a, the Petitioner has not initiated any legal proceedings prior to the instant Proceedings and the Petitioner has not explained the reasons for not initiating proceedings earlier.”*

*“16.....**In fine, the instant ‘Appeal’ Comp App (AT) (Ch) (Ins) No. 41/2021 is allowed.** No costs. The impugned order dated 23.02.2021 passed by the Adjudicating*

Authority in CP (IB) No. 79/BB/2019 is set aside. The Adjudicating Authority is directed to restore the CP (IB) No. 79/BB/2019 to its file and to pass an ‘order of admission’ of the petition (filed under section 9 of the I & B Code, 2016) and proceed further in accordance with Law and in the manner known to Law.”

19. To check whether the issuance of Demand Notice basing on Invoices in Form 3 instead of Form 4, will jeopardize the rights of the parties or will cause prejudice to any of the party, it is necessary to compare title, subject and contents of Form 3 with Form 4. That when one compares the title of the Form 3 (*FORM OF **DEMAND NOTICE / INVOICE DEMANDING PAYMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016***) with Form 4 (*FORM OF **NOTICE WITH WHICH INVOICE DEMANDING PAYMENT IS TO BE ATTACHED***), one finds that the term ‘**invoice**’ is mentioned in the Titles of both Form 3 and Form 4.

20. Further, when we compare the Subjects of Form 3 (***Demand notice/invoice demanding payment in respect of unpaid operational debt due from [corporate debtor] under the Code***) with that of Form 4 (***Notice attached to invoice demanding payment***), one notices that the Form 4 is merely a Notice/cover page of the Invoice, whereas the subject of Form 3 clearly recognizes the term ‘Invoice’ demanding payment in respect of unpaid “operational debt”. The term “Operational Debt” is defined under Section 5(21) of IBC 2016 as below :

*“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.”*

Thus, the definition of the “Operational Debt” includes the debt arising out of the provision of Goods and Services, which invariably are supplied against invoices. Thus, for establishing the default of the Operational Debt obviously there shall be invoices which are recognized under Column 7 (**List of documents attached** to this application in order to prove the existence of operational debt and the amount in default) of the Form 3 as an attachment to the other Documents. Similar finding is given in Para 37 of the Neeraj Jain Case (Supra), which is reproduced below :

*“37. Thus, if the demand notice is sent in Form 3, then the Operational Creditor has to submit the document to prove the existence of operational debt and the amount in default along with the notice. **The said document may either be invoice or any other document to prove the existence of the operational debt and the amount in default.** This situation may arise when the operational debt, is of such nature where no invoice is generated. For example, if an operational debt is relating to the salary dues of an employee, then, in that case, the operational creditor will not have any invoice.”*

21. It is further observed that subject of the Form 3 is Demand Notice/invoice, which requires the Operational Creditor to give comprehensive details of the operational debt in columns from 1 to 7 like Total amount of debt, Date of Default, Calculation of reaching the amount of Default, Particulars of Security held, Record with Information Utility etc. However, in contrast, the Form 4 provides an escape route to the Operational Creditor from disclosing these important facts.

22. Furthermore, the Form 3 educates the Corporate Debtor about its statutory right of sending the notice of dispute within 10 days from the receipt of demand notice. In addition to this, the Form 3 gives an opportunity to the Corporate Debtor in line with Section 8(2)(b) of IBC, 2016 to demonstrate a situation where a debt claimed is already discharged. Per contra, no such provisions are contained in Form 4, which rather keeps the Corporate Debtor in dark, who may not be that aware of the detailed provisions of IBC, 2016.

23. Hence, one finds that no prejudice can ever be caused to any of the parties if the Demand Notice based on Invoices is sent in Form 3.

24. Even if we assume that the Demand Notice with Invoices has to be sent in Form 4 only, quoting of incorrect Section or erroneous label cannot be a ground of dismissal of an Application as held by Hon'ble Supreme Court in the matter of **Vijaya Bank Vs Shyamal Kumar Lodh Civil Appeal No. 4211 and 4212 of 2007 dated 6th July, 2010** :

“16Incorrect label of the application and mentioning wrong provision neither confers jurisdiction nor denudes the Court of its jurisdiction. Relief sought for, if falls within the jurisdiction of the Court, it cannot be thrown out on the ground of its erroneous label or wrong mentioning of provision.....”

25. Holding the aforesaid presumption still true, if invoices are attached with Form 3 instead of Form 4, then what remains is only the incorrect label. Further, the applicability of which Form needs to be sent, is a procedural law and the Hon’ble Supreme Court has held in the matter of **Macquarie Bank Limited vs Shilpi Cable Technologies Ltd Civil Appeal No.15135 Of 2017, that :**

“32.....it is well settled that procedure is the handmaid of justice and a procedural provision cannot be stretched and considered as mandatory, when it causes serious general inconvenience. As has been held in Mahanth Ram Das v. Ganga Das (1961) 3 SCR 763 at 767-768.”

26. However, we would still like to see - whether the Operational Creditor in the present case has delivered the Demand Notice in terms of Section 8(1) of IBC 2016 in the light of its interpretation by the Hon’ble NCLAT in the Neeraj Jain case. For that, we would like to refer to Section 8(1) of IBC 2016 and extract of Para 45 of the Neeraj Jain Judgement :

Section 8(1) of IBC, 2016 :

*“8. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt **or** 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.”

Para 45 of the Neeraj Jain Judgement :

*“45 It is important to mention that legislative provisions are made with a larger perspective to deal with all the eventualities that may arise in the implementation of the said provisions. Therefore, **the use of the word “OR” in Section 8 cannot be interpreted as such, that the Insolvency and Bankruptcy Code has provided a choice or a discretion to an Operational Creditor, to provide an escape route from submission of the invoice**, which can be treated as the most relevant document to prove the debt and amount in default.”*

27. From the collective reading of both the provision under section 8(1) of IBC 2016 and Para 45 of the Neeraj Jain Judgement, we observe that the law laid down by Hon’ble NCLAT is primarily to curb the practice of not annexing invoice(s) in a transaction, where invoice(s) is not only generated but is also a relevant document to prove the existence of default. In the instant case, the Operational Creditor has sent the demand notice along with copy of the unpaid invoice. Further, the said Judgement has not expressly dealt with the interpretation of Rule 5 of I&B (Application to Adjudicating Authority) Rules 2016, which could be applied as a thumb rule for each and every case. Therefore, we are of the view that in the present case, the Demand Notice has been sent in letter and spirit of Section 8(1) read with Rule 5(1) of I&B (Application to Adjudicating Authority) Rules, 2016.

28. We, therefore, conclude that the facts of the Neeraj Jain Case decided by Hon'ble NCLAT were different from the facts of the present case inasmuch as no invoice was ever sent by the Operational Creditor in that case, whereas the Operational Creditor in the present case has annexed the invoices with its demand notice sent in Form 3. Hence, the conclusion made in the aforesaid Judgement is binding on this Adjudicating Authority only in a situation where invoice is not only generated but is also a relevant document to prove the existence of default but the same is not annexed with the Demand Notice sent in Form 3 or Form 4.

29. Accordingly, **we hold that in a situation where an Operational Debt arises out of the provision of goods and services and pursuant to that Invoices are raised, there is no illegality in choosing the Form 3 as provided in Rule 5(1)(a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for sending the Demand Notice provided that the Unpaid Invoices forming part of the transaction are annexed therewith. Hence, issuance of Demand Notice in Form 3 annexed with invoices by the Operational Creditor in the present case would be in order in terms of the Rules.**

30. However, nothing expressed in this order shall be construed as an opinion on either merits of the Petition or any other aspects thereof including Service of Demand Notice, Pre-existing Dispute, Limitation etc.

31. List this matter for hearing on 12.07.2021 on the point of delivery of Demand Notice to the Corporate Debtor, pecuniary jurisdiction, limitation etc.

-S/d-
(L. N. Gupta)
Member (T)

-S/d-
(Abni Ranjan Kumar Sinha)
Member (J)