

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
APPELLATE JURISDICTION
Company Appeal(AT)(Insolvency) No. 524 of 2020**

[Arising out of Impugned Order dated 21st January, 2020 passed by the 'Adjudicating Authority'/National Company Law Tribunal, Ahmedabad Bench, Ahmedabad in CP(IB) No. (IB) 245/9/NCLT/AHM/2018]

IN THE MATTER OF:

M/s IDBI Capital Markets & Securities Ltd.

Mafatlal Centre, 3rd Floor,
Nariman Point,
Mumbai- 400 021

Presently at:

6th Floor, IDBI Tower,
World Trade Centre, Cuffee Parada,
Mumbai – 400 005

...Appellant

V

M/s JBF Petrochemicals Ltd.

Survey No. 273,
Village Athola
Dadra Nagar Haveli
Silvassa – 396 230

...Respondent

Present:

For Appellant : Ms. Pratiksha Sharma and Mr. Kunal Kanungo, Advocates.

For Respondent : Mr. Shiv Kumar Suri, Ms. Madhu Suri, Ms. Nikita Thapar and Ms. Prerna Wagh, Advocates

**J U D G M E N T
(Virtual Mode)**

M. Venugopal, (J):

BACKGROUND

The Appellant/Applicant/Operational Creditor has preferred the instant Company Appeal (AT)(Insolvency) No. 524 of 2020 before this Tribunal being dissatisfied with the order dated 21st January, 2020 in C.P. No. (IB) 245/9/NCLT/AHM/2018 (filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 r/w Rule-6 of The Insolvency and Bankruptcy (Application to Adjudicating Authority, 2016) passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad, Ahmedabad). While passing the impugned order on 21.01.2020 in CP(IB) No. (IB) 245/9/NCLT/AHM/2018 at paragraphs 14 to 21 had observed the following:-

14. *“On perusal of the records it is found that the respondent company had approached the applicant to assist in arranging working capital requirement of maximum Rs. 2000.00 crores (including SBLC of Rs. 550.00 Crores to be given to ONGC Mangalore Petrochemicals Limited) or lower amount as per assessment of working capital of lead bank. According to the offer letter dated June, 2016 (page 20 to the application) the applicant was entitled to the following payment terms: -*

<i>Sl. No.</i>	<i>Milestone</i>	<i>Amount in Lacs</i>
<i>01.</i>	<i>Commencement of fee</i>	<i>20.00</i>
<i>02.</i>	<i>On issuance of sanction letter by IDBI Bank</i>	<i>30.00</i>
<i>03.</i>	<i>On financial closure*</i>	<i>Balance fee</i>
	<i>Total fees payable</i>	<i>200.00</i>

15. On perusal of the records it is found that with respect to the first invoice dated 17th June, 2016 for Rs. 23.00 lacs (page 34 to the petition), the corporate debtor has already made payment of Rs. 20.00 lacs. With respect to the second invoice dated 30th December, 2016 (page 35 to the petition) and third invoice (page 36 to the petition) are not due and payable for the reasons as stated in the reply dated 28.03.2018 filed by the respondent at page No. 57 as Annexure-“A”, wherein the corporate debtor has categorically stated that the corporate debtor has only received sanction letter from IDBI bank Limited for an amount up to Rs. 360.00 crores and that amount has not been disbursed till date. Thus, the purpose of engaging the services of the operational creditor for assistance in providing working capital has not been fulfilled. Even the operational creditor has also failed to produce any document(s) with regard to disbursement of the amount in favour of the corporate debtor.

16. On perusal of the records it is also found that the operational creditor's demand notice dated 21.03.2018 has been replied by the respondent vide letter dated 27.03.2018 (page 59 to the reply by respondent) thereby raising a bona fide and genuine dispute and the said fact has not been disclosed by the applicant. On the contrary the petitioner by way of affidavit sworn that the corporate debtor has not raised any dispute.

17. It is also a matter of record that the corporate debtor has filed the affidavit in support of application, however the same is not executed in non-judicial paper nor any court fee is paid. Further, paragraph No. 2 of the General Affidavit verifying the petition annexed at page No. 45 of the application is not complete and spaces are kept vacant. Genuineness of the document is doubtful as to how the Public Notary has put his seal and signature in an incomplete document.

18. The Hon'ble Supreme Court in **Mobilox Innovations (supra)** gave a very wide meaning to the term '**the existence of a dispute**'. The Hon'ble Supreme Court held that word 'and' appearing in clause (a) of sub-section (2) of Section 8 must be read as 'or' keeping in mind the legislative intent and the fact that anomalous situation would arise if it is not read as 'or'. By reading it as 'and' the bankruptcy cases would be stave off only where the cases are pending and the cases where dispute has arisen just few days back or where the limitation for filing cases is not over may be published in to insolvency process, though a dispute may exist. The code is designed in a manner that operational creditors with small debt are not able to push corporate debtor into premature insolvency resolution process it is enough that dispute exists between the parties.

19. Thus it is established that there is pre-existing dispute in as much as the operational creditor has totally failed to provide the services to the corporate debtor as till date not a single penny is disbursed in favour of the corporate debtor as agreed by the operational creditor, though the corporate debtor has paid an amount of Rs. 20.00 lacs as process fee.

20. On perusal of the records it is also found that on the basis of resolution passed on 26th October, 2017 and Office Circular dated 21.11.2017, Ms. Christina D'souza – Utpal Mehta, to initiate CIRP proceedings against the respondent company and, accordingly, Mr. Utpal Mehta has signed and filed the instant petition on behalf of the applicant. Further, on perusal of the record it is found that Ms. Christina D'souza, Company Secretary and Compliance Officer authorised Mr. Utpal Mehta vide authority letter dated 23.04.2018 (page 10 of application) to file application under Section 9 of the I & B Code 2016, before the NCLT, Kolkata bench only, not Ahmedabad.

21. Further, by way of an Officer circular dated 21.11.2017 (page 14 of the application Mr. Garla delegated power to inter alia 'file applications on behalf of the company before Tribunals to Mr. V. Gopinath and Ms. Christina D'souza, company secretary and compliance officer (page 17 of the application, point 4b0. No express power to sign an affidavit in support of application to be filed before the Tribunal or court was conferred by Mr. Garla on Mr. Gopinath or Ms. D'souza.

In clauses 4a and 4d at serial No. 5 of the office circular relating to filing before the government and governmental authorities the word 'sign' has been expressly mentioned whereas the same stands omitted in 4b suggesting that the delegator of power know the exact nature of power being delegated by him. Thus, power delegated to Ms. Christina by Mr. Garla is the power only to 'file' applications or lodge the same with the registry on behalf of the company and not 'sign' affidavit in support of the applications. Since Ms. Chritina herself did not possess authority to sign affidavit on behalf of the company, she could not have further authorised Mr. Utpal Mehta to sign affidavit in support of the application on behalf of the company."

and dismissed the 'Application' as devoid of merit without costs.

APPELLANT'S CONTENTIONS:

2. According to the Learned Counsel for the Appellant/Applicant/Operational Creditor, the impugned order of the 'Adjudicating Authority' dated 21st January, 2021 in CP(IB) No. (IB) 245/9/NCLT/AHM/2018 is not sustainable because of the fact that the same was passed by not taking into account 'Balance Of Confirmation' dated 30.10.2017 in and by which the debt of liability was admitted and affirmed by the Respondent/'Corporate Debtor'. The Learned

Counsel for the Appellant contends that the 'Adjudicating Authority' had not appreciated the fact that there existed a sum of more than Rs. 1 Lakh especially when the Respondent/'Corporate Debtor' had admitted to have paid only a sum of Rs. 20 Lakhs for invoice of Rs. 23 Lakhs (Rupees Twenty-Three Lakhs). It is furnished by the Appellant that it was not given the opportunity to rectify the procedural defects as per proviso of Section 9(5)(ii)(a) of Insolvency and Bankruptcy Code, 2016 (in short '**IBC**').

3. The Learned Counsel for the Appellant refers to Section 3(12) of IBC defined 'default' as non-payment of debt when whole or part or instalment of the amount of the debt had become due and payable and was not paid by the 'Debtor' or 'Corporate Debtor'. Further, there is an admitted default of Rs. 3 lakhs by the Respondent/'Corporate Debtor' without any dispute.

4. The Learned Counsel for the Appellant proceeds to point out that as per Section 8 of the IBC 'Dispute' must exist before the receipt of 'Demand Notice' and in the instant case, for the first time, the Respondent/'Corporate Debtor', in reply the 'Demand Notice' mentioned about any non-compliance of the Agreement and further that the Respondent/'Corporate Debtor' had not produced even a single document to show that he had instituted a suit or arbitration nor sought any communication showing the dispute before receiving the 'Demand Notice'.

5. The Learned Counsel for the Appellant projects an argument that the 'Adjudicating Authority' had committed an error in coming to the conclusion that the dispute raised in the Reply to the 'Demand Notice' is pre-existing one as per Section 8 of IBC. The Learned Counsel for the Appellant brings to the notice of this Tribunal that the 'Adjudicating Authority' had failed to apply the decision of

the Hon'ble Supreme Court in the matter of "**Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.**" **reported in (2018) 1 SCC 353**) and came to an erroneous conclusion that there existed a pre-existing dispute in the instant case.

6. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' had wrongly held that the Appellant had failed to honour its obligation under the 'Offer Letter' inasmuch as the said finding arrived at by it was contrary to its own finding wherein it was inferred that the Respondent/'Corporate Debtor' had in fact received Sanction Letters and in terms of the Offer Letter of June, 2016, the Respondent/'Corporate Debtor' was to make payment of Rs. 30 Lakhs on issuance of the said Sanction Letter. Moreover, the Respondent/'Corporate Debtor', according to the Appellant, despite the suit as well as an Invoice of Rs. 30 lakhs, had failed to make the payment to the Appellant/'Operational Creditor' and on this score alone, the Application under Section 9f of IBC filed before the 'Adjudicating Authority' by the Appellant is to be allowed in the interest of justice.

7. The Learned Counsel for the Appellant refers to an Agreement in June, 2016 entered into between the Appellant/'Operational Creditor' and the Respondent/'Corporate Debtor' for Assistance in Arrangement in working capital facilities and the said 'Offer Letter' clearly mentioned that the same was signed for Assistance in Arrangement in working capital facilities for the Respondent/'Corporate Debtor' and the remuneration was to be paid in terms of Clause -9 thereof.

8. The Learned Counsel adverts to Clause-16 of the 'Offer Letter' stating that the same is not cannot under any circumstances be construed as constituting of the commitment by the Advisor to provide to provide any advances, loans or

financing in any form to the Companies or any third party. Furthermore, this 'Letter of Offer' was exclusively meant for the Company for the purposes of outlining the Scope of services as envisaged by the Advisory and should be treated as strict confidence.

9. The Learned Counsel for the Appellant points out that as per the Terms of Services provided as per the 'Offer Letter', the Appellant/Operational Creditor/Applicant raised three invoices dated 17.06.2016, 30.12.2016 and 31.03.2017 for a sum of Rs. 23 lakhs, Rs. 30 Lakhs and Rs. 45 Lakhs respectively. In this connection, the Learned Counsel for the Appellant takes a stand that the Respondent/'Corporate Debtor' had not raised any 'dispute' in regard to the amount of the Services provided by the Appellant/Operational Creditor and in fact, made a part payment of Rs. 20 Lakhs in respect of first invoice dated 17.6.2016 as an 'Acknowledge of Debt'.

10. The Learned Counsel for the Appellant by referring to the Letter of Confirmation of Balance letter dated 23.10.2017 issued by the Appellant/Operational Creditor as on 13.09.2019 for an outstanding amount of Rs. 78 Lakhs and in reality the Respondent/'Corporate Debtor' had confirmed the said 'Balance Confirmation' on 30.10.2017 by signing and acknowledging the same.

11. The Learned Counsel for the Appellant brings to the notice of this 'Tribunal' that because of the non-payment of balance sum of Rs. 78 Lakhs, the Appellant/Operational Creditor had issued a Demand Notice under Section 8 of the IBC for which the Respondent/'Corporate Debtor' had issued a Reply on 27.03.2018 and in May, 2018, the Appellant/Operational Creditor had preferred

an Application under Section 9 of the IBC which was dismissed by the 'Adjudicating Authority' by passing the impugned order dated 21.01.2020.

12. The other stand of the Appellant is that the Respondent/'Corporate Debtor' before the 'Adjudicating Authority', in the course of the proceedings had issued a letter dated 30.05.2019 proposing the settlement between the Appellant/Operational Creditor to which the Appellant/Operational Creditor had issued a letter on 04.06.2019.

13. The Learned Counsel for the Appellant submits that the process between the 'Sanction' and 'Disbursal' is between the between the borrower (Respondent/'Corporate Debtor') and the Lender (Bank) and therefore, the Appellant/Operational Creditor had no role in this aspect and was simply claiming the same due to which the services rendered as per the terms of the 'Offer Letter' for arranging the same. The Learned Counsel for the Appellant contends that the service tax exemption of Rs. 3 Lakhs included in the first invoice dated 17.06.2017 was payable by the Respondent/'Corporate Debtor,' since the purported exemption claimed by the Respondent/'Corporate Debtor' was applicable w.e.f. 22.08.2016, whereas the 'First Invoice' was raised on 17.06.2016.

14. The Learned Counsel for the Appellant urges before this Tribunal that the authorization in the name of Mr. Utpal Mehta, the 'Authorised Officer', who filed Section 9 Application before the Adjudicating Authority was a correct one.

15. The Learned Counsel for the Appellant/Operational Creditor takes a stand that a 'Demand Notice' dated 23.08.2018 signed by the Appellant satisfied with the requirements prescribed in Form No. 3 & 4 of the Insolvency & Bankruptcy (Application to the Adjudicating Authority), Rules, 2016.

APPELLANT'S CITATIONS:

16. The Learned Counsel for the Appellant relies on the Judgment of this Tribunal in "**G.T. Polymers Vs. Keshava Medi Devices Pvt. Ltd.**" in Comp. Appl. (AT)(Ins)1266 of 2019 reported in MANU/NL/0257/2020 wherein at paragraphs 10 & 15 it is observed as under:

10. "The Hon'ble Supreme Court in Mobilox Innvations Pvt. Ltd. Vs. Kirussa Software Pvt. Ltd. 2017 1 SCC Online SC 353 held as to what are facts to be examined by the Adjudicating Authority while examining an Application under Section 9 of I & B Code which is as follows: -

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "Operational Debt" as defined exceeding Rs. 1 Lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application,

as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

15. *"Hon'ble Supreme Court, in the case of Mobilox Innovations Pvt. Ltd. (Supra) held that what is the scope of ascertaining the existence of a dispute at the time of admitting the Application, which is as follows:-*

"it is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence."

17. The Learned Counsel for the Appellant cites the decision of the Hon'ble Supreme Court of India in the matter of **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. reported in** MANU/SC/1196/2017 wherein at paragraph-40 it is observed as under;

40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under

Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the 86 adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

18. The Learned Counsel for the Appellant relies on the Judgment of this Tribunal in Comp. Appl(AT)(Ins) No. 12 of 2018 between **“Crompton Greaves Consumer Electrical Ltd. Vs. K.P.R. Industries (India) Ltd.”** reported in MANU/NL/0105/2018 wherein in paragraph- 7 & 8 it is observed as under:

7. “Adverting to the facts of instant matter, be it seen that the Appellant/ Operational Creditor served demand notice dated 7th April, 2017 on the Respondent/ Corporate Debtor in terms of Section 8 of the I&B Code. Respondent/ Corporate Debtor claimed that the demand notice was defective. The Adjudicating Authority observed that the demand notice had been issued by the advocate of the Operational Creditor and the same was not in the format as prescribed. Relying upon the decision of

this Appellate Tribunal in 'Uttam Galva Steels Limited' (Supra), the Adjudicating Authority rejected the application of Operational Creditor seeking triggering of CIRP. As already observed in this judgement elsewhere, the decision of this Appellate Tribunal in 'Uttam Galva Steels Limited' Versus 'DF Deutsche Forfait AG & Anr.' has been set aside by the Hon'ble Apex Court in 'Macquarie Bank Limited' (supra). It has been held that a notice sent on behalf of an Operational Creditor by a lawyer would perfectly be in order. The impugned order could be set aside on this ground alone. However, the second issue raised in regard to demand notice is required to be dealt with. As held by the Hon'ble Apex Court in 'Innoventive Industries Ltd.' versus 'ICICI Bank & Anr.', Civil Appeal Nos.8337-8338 of 2017 decided on 31st August, 2017, under Section 8 of I&B Code, the Operational Creditor is, on the occurrence of a default required to first deliver a demand notice of the unpaid debt to the Corporate Debtor in the manner provided in Section 8(1) of the I&B Code and the Corporate Debtor is, under Section 8(2), required to bring to the notice of the Operational Creditor, within a period of 10 days of receipt of demand Company Appeal (AT) (Insolvency) No. 12 of 2018 notice, the existence of dispute or pendency of a suit or arbitration proceeding which is pre-existing. Proof of existence of a debt and a default in relation to such debt can be proved by documentary evidence as contemplated by Section 9(3)(d) of the I&B Code. Section 8 does not prescribe any particular method of proof of occurrence of default. In the instant case it has been noticed by the Adjudicating Authority that the Operational Creditor had submitted a letter dated 11.09.2017 from ICICI Bank confirming that no amount had been received in the account of Operational Creditor from any account of the Corporate Debtor since 07.07.2016. The existence of debt and default were satisfactorily established by the Operational Creditor. No pre-existing dispute was brought to the notice of the Adjudicating Authority to reject the application. Assuming that there was a defect in the demand notice, the Adjudicating Authority was required to provide opportunity to the Operational Creditor to remove the same. The Adjudicating Authority appears to have overlooked the legal aspects. It also appears that the

Appellant had sent another demand notice which was received back as 'refused'. This is claimed to have been filed as an Annexure with Form-5 filed by the Operational Creditor before the Adjudicating Authority. The Adjudicating Authority appears to have ignored the same, for no valid reason.

8. *In view of the forgoing discussions, the impugned order cannot be supported. The appeal is allowed and the impugned order is set aside. The case is remitted back to adjudicating authority to admit the application in terms of the provision Section 9(5)(i). If any defect is noticed in the application for initiation of CIRP by the Operational Creditor, the adjudicating authority shall provide adequate authority to the operation creditor to remove the same. The appeal is accordingly disposed of. “*

19. The Learned Counsel for the Appellant seeks in aid of the Judgment of the Hon'ble Supreme Court in **“Macquarie Bank Limited Vs. Shilp Cable Technologies Ltd.”** reported in (2018) 2 SCC 674 reported at paragraph -32 it is observed as under:

32. *“Shri Mukul Rohatgi strongly relied upon a recent judgment delivered by this Court in Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Others, Civil Appeal No. 8400 of 2017 decided on September 19, 2017. In this case, the question of law framed by the NCLAT for its decision was whether the time limit prescribed for admitting or rejecting a petition for initiation of the insolvency resolution process is mandatory. The precise question was whether, under the proviso to Section 9(5), the rectification of defects in an application within 7 days of the date of receipt of notice from the adjudicating authority was a hard and fast time limit which could never be altered. The NCLAT had held that the 7 day period was sacrosanct and could not be extended, whereas, insofar as the adjudicating authority*

is concerned, the decision to either admit or reject the application within the period of 14 days was held to be directory. This Court, in disagreeing with the NCLAT on the 7 day period being mandatory, held:

“We are not able to decipher any valid reason given while coming to the conclusion that the period mentioned in proviso is mandatory. The order of the NCLAT, thereafter, proceeds to take note of the provisions of Section 12 of the Code and points out the time limit for completion of insolvency resolution process is 180 days, which period can be extended by another 90 days. However, that can hardly provide any justification to construe the provisions of proviso to sub-section (5) of Section 9 in the manner in which it is done. It is to be borne in mind that limit of 180 days mentioned in Section 12 also starts from the date of admission of the application. Period prior thereto which is consumed, after the filing of the application under Section 9 (or for that matter under Section 7 or Section 10), whether by the Registry of the adjudicating authority in scrutinising the application or by the applicant in removing the defects or by the adjudicating authority in admitting the application is not to be taken into account. In fact, till the objections are removed it is not to be treated as application validly filed inasmuch as only after the application is complete in every respect it is required to be entertained. In this scenario, making the period of seven days contained in the proviso as mandatory does not commend to us. No purpose is going to be served by treating this period as mandatory. In a given case there may be weighty, valid and justifiable reasons for not able to remove the defects within seven days. Notwithstanding the same, the effect would be to reject the application.

The court further went on to hold: “Further, we are of the view that the judgments cited by the NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the

objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.

Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like to enter a caveat.

We are also conscious of the fact that sometimes applicants or their counsel may show laxity by not removing the objections within the time given and make take it for granted that they would be given unlimited time for such a purpose. There may also be cases where such applications are frivolous in nature which would be filed for some oblique motives and the applicants may want those applications to remain pending and, therefore, would not remove the defects. In order to take care of such cases, a balanced approach is needed. Thus, while interpreting the provisions to be directory in nature, at the same time, it can be laid down that if the objections are not removed within seven days, the applicant while refilling the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes up for admission/order before the adjudicating authority, it would be for the adjudicating authority to decide as to whether sufficient cause is shown in not removing the defects beyond the period of seven days. Once the adjudicating authority is satisfied that such a case is shown, only then it would entertain the application on merits, otherwise it will have right to dismiss the application.

” This judgment also lends support to the argument for the appellant in that 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, we have traveled far from the days of the laws of the Medes and the Persians

wherein, once a decree was promulgated, it was cast in stone and could not be varied or extended later:

“Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding, even though a final order had been passed.”

20. The Learned Counsel for the Appellant refers to the Judgment of the Hon’ble Supreme Court in **“State of Mysore & Ors. Vs. V.K Kangan & Ors.”** reported in (1996) 2 SCC 895 wherein at Paragraph-10, it is observed as under:

10. “In determining the question whether a provision is mandatory or directory, one must look into the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object, intended to be secured. No doubt all laws are mandatory in the sense they impose the duty to obey on those who come within its purview. But it does not follow that every departure from it shall taint the proceedings with a fatal blemish. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other. We see no reason why the rule should receive a permissible interpretation instead of a preemptory construction.”

21. The Learned Counsel for the Appellant adverts to the Judgment of the Hon'ble Supreme Court in "**ITC Limited Vs. Blue Coast Hotel Ltd. & Ors.**" reported in MANU/SC/0263/2018 wherein at paragraph-35 it is observed as under:

35. "The submission on behalf of the debtor that the letter of undertaking was given in the Dated 26.03.2013 Dated 27.05.2013 On 25.11.2013 Dated 25.11.2013 course of negotiations and cannot be held to be an evidence of the acknowledgement of liability of the debtor, apart from being untenable in law, reiterates the attempt to evade liability and must be rejected. The submission that the letter was written without prejudice to the legal rights and remedies available under any law and therefore the acknowledgement or the undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a letter that fell for consideration in Spencer's³⁴ case as pointed out by Mr. Harish Salve, "as a rule the debtor who writes such letters has no intention to bind himself further than is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure."

It was argued in a subsequent case ³⁵ that an acknowledgment made "without prejudice" in the case of negotiations cannot be used as evidence of anything expressly or impliedly admitted. The House of Lords observed as follows:

"But when a statement is used as acknowledgement for the purpose of s. 29 (5), it is not being used as evidence of

anything. The statement is not an evidence of an acknowledgement. It is the acknowledgement.”

Therefore, the without prejudice rule could have no application.

It said:

“Here, the respondent, Mr. Rashid was not offering any concession. On the contrary, he was seeking one in respect of an undisputed debt. Neither an offer of payment nor actual payment.”

We, thus, find that the mere introduction of the words “without prejudice” have no significance and the debtor clearly acknowledged the debt even after action was initiated under the Act and even after payment of a smaller sum, the debtor has consistently refused to pay up.”

RESPONDENT’S SUBMISSIONS:

22. The Learned Counsel for the Respondent/‘Corporate Debtor’ submits that the Notes issued by the Appellant/Petitioner/Operational Creditor on 21.03.2018, based on which CP(IB) No. (IB) 245/9/NCLT/AHM/2018 was filed before the ‘Adjudicating Authority’ is neither in the prescribed format nor does it provide requisite details and documents, as envisaged un the Format specified in the IBC. In this connection it is represented on behalf of the Respondent that Section 8 of IBC, r/w Rule 5 of The Insolvency and Bankruptcy (Application to Adjudicating Authority, 2016) Rules, 2016 mandates that a ‘Demand Notice’ be issued in the format as prescribed in the format as prescribed in Form – 3 & 4.

23. The Learned Counsel for the Respondent No. 1 adverts to the fact that in the instant case, the 'Notice' issued by the Appellant is a simpliciter of 'Letter of Admission' and the same does not contain requisite particular to which necessary identification of a 'Demand Notice' and issued under Section 8 of IBC. In effect, the stand taken by the Respondent is that Notice issued by the Appellant is not to be construed as one under Section 8 of IBC (r/w Rule 5) in as much as their said Note indicate the details of the transaction entered into between the two parties nor does exparte was justified as to how the amount became due and payable or any default committed by the Respondent.

24. Expatiating his submissions, the Learned Counsel for the Respondent takes a plea that the Appellant was assisted by the Respondent based on the 'Offer Letter' dated 26.06.2016 to arrange working capital requirement of the Respondent for approximately Rs. 2000 Crores including Rs. 550 Crores of Stand By Letter of Credit (in short '**SBLC**') and in fact, the Appellant was under obligation to arrange:

- a) Rs. 550 crores 'SBLC' from the existing lenders of the 'Corporate Debtor' to avail supply of Paraxylene from ONGC Mangalore Petrochemicals Limited,
- b) Additional funds based and non fund based working capital of approximately Rs. 1500 or lower amount.

25. On behalf of the Respondent it is pointed out that the Respondent had paid a sum of Rs. 20 lakhs as per the 'Terms' of the 'Offer Letter' on the commencement of the assignment, receipt which was duly acknowledged by the Appellant in his Notice dated 21.03.2018. In this regard grievance of the Respondent is that in spite of the payment of Rs. 20 Lakhs made by the

Respondent to the Appellant towards commencement/process fee i.e., First tranche, the Appellant had failed to honour its obligations under the 'Offer Letter' amounting to rendering of inadequate and deficient services.

26. As regards to claim of Rs. 3 Lakhs in respect of service tax, according to the Respondent 'no such amount was due and payable because of the fact that the Respondent was entitled to ab initio exemption from Service Tax of any service rendered by the Appellant as per Notification No. 12/2013 ST dated 01.07.2013 issued by the Central Government read with Notice issued by Dy. Assistant Commissioner of Central Excise. Furthermore, it is projected that the Appellant had admitted that the said sum of Rs. 3 Lakhs (Rupees three Lakhs) was not towards provision of any Goods or Services to the Respondent. Therefore, the contention was advanced on behalf of the Respondent that the Appellant had clubbed a sum of Rs. 20 Lakhs which is neither an Operational nor Financial debt with the amount of Rs. 20 lakhs which is impermissible in law and hence the Appellant is not entitled to prefer an Application under Section 9 of IBC.

27. It is the version of the Respondent that 2nd Tranche of Rs. 30 Lakhs was payable only upon issuance of Sanction Letter by IBC. In reality, the Sanction Letter was issued by IDBI on 31.01.2017 that too for part finance. On behalf of the Respondent a plea is taken that the Appellant had raised an Invoice for a sum of Rs. 30 Lakhs in respect of 2nd Tranche on 30.12.2016 i.e., even prior to the issuance of the Sanction Letter and therefore, the Respondent informed that Invoice dated 30.12.2016 for Rs. 30 Lakhs could not be raised prematurely as Sanction Letter was not received from IDBI Bank on behalf of all the renders of the Respondent.

28. The Learned Counsel for the Respondent brings to the notice of this 'Tribunal' that the Sanction Letter was issued by the IDBI Bank on 31.01.2017 for the credit facilities of Rs. 360 Crores (inclusive of Rs. 157 Crores of SBLC) and Indian Overseas Bank dated 29.07.2017 for Rs. 140 Crores (inclusive of Rs. 60 Crores of SBLC) and in spite of the fact that aforesaid amount being sanctioned, the same were not disbursed and as such the second milestone was not achieved.

29. The Learned Counsel for the Respondent points out that as against working capital of Rs. 1500 Crores, only Rs. 283 Crores (Rs. 203 Crores by IDBI Bank and Rs. 80 Crores by Indian Overseas Bank) were sanctioned, which were not disbursed. Likewise, as against the stand of 'Letter of Credit' of Rs. 550 Crores, the Operational Creditor could only arrange to sanction Rs. 217 Crores which was also not disbursed. In short, the Appellant had failed to arrange for sanction from the other lenders of the Respondent as contemplated in the 'Offer Letter' which lead non-fulfilling of scope of services thereby giving rise to an existence of dispute and further that non-completion of the assignment within time, as stipulated in the 'Offer Letter', amounts to existence of dispute.

30. The other contention raised on behalf of the Respondent is that the Appellant is aware that the services rendered by it under the 'Offer Letter' are incomplete and deficient due to which the Respondent had not issued Advisory Assignment Completion Certificate is required under Clause 14(g) of the 'Offer Letter'.

31. Apart from this, it is the contention of the Learned Counsel for the Respondent that in the business of the Appellant satisfying which is scope of service under the 2nd milestone and the issuance of Advisory Assignment

Completion Certificate. The 3rd Invoice dated 31.03.2017 for Rs. 45 lakhs was not payable as no amount was actually disbursed to the Respondent and therefore, admittedly no financial closure. In short, the argument advanced by the Respondent is that no legal liability arose for which to make a payment of Rs. 45 Crores towards 3rd Invoice and indeed was also prematurely raised and other lenders had not issued 'Sanction Letter' and that the 'Sanction Letter' of Indian Overseas Bank of was received only on 29.09.2017 and these facts were mentioned in the Reply to the purported 'Demand Notice' which was withheld by the Appellant in its petition filed before the 'Adjudicating Authority' and not filed together with the Petition.

32. The Learned Counsel for the Respondent points that the Balance Confirmation dated 30.03.2017, affirmed by the Respondent was issued by the Respondent on the assurance that the Appellant will fulfil its obligation under the 'Offer Letter' and procurement of the 'Balance Confirmation' from the 'Corporate Debtor' was only a matter of 'General Practise' and that the other confirmation does not in any way constitute a 'Acknowledgment of Liability' because of the fact no 'Debt' exist on account of failure of the Appellant to render services as per the terms of 'Offer Letter'.

33. The Learned Counsel for the Respondent contends that Mr. Nagaraj Garla, Managing Director & CEO was authorised by the Appellant through a Board Resolution dated 26.10.2017 to file a petition on behalf of the Appellant, before numerous judicial fora (including the Tribunal). Furthermore, the said Mr. Garla was also authorised to delegate powers conferred upon him by the Board upon an Officer or employee of the Appellant. Besides this, through an Officer Circular dated 21.12.2017, Mr. Garla had delegated the power to file an Application on

behalf of the Appellant before the Tribunal to Mr. V. Gupinath and Ms. Christina D'souza – Company Secretary and Compliance Officer. In this connection the stand of the Respondent is that no express power to file Affidavit before the Tribunal or Court was showered by Mr. Nagraj Garla, MD & CEI upon Mr. Gopinath or Ms. D'souza.

34. The Learned Counsel for the Respondent proceeds to point out that clauses 4a and 4d at serial No. 5 of the Office Circular pertaining to the filing before the Government and Governmental Authorities word 'sign' has been expressly maintained. However, the same stood omitted in 4b suggesting that the delegator of power knew the exact nature of power being delegated by him. In short, the stand of the Respondent is that power delegated to Ms. Christina D'souza – Company Secretary and Compliance Officer by Mr. Nagraj Garla was power to file Applications or lodge the same before the Registry on behalf of the Appellant and not sign Affidavit in support of the Applications. Furthermore, the plea taken on behalf of the Respondent is that in view of the fact Ms. D'Souza had not possessed the authority to sign Affidavit on behalf of the Company, she could have further authorised Mr. Utpal Mehta to sign Affidavit in support of the Application on behalf of the Appellant.

35. The Learned Counsel for the Respondent submits that in terms of Rule-10 of Adjudicating Authority Rules, 2016 read with Rules 23 & 26 of National Company Law Tribunal, an Application presented before the 'Adjudicating Authority' has to be signed by an authorised signatory. In this regard, the Learned Counsel for the Respondent relies on the judgment of this Tribunal in Company Appeal(AT)(Insolvency) No 30 of 2017 ***“Palogix Infrastructure Private Limited v. ICICI Bank Limited”*** wherein it is observed that the person

signing the Application shall be specifically authorised by the Board Directors to sign an Application on behalf of the Company. But in the present case, the authorisation had not been conferred on Mr. Utpal Mehta to sign the Application on behalf of the Company before the 'Adjudicating Authority'.

36. The other line of argument canvassed by the Learned Counsel for the Respondent is that the ingredient of Section 9 of IBC enjoins completion of certain formalities before or at the time of an Application and further that any deficiency must be cured before the listing of the Application before the 'Tribunal' for 'Hearing'. However, in the instant case, no such Leave was sought by the Appellant in clearing the defects.

37. According to the Learned Counsel for the Respondent, the Appellant in spite of the fact of receiving a Reply dated 28.03.2018 to the 'Demand Notice' dated 27.03.2018 issued by the Appellant, the Appellant had deliberately withheld the same and had not produced the said Reply before the 'Adjudicating Authority' which indicates that the Appellant had suppressed the factum of receipt of Reply from the Respondent and in fact, the deponent before the 'Adjudicating Authority' had falsely affirmed on oath that no Reply was issued by the Respondent. In fact, the Respondent had raised substantial dispute in regard to the existence of any 'Debt' in favour of the Operational Creditor within the statutory period of 10 days.

RESPONDENT'S CITATIONS:

38. The Learned Counsel for the Respondent cites a decision of the Hon'ble Supreme Court in the ***"Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India &***

Ors.” Reported in (2019) 4 SCC 17 at Spl. Page 69,76 & 77 wherein a paragraphs 52 & 65 it is observed as:

“52, NOTICE, HEARING, AND SET-OFF OR COUNTERCLAIM QUA FINANCIAL DEBTS.

. This Court, in *Innoventive Industries (supra)* stated as follows:

—27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in [Section 3\(12\)](#) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of —debt||, we have to go to [Section 3\(11\)](#), which in turn tells us that a debt means a liability of obligation in respect of a —claim|| and for the meaning of —claim||, we have to go back to [Section 3\(6\)](#) which defines —claim|| to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more ([Section 4](#)). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under [Section 5\(7\)](#) as a person to whom a financial debt is owed and a financial debt is defined in [Section 5\(8\)](#) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under [Section 5\(21\)](#) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, [Section 7](#) becomes relevant. Under the Explanation to [Section 7\(1\)](#), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under [Section 7\(2\)](#), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the Adjudicating Authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the Adjudicating Authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of

the receipt of the application. It is at the stage of [Section 7\(5\)](#), where the Adjudicating Authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the —debt¹, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the Adjudicating Authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the Adjudicating Authority. Under sub- section (7), the Adjudicating Authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of [Section 7](#) stands in contrast with the scheme under [Section 8](#) where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under [Section 8\(2\)](#), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is —due² i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the Adjudicating Authority that the Adjudicating Authority may reject an application and not otherwise.³

Xxx

65, . In this context, it is important to differentiate between —claim⁴, —debt⁵ and —default⁶. Each of these terms is separately defined as follows:

—3. Definitions.—In this Code, unless the context otherwise requires,—

xxx xxx xxx

(6) —claim⁷ means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

xxx xxx xxx

(11) —debt|| means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt; (

12) —default|| means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;

xxx xxx xxx||

Whereas a —claim|| gives rise to a —debt|| only when it becomes —due||, a —default|| occurs only when a —debt|| becomes —due and payable|| and is not paid by the debtor. It is for this reason that a financial creditor has to prove —default|| as opposed to an operational creditor who merely —claims|| a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under [Section 7](#) and by operational creditors under Sections 8 and 9 of the Code becomes clear”.

39. The Learned Counsel for the Respondent relies on the decision of “**Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.” reported in (2018) 1 SCC 353**) at spl. Page 403 at paragraph- 51 it is observed

51 “It is clear, therefore, that once the Operational Creditor has filed an Application, which is otherwise complete, the Adjudicating Authority must reject the Application under Section 9(5)(2)(d) if Notice of Dispute has been received by the Operational Creditor or there is a record of dispute in the information utility. It is clear that such Notice must bring to the notice of the Operational Creditor, the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending the parties. Therefore, all that adjudicating authority is to see at this stage is whether there is plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of the fact unsupported by evidence. It is important to separate the green from the chaff and to reject spurious defence which is a mere bluster.

However, in doing so the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exist in fact and is not spurious hypothetical or illusory, the adjudicating authority has to reject the application. “

40. The Learned Counsel for the Respondent refers to the English decision **“Taylor V. Taylor”** Chancery Division (1874) T. 99, (1875) LR 1 CHD 426 at pages 431 & 432 wherein it is mentioned as under:

... “In the same way when the statute says who is the person to petition, it means that the person or persons so described and no others, shall be entitled to petition otherwise anyone interested might petition under the General Principle that when the powers are to be exercised by a Court of Law, any person interested in calling those powers into execution is entitled to come before the Court and the only reason for putting in such a section is to show that it is not the meaning of the legislature but that the right of calling for the exercise of the powers shall be confined to the powers so described.”

41. Apart from the above decision, the Learned Counsel for the Respondent adverts the following judgments:

- i) In the judgment of this ‘Tribunal’ in the matter of: **“Mr. Santhil Kumar Karmegam Vs. Dolphin Offshore Enterprises (Mauritius) Pv. Ltd. & Anr.”** Reported in 2017 SCC online NCLAT 334 wherein it spl. Pages 152 & 156 wherein at paragraph -6 it is observed as under:

6. “In the present case as the demand noticed has been given by an advocate and there is nothing on record to suggest that the advocate in question holds any position with or in relation to the respondent- Delphin Offshore Enterprises (Mauritius) Pvt.

Ltd. and the demand notice has not been issued in mandatory Form 3 or Form 4, as stipulated, under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the initiation of resolution process cannot be upheld. The case of the appellant being covered by the decision of the Uttam Galva Steel Limited (Supra) we have no other option but to set aside the impugned order.”

- ii) In the Judgment of this Tribunal in **“Jord Engineers India Ltd. Vs/ Valia & Company”** reported in 2017 SCC online NCLAT 292 wherein at paragraphs 6 & 7 it is observed as under:

“6. As noticed, similar issue fell for consideration before this Appellate Tribunal in ‘Uttam Galva Steels Limited’ (Supra). In the said case the Appellate Tribunal’s judgment dated 28th July, 2017 held as follows

“27. From a plain reading of sub-section (1) of Section 8, it is clear that on occurrence of default, the Operational Creditor is required to deliver the demand notice of unpaid Operational Debt and copy of the invoice demanding payment of the amount involved in the default to the Corporate Debtor in such form and manner as is prescribed.

28. Sub-rule (1) of Rule 5 of the ‘Adjudicating Authority Rules’ mandates the ‘Operational Creditor’ to deliver to the ‘Corporate Debtor’ the demand notice in Form-3 or invoice attached with the notice in Form-4, as quoted below: -

“Rule 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.”

29. Clause (a) and (b) of sub-rule (1) of Rule 5 of the 'Adjudicating Authority Rules' provides the format in which the demand notice/invoice demanding payment in respect of unpaid 'Operational Debt' is to be issued by 'Operational Creditor'. As per Rule 5(1) (a) & (b), the following person (s) are authorised to act on behalf of operational creditor, as apparent from the last portion of Form-3 which reads as follows: -

“6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [name of corporate debtor].
Yours sincerely, Signature of person authorised to act on behalf of the operational creditor
Name in block letters Position with or in relation to the operational creditor
Address of person signing “

30. From bare perusal of Form-3 and Form-4, read with sub-rule (1) of Rule 5 and Section 8 of the I&B Code, it is clear that an Operational Creditor can apply himself or through a person authorised to act on behalf of Operational Creditor. The person who is authorised to act on behalf of Operational Creditor is also required to state “his position with or in relation to the Operational Creditor”, meaning thereby the person authorised by Operational Creditor must hold position with or in relation to the Operational Creditor and only such person can apply.

31. The demand notice/invoice Demanding Payment under the I&B Code is required to be issued in Form-3 or Form - 4. Through the said

formats, the 'Corporate Debtor' is to be informed of particulars of 'Operational Debt', with a demand of payment, with clear understanding that the 'Operational Debt' (in default) required to pay the debt, as claimed, unconditionally within ten days from the date of receipt of letter failing which the 'Operational Creditor' will initiate a Corporate Insolvency Process in respect of 'Corporate Debtor', as apparent from last paragraph no. 6 of notice contained in Form – 3, and quoted above. Only if such notice in Form-3 is served, the 'Corporate Debtor' will understand the serious consequences of nonpayment of 'Operational Debt', otherwise like any normal pleader notice/Advocate notice, like notice under Section 80 of C.P.C. or for proceeding under Section 433 of the Companies Act 1956, the 'Corporate Debtor' may decide to contest the suit/case if filed, distinct Corporate Resolution Process, where such claim otherwise cannot be contested, except where there is an existence of dispute, prior to issue of notice under Section 8.

32. In view of provisions of I&B Code, read with Rules, as referred to above, we hold 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, which otherwise is a 'lawyer's notice' as distinct from notice to be given by operational creditor in terms of section 8 of the I&B Code."

7. In the present case as the demand notice has been given by an advocate and there is nothing on record to suggest that the advocate in question holds any position with or in relation to the respondent – Valia & Company and the demand notice has not been issued in mandatory Form 3 or Form 4, as stipulated under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the initiation of resolution process cannot be upheld. The case of the appellant being covered by the decision of the Uttam Galve Steels Limited (Supra), we have no other option but to set aside the impugned order.

- iii) In the decision in the matter of **“Palogix Infrastructure Private Limited Vs. ICICI Bank Limited”** reported in 2017 SCC online NCLAT 216 wherein at paragraphs 21 to 24 and paragraphs 28 to 32 it is observed as under:-

21. “According to learned Counsel ‘Corporate Debtor’, the application under Section 7 of the I & B Code’ if signed and filed by a ‘general power of attorney’ without specific authorisation is not maintainable. According to him the procedure prescribed requires specific authorisation, such as

i) The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (Rules 4 & 10) incorporate by reference procedure prescribed under Rule 23 and 26 of the National Company Law Tribunal Rules 2016.

ii) Rule 23 read with Rule 26 of the National Company Law Tribunal Rules, 2016 requires petition/application to be signed and verified by ‘Authorised representative’ of the petitioner.

22. According to the 'Corporate Debtor' the 'Authorization' in the case of a company would mean a specific authorization by the Board of Directors of the company by passing a resolution. The reliance has been placed on the Hon'ble Supreme Court's decision in "State Bank of Travancore vs. Kingston Computers India Fyi. Ltd. (2011) 11 SCC 524".

23. Therefore, according to the 'Corporate Debtor', an application under section 7 of the 'I&B Code' in absence of any supporting affidavit verifying the petition is not maintainable. It was also contended that 9 prerequisites under the 'I&B Code' are mandatory and it should be strictly construed and barring specific Power of Attorney, no application can be entertained.

24. Learned counsel for the 'Corporate Debtor' submitted that a Power of Attorney is an authorization by a 'principal' to its 'agent' to do an act. A fortiori, such authorisation can only be of acts which are in the contemplation and knowledge of the 'principal' as on the date when such authorisation is given. If the 'principal' itself is unaware of an eventuality, it cannot authorize its agent for such eventuality. This is more so when 'I&B Code' sets in motion a very serious and irreversible process, therefore, according to the 'Corporate Debtor', the procedural pre-requisites under the 'I&B Code' must be strictly construed."

28. Having regard to objection regarding the removal of defect, we reject the submission made on behalf of the 'Corporate Debtor, in view of the proviso to sub-section (5) of Section 7 of the 'I&B Code', which reads as follows:-

"Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority."

29. Similar provision has been made under proviso to sub-section (5) of Section 9 and sub-section (4) of Section 10 of the 'J&B Code'.

30. The seven days for rectification of defects is to be counted not from the date of the order passed by the Adjudicating Authority but from the date of "receipt of such notice from the Adjudicating Authority to rectify the defects in the application." The 'Corporate Debtor', though raised objection that the defects were not removed within seven days, but not given the date on which the notice for correction of defect was served by the Adjudicating Authority on the 'Financial Creditor'-ICICI Bank. In absence of such specific pleadings stand taken by the 'Corporate Debtor' that objection that defect was not removed within seven days cannot be accepted. This apart, we accept the stand taken by the 'Financial Creditor' that for the purpose of counting the period of seven days, apart from the date of receipt of the order for removal of defects, the holidays such as Saturdays, Sundays and other holidays of the Tribunal to be excluded.

31. For determination of question relating to Power of Attorney, as raised in this appeal, it is desirable to refer Section 2 of Power of Attorney Act, 1882 which reads as follows:-

"2. Execution under Power-of-Attorney: The donee of a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof. This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force."

32. In *"T.C. Mathal and Another Vs. District & Sessions Judge, Thiruvananthapuram, Kerala, (1999) 3 SCC 614"* the Hon'ble Supreme Court held that "Section 2 of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a party-in-person."

- iv) In the decision of this 'Tribunal' in the matter of **"Uttam Galva Steels Limited vs/ DF Deutsche Forfait AG & Anr."** 2017 SCC online NCLAT 212 wherein at paragraphs 9 to 13 & paragraphs 29 to 38 it is observed as under:

9. "Ld. Counsel for the Respondents submitted that in terms of Rule 10 of the 'Adjudicating Authority Rules, 2016', Rule 20, 21, 22, 23, 24 and 25 of the 'NCLT Rules 2016' stands adopted. Reliance was also placed on notification dated 20.12.2016 whereby NCLT Rules, 2016 was amended and Rule 23A was inserted, as follows:-

"23A. Presentation of joint petition. – (1) The Bench may permit more than the person to join together and present a single petition if it is satisfied, having regard to the cause of action and the nature of relief prayed for, that they have a common interest in the matter.

(2) Such permission shall be granted where the joining of the petitioners by a single petition is specifically permitted by the Act."

10. In view of Rule 23A it was contended that a joint petition is maintainable.

11. It was further contended that the Appellant himself has admitted that a suit was filed by Appellant before the Hon'ble High Court of Bombay but therein the Appellant has not disputed the transactions of sale/purchase in terms of quality/ quantity of goods supplied nor has disputed the existence of debt. The only contention it sought to raise is that the goods were meant for consumption of another end user,

namely, "Aartee Commodities (UK) Limited" and that the said end user has not paid any amount to the Appellant despite the notice of demand for supplies made

12. Insofar as issuance of notice under Section 8 of the MB Code through a lawyer is concerned, accor under [Section 8](#) can also be given throu procedures are hand maiden of justice which cannot defeat the substantive rights of the parties. The matter of procedure is within ;read in a manner that defeat the very purpose an ent of enactment or in a manner that takes away or abridge, the substantive rights of the party. Therefore, the format of demand notice cannot be stated to be mandatory and that it does not suggest or mandate that it is to be issued by an 'Operational Creditor' personally.

13. Insofar as certificate by 'Financial Institutions' is concerned, it was contended that in the case of "[Smart Timing Steel Limited vs National Steel and Agro Industries Limited](#)", the Appellate Tribunal while held the requirement of Certificate is mandatory, but in that case no such Certificate was filed by the party. In the said case the creditor had no office in India and no certificate of an 'financial institution' was filed. On the other hand, in the present case, the Respondents along with their application to the Adjudicating Authority has filed a certificate by a banking company which maintains its operations-to prove that,'no payment has been received in response to the notice for demand issued under S of the MB Code. Since the requirement by a financial institution which has been held to be mandatory is only for the purpose of confirming or ascertaining through a trustworthy source like any financial institution to find out, whether any payment has been received the demand notice or not. Ld. Counsel submitted that case a certificate of bank albeit incorporated under the law of Germany has been produced to affirm that no payment has been received."

29. From a plain reading of sub-section (1) of Section 8, it is clear that on occurrence of default, the Operational Creditor is required to deliver the demand notice of unpaid Operational Debt and copy of the invoice demanding payment of the amount involved in the default to the Corporate rm and manner as is prescribed.

30. Sub-rule (1) Rule 5 of the 'Adjudicating Authority Rules' mandates the 'Operational Creditor' to deliver to the 'Corporate Debtor' the demand notice in Form-3 or invoice attached with the notice in Form-4, as quoted below: -

"Rule 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."

31. Clause (a) and (b) of sub-rule (1) of Rule 5 of the 'Adjudicating Authority Rules' provides the format in which the demand notice/ invoice demanding payment in respect of unpaid 'Operational Debt' is to be issued by 'Operational Creditor'. As per Rule 5(1) (a) & (b), the following person (s) are authorised to act on behalf of Operational Creditor as apparent from the last portion of Form 3 which reads as follows:

6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten idays from the receipt of this letter failing which we shall initiate corporate insolvency resolution in respect of (name of corporate) debtor

Yours sincerely,

Signature of person authorised to act	Name in Block letter	Position with or in relation to the
---------------------------------------	----------------------	-------------------------------------

to act the Operational Creditor on behalf of Address of person signing		operational creditor.

32. From bare perusal of Form-3 and Form-4, read with sub-rule (1) of Rule 5 and Section 8 of the I&B Code, it is clear that an Operational Creditor can apply himself or through a person authorised to act on behalf of Operational Creditor. The person who is authorised to act on behalf of Operational Creditor is also required to state "his position with or in relation to the Operational Creditor", meaning thereby the person authorised by Operational Creditor must hold position with or in relation to the Operational Creditor and only such person can apply.

33. The demand notice/invoice MB Code is required to be issued in Formclear understanding that the 'Operational Debt' (in default) required to pay the debt, as claimed, unconditionally within ten. days from the date of receipt of letter failing which the 'Operational Creditor' will initiate a Corporate Insolvency Process in respect of 'Corporate Debtor', as apparent from last paragraph no. 6 of notice contained in Form - 3, and quoted above. 21 Secretary' in absence of any authority of no position with or in relation to Only if such notice in Form-3 is served, the 'Corporate Debtor' will understand the serious consequences of non-payment of 'Operational Debt', otherwise like any normal pleader notice/ Advocate notice, like notice under Section 80 of C.P.C. or for proceeding under Section 433 of the Companies Act 1956, the 'Corporate Debtor' may decide to contest the suit/ case if filed, distinct Corporate Resolution Process, where such claim otherwise cannot be

contested, except where there is an existence of dispute, prior to issue of notice un

34. In view of provisions of I&B Code, read with Rules, as referred to above, we hold that an 'Advocate/ Lawyer' or 'Chartered the Operational Creditor cannot issue any notice under Section 8 of the I&B Code, which otherwie is a 'lawyer's notice' as distinct from notice to be given b erational creditor in terms of section 8 of the I&B Code.

35. In the present case as an advocate/lawyer has given notice and there is nothing on record to suggest that the lawyer has been authorised by 'Board of Directors' of the Respondent - 'DF Deutsche 22 Forfait AG' and there is nothing on record to suggest that the lawyer hold any position with or in relation with the Respondents, we hold that the notice issued by the lawyer on behalf of the Respondents can not be treated as a notice under section 8 of the I&B Code and for that the petition under section 9 at the instance of the Respondents against the Appellant was not maintainable

36. The other question raised is whethei e is existence of dispute, if any, in the present case

37. From bare perusal of r issued a winding up notice on i.e., much prior to issuance of L Section 8 of the I&B Code On rd it is clear that the Respondents ellant on 8th December 2016 awyer's notice purported to be under receipt of such notice, the Appellant disputed the claim by detailed reply dated 3rd January 2017. Apart from that the Respondents were relying on document dated 27th December 2013 to fix liability on the Appellant, which according to Appellant was not signed by the Appellant such fact was brought to the notice of the Respondents as back as in the year 2013.

38. In "Kirusa Software Private Ltd. Vs Mobilox Innovations Private Ltd. ", - Company Appeal (AT) (Insolvency) No. 6 of 2017, this Appellate Tribunal decided as to what is the

meaning of 'dispute' and 'existence of dispute' in terms of Section 8 of the I&B Code and sub-Section (5) of Section 5 of I&B Code and by judgment dated 24th May 2017 held as follows -- -

17. For the purposes of Part H only of the Code, some terms/words have been defined. S 12 Sub Section (6) of Section 5 defines "dispute", to include, unless the context otherwise requires, a dispute pending in any suit or arbitration proceedings relating to: (a) existence of amount of the debt; (b) quality of good or service; (c) breach of a representation or warranty. The definition of "dispute" is "inclusive" and not "exhaustive". The same has to be given wide meaning provided it is relatable to the existence of the amount of the debt, quality of good or service or breach of a representation or warranty.

18. Once the term 'dispute' is given-W" na upon reading of the Code as a whole, the cover all disputes on debt, default etc. and no ways of disputing a demand made by the o either by showing a record of pending suit or o a pending arbitration. The intent of - the definitic illustrative erational creditor can be disputed only by arbitration proceeding, the definition of he dispute would have simply said dispute means a dispute pending in Arbtration or a suit.

21. Admittedly in sub-section (6) of Section 5 of the 'I & B Code', the Legislature used the words 'dispute includes a suit or arbitration Proceedings'. If this is harmoniously read with Section (2) of Section 8 of the 'I & B Code', where words used are 'existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings, 'the result is disputes, if any, applies to all 14 kinds of disputes, in relation to debt and default. The expression used in subsection (2) of Section 8 of the 'I & B Code' 'existence of a dispute, if any,' is disjunctive from the expression 'record of the pendency of the suit or

arbitration proceedings'. Otherwise, the words 'dispute, if any'. in subsection (2) of Section 8 would become surplus usage.

22. Sub-section (2) of Section 8 of the 'I & B Code' cannot be read to mean that a dispute must be pending between the parties prior to the notice of demand and that too in arbitration or a civil court. Once parties are already before any judicial forum/authority for the Legislature, as evident n of the term "dispute is that it wanted the same t (and not exhaustive) If the intent 0 be of the Legislature was d ordinary m.eaning, "dispute" should ited to only two creditor, i.e. Wing a. record of from that a demand by an o showing a record of a suit dispute would have simply si Arbitration or a suit. 24 adjudication of disputes, notice becomes irrelevant and such an interpretation renders the expression 'existence of a dispute, ifariy, in sub-section (2) of Section 8 itiose. 24. The statutory requirement in subsection (2) of Section 8 of the 'I & B Code' is that the dispute has to be brought to the notice of the Operational. Creditor. The two comes post the word 'dispute' (f any) have been added as a matter of convenience and/or to give meaningfulness to sub-section (2) of Section 8 of the 'I & B Code'. Without going into the grammar and punctuation being hapless victim ofpace of life, if one discovers the true meaning of subsection (2)(a) of Section 8 of the 'I & B Codeç having regard to the context of Sections 8 and 9 of the Code, it emerges, bothfrom the object and purpose of the 'I& B Code' and the context in which the. expression is used, that disputes raised in the notice sent by the corporate debtor to the Operational Creditor would get covered within sub-section (2) of Section 8 of the 'I & B Code'.

25. The true meaning of sub-section (2)(a) of Section 8 read with subsection (6) of Section 5B the '1 & B Code' clearly

brings out the intent of the Code, namely the Corporate Debtor must raise a dispute with sufficient particulars. And in case a dispute is being raised by simply showing a record of dispute in a pending arbitration or suit, the dispute must also be relatable to the three conditions provided under sub-section (6) of Section 5 of the 'I & B Code' only. The words 'and record of the pendency of the suit or arbitration proceedings' under sub-section (2)(a) of Section 8 also make the intent of the Legislature clear that disputes in a pending suit or arbitration proceeding are such disputes which satisfy the test of sub-section (6) of Section 5 of the 'I & B Code' and that such disputes are within the ambit of the expression, 'dispute, any'. The record of suit or arbitration proceeding is required to demonstrate the same, being pending prior to the notice of demand under sub-section 8 of the 'I & B Code'.

26. It is a fundamental principle of law that multiplicity of proceedings is required to be avoided. Therefore, if disputes under sub-section (2)(a) of Section 8 read with sub-section (6) of Section 5 of the 'I & B Code' are confined to a dispute in a pending suit and arbitration in relation to the three classes under sub-section (6) of Section 5 of the 'I & B Code', it would violate the definition of operational debt under subsection (21) of Section 3 of the 'I & B Code' and would become inconsistent thereto, and would bar Operational Creditor from invoking Sections 8 and 9 of the Code.

27. Sub-section (6) of Section 5 read with sub-section (2)(a) of Section 8 also cannot be confined to pending arbitration or a civil suit. It must include disputes pending before every judicial authority including mediation, conciliation etc. as long there are disputes as to existence of debt or default etc., it would satisfy subsection (2) of Section 8 of the 'I & B Code'.

29. The definition of 'dispute' for the purpose of Section 9 must be read along with expression operational debt as defined in

Section 5(2 1) of I&B Code, 2016 means: (21) "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;" S 18 Thus the definition of 'dispute', 'operational debt' is read together for the purpose of Section 9 is clear that the intention of legislature to lay down the nature of 'dispute' has not been limited to suit or arbitration proceedings pending but includes other proceedings "if

30. Therefore, it is clear that for the purpose of sub-section (2) of Section 8 and Section 9W 'dispute' must be capable of being discerned from notice of corporate debtor and the meaning of "existence" a "dispute, if any", must be understood in the context.

31. The dispute under I&B Code, 2016 must relate to specified nature in clause (a), (b) or (c) i.e. existence of amount of debt or quality of goods or service or breach of representation or warranty. However, it is capable of being discerned not only from in a suit or arbitration from any document related to it. For example, the 'operational creditor' has issued notice under Code of Civil Procedure Code, 1908 prior to initiation of the suit against the operational creditor which is disputed by 'corporate debtor. Similarly notice under Section 59 of the Sales and Goods Act issued by one of the party, a labourer/employee who may claim to be operational creditor for the purpose of Section 9 of I&B Code, 2016 may have raised the dispute with the State Government concerning the subject matter i.e. existence of amount of debt and pending consideration before the competent Government. Similarly, a dispute may be pending in a Labour Court about existence of amount of debt. A party can move before a High Court under

writ jurisdictions against Government, corporate debtor (public sector 19 undertaking). There may be cases where one of the party has moved before the High Court under Section 433 of the Companies Act, 1956 for initiation of liquidation proceedings against the corporate debtor and dispute is pending. Similarly, with regard to quality of goods, if the 'corporate debtor' has raised a dispute, and brought to the notice of the 'operational creditor' to take appropriate step, prior to receipt of notice under sub-section (1) of Section 8 of the 'I & B Code', one can say that a dispute is pending about the debt. Mere raising a dispute for the sake of dispute, unrelated or related to clause (a) or (b) or (c) of Subsection (6) of Section 5, if not raised prior to application and not pending before any competent court of law or authority cannot be relied upon to hold that there is a 'dispute' raised by the corporate debtor. The scope of existence of 'dispute', if any, which includes pending suits and arbitration proceedings cannot be limited and confined to suit and arbitration proceedings only. It includes any other dispute raised prior to Section 8 in this in relation to clause (a) or (b) or (c) of sub-section (6) of Section 5. It must be raised in a court of law or authority and proposed to be moved before the court of law or authority and not any got up or made up dispute just to stall the insolvency resolution process.

32. There may be other cases such as a suit relating to existence of amount of debt stands decided and decree is pending for execution. Similarly, existence of amount of debt or quality of goods or service for which a suit have been filed and decreed; an award has been passed by Arbitral Panel, though petition under Section. 34 of Arbitration and Reconciliation Act, 1996 may be pending. In such cases the question will arise whether a petition under Section. 9 will be maintainable particularly when it was a suit, arbitration

proceeding is not pending, but stand decided? Though one may argue that Insolvency resolution process cannot be misused for execution of a judgement and decree passed in a suit or award passed by an arbitration Tribunal, but such, submission cannot be accepted in view of Form 5 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016 wherein a decree in suit and award has been shown to be a debt for the purpose of default on non-payment.

33. Thus it is clear that while sub-section (2) of Section 8 deals with 'existence of a dispute', sub-section 3 of Section 9 does not confer any discretion on adjudicating authority to verify adequacy of the dispute. It prohibits the adjudicating authority from proceeding further if there is a genuine dispute raised before any court of law or authority or pending in a court of law or authority including suit and arbitration proceedings. Mere a dispute giving a colour of genuine dispute or illusory, raised for the first time while replying to the notice under Section 8 cannot be a tool to reject an application under Section 9 if the operational creditor otherwise satisfies the adjudicating authority that there is a debt and there is a default on the part of the corporate debtor."

DEMAND NOTICE

42 Undoubtedly, the 'Demand Notice' is to be issued to start the insolvency proceedings against the 'Corporate Debtor'. To exhibit the inability of a certain debtors' liability to pay his/its debt, the 'Demand Notice' will be issued by the operational creditor for the validation of filing of an application for initiation of CIRP under Section 9 of the I&B Code. Section 8 of the I&B Code specifies the pre-conditions for initiation of the insolvency proceedings by an

operational creditor. Consequent to the default in payment committed by the 'Corporate Debtor', the 'operational creditor' is to send a 'Demand Notice' seeking repayment of the debt in question. As a matter of fact, the 'Corporate Debtor' ought to respond between 10 days either with the proof of 'Debt Repayment' or receives payment because of the dispute in regard to the 'Debt'. Apart from this the details about the pending 'Suit' or an 'Arbitral' proceedings filed before the receipt of 'Demand Notice' may also be furnished.

NATURE OF DISPUTE

43 An 'Adjudicating Authority' is to decide whether there exists a dispute in terms of the I&B Code and in fact, the said dispute is not to rest on weak defence or based on affirmation of facts, unsupported by material evidence. In short, there shall be a 'Genuine Dispute'.

DISPUTED DEBT

44 If a bona fide dispute is proved an 'Insolvency Petition' is not a proceeding to determine the issue pertaining to the validity of a 'Disputed Debt'.

45 It is to be remembered that if the 'Corporate Debtor' assails the validity of the 'Demand', then he is to show because of the defect in the 'Demand Notice' 'prejudice' was caused to him. If the 'Corporate Debtor' raise a 'Dispute' in its reply to the 'Demand Notice' issued by the 'Operational Creditor' the onus of establishing the admissibility of the petition will fall upon the said 'Creditor'. If any 'Plausible Dispute' was there prior to the issuance

of Section 8 Notice under the I&B Code, it is to be construed as 'Dispute', as stated under Section 8 of the Code.

MEANING OF DISPUTE

46 It must be borne in mind that a 'Dispute' is not to be a just denial of the due payment. A 'Dispute' is to come within the definition of Section 5(6) of the I&B Code. The term 'includes' in the definition of 'Dispute' (as per Section 5(6) of the Code) is to be read as 'means' and not as 'include'. An 'Adjudicating Authority' is to be subjectively satisfied that there exists a 'Dispute' and the same is not a frivolous or vexatious one. Also, it cannot be forgotten that an 'Adjudicating Authority' under the I&B Code is not the 'proper Forum' for deciding the disputed claims/triable issues of a given case, in the considered opinion of this 'Tribunal'.

PREVALENCE OF DISPUTE

47 An 'Adjudicating Authority' is necessarily to examine in an application filed under Section 9 of the I&B Code prior to the admission or rejecting the said application as to whether the controversy/dispute projected by the 'Corporate Debtor' come within the ambit of 'Dispute' as per Section 5(6) of 5 of the Code. Moreover, it is to be seen whether the 'Notice of Dispute' issued by the 'Corporate Debtor' satisfies the requirements mentioned in Section 8(2) of the Code.

SUPPRESSION OF MATERIAL FACT

48 An 'Operational Creditor' in an application under (Section 9 of the I&B Code, 2016) filed against the 'Corporate Debtor' in terms of Section 9(3)

(b) of the I&B Code shall furnish the following:-

- (a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
- (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor by confirming that there is no payment of an unpaid operational debt by the corporate debtor(if available); and
- (d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and
- (e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

An 'Affidavit' filed as per Section 9 (3)(b) of the Code by the 'Operational Creditor' if it is an incorrect one, not disclosing the factum of furnishing of 'Reply' by the 'Corporate Debtor' to the 'Demand Notice' issued by the 'Operational Creditor' then, the 'Adjudicating Authority' can decide the fate of the application based on the existing realities.

ASSESSMENT

49 The Appellant/Operational Creditor/Applicant in its application under Form 5 seeking to initiate 'CIRP' against the 'Corporate Debtor' under the caption Part IV-'Particulars of Operational Debt' had mentioned that the total

amount of Debt due was Rs.78,00,000/- and that the 'Continuing Default' since last payment was mentioned as one 31.03.2017. In fact, the Appellant/Operational Creditor had issued an invoice dated 30.12.2016 to the Respondent/Corporate Debtor claiming a sum of Rs.30 lakhs 'on issue of sanction letter' by IDBI Bank.

50 Be it noted, in the application filed by the Appellant/Operational Creditor/Applicant under Part V 'Particulars of Operational Debt(Documents, Records and Evidence of Default) at Sl.No.8 it is mentioned as under:-

"List of other documents attached to this Application in order to prove the existence of operational debt and the amount in default:

- 1. Copies of the Offer Letter for arrangement of Working Capital Facilities dated June, 2016.*
 - 2. Copies of three Invoices dated 17.06.2016 (Bill No.IB/16-17/20), 30.12.2016 (Bill No.IB/16-17/144) and 31.03.2017 (Bill No.IB/16-17/210) issued by the Operational Creditor to the Corporate Debtor.*
 - 3. Copy of Demand Notice dated 21.03.2018 issued to Corporate Debtor.*
 - 4. Copies of all other required documents as per Annexure 1 to VI.*
- No response to demand notice/invoice attached with notice dtd. 21.03.2018 served in Form 4 from the Corporate Debtor."*

51 As seen from the Bill dated 31.03.2017 the Appellant/Operational Creditor under the caption 'Heading of Bill' had raised an invoice and claimed

a pro-rate fee on sanction by Lead Bank a sum of Rs.45,00,000/-. Further, the Accounts Executive of the Respondent/Corporate Debtor on 30.10.2017 had certified that the 'Debt Balance' of Rs.78,00,000/- as due sum to the Appellant/Operational Creditor as per their 'Books'.

52 The Appellant/Operational Creditor had issued a Notice dated 21.3.2018 addressed to the Respondent/Corporate Debtor wherein it was mentioned that the invoices were raised pursuant to the offer letter for arrangement of working capital facilities dated June, 2016 entered into between the Appellant/Operational Creditor and the Respondent/Corporate Debtor. Indeed, the details of the invoice are as under:-

S.No.	Invoice No	Date of the Invoice	Amount
1	Bill No.IB/16-17/20	17.06.2016	INR 2,300,000
2	Bill No.IB/16-17/144	30.12.2016	INR 3,000,000
3	Bill No.IB/16-17/210	31.03.2017	INR 4,500,000

53 As a matter of fact that the Appellant/Operational Creditor in the aforesaid notice dated 21.3.2018 had stated that it has received part payment of INR Rs.20 lakhs in respect of the part payment of the invoice Bill No.IB/16/17/20 dated 17.06.2016 and that the remaining amount for the aforementioned invoices was due and payable as on date. Added further, the Appellant/Operational Creditor had proceeded to state in the aforesaid Notice that the 'Respondent/Corporate Debtor' was to repay the debt due within 10 days of the receipt of the Notice and failure to do so may entail the

Appellant/Operational Creditor to file an application before the 'Adjudicating Authority' for initiating 'CIRP' under Section 9 of the Code.

54 The Respondent/Corporate Debtor in its Reply to CP/IB/No.245/NCLTAHM/2018 had averred that a 'Reply' was issued on 27.3.2018, to the Demand Notice of the Appellant/Operational Creditor dated 21.03.2018 and that the said Reply of the Respondent/Corporate Debtor was received by the Appellant/Operational Creditor on 28.3.2018 and this vital information was suppressed by the Appellant/Operational Creditor and in fact an act of 'perjury' was committed by the 'Deponent' by making incorrect statement in para 2.6 of the affidavit (Page 43 of the application) in regard to the non-receipt of a Notice of dispute from the 'Corporate Debtor'.

55 The stand of the Respondent/Corporate Debtor as seen from its Reply filed before the 'Adjudicating Authority' is that the Appellant/Applicant had not fulfilled its obligations under the 'offer letter' dated June, 2016 and in fact the Respondent/Corporate Debtor had hired the services of the Appellant/Applicant to arrange for the working capital requirement of approximately Rs.2000 crores (including of Rs.550 crores of 'Stand By Letter of Credit' (SBLC)).

56 The grievance of the Respondent/Corporate Debtor is that the Appellant had managed to arrange only Rs.217 crores (Rs.157 crores from IDBI Bank Ltd and Rs.60 crores from Indian Overseas Bank) towards 'FBIL' as against the requirement of Rs.550 crores. In reality, although Rs.217 crores was sanctioned, the same was not disbursed as the Appellant/Operational Creditor had failed to obtain consent of all the Lenders of the Corporate Debtor

and, therefore, the Appellant/Operational Creditor had failed to honour its obligations to arrange and disburse Rs.550 crores.

57 According to the Learned Counsel for Respondent/Corporate Debtor, the Appellant/Operational Creditor was entitled to the undermentioned payment terms:

S.No.	Particulars	Amount
1	Commence Fee	Rs.20 lac
2	On issuance of sanction letter by IDBI Bank	Rs.30 lakhs
3.	On financial closure*	Balance fee
4	Total Fees payable	Rs.200 lacs

*payable on pro rata basis, proportionate to the limits applied for

58 It is the version of the Respondent/Corporate Debtor that it made a payment of Rs.20 lakhs towards the 'commencement fee' under the first milestone. In regard to the second milestone viz. issuance of sanction letter by IDBI Bank Ltd-Lead Bank on behalf of all the Banks, the Appellant had raised an invoice dated 30.12.2016 for Rs.30 lakhs even before the issuance of sanction letter. As a matter of fact, the Respondent/Corporate Debtor had informed the Appellant/Operational Creditor that an invoice dated 30.12.2016 for Rs.30 laksh could not be raised as 'sanction letter' was not

received from the IDBI Bank Ltd on behalf of all the Lenders of the Corporate Debtor.

59 The stance taken on behalf of the Respondent/Corporate Debtor is that the sanction letter was issued by the IDBI Bank on 31.01.2017 for the credit facilities of Rs.360 crores (inclusive of Rs.157 crores SBLC) and Indian Overseas Bank for Rs.140 crores (inclusive of Rs.60 crores SBLC) and although the aforesaid sums were sanctioned, the same were not disbursed and that the 'second milestone' was not fulfilled.

60 In substance, the plea of the Respondent/Corporate Debtor is that the Appellant/Applicant had failed to arrange for the 'sanction' from other Lenders of the Corporate Debtor as visualised in the 'offer letter' and this led to the non-fulfilment of the 'ambit of services', which gave rise to an existence of dispute. Besides this, it is the contention of the Respondent/Corporate Debtor that it was not aware of the basis on which the invoice dated 31.3.2017 was issued by the Appellant for Rs.45 lakhs in respect of the 'third milestone'.

61 It is represented on behalf of the Respondent/Corporate Debtor that the services rendered by the Appellant under the 'offer letter' was incomplete and deficient, due to which it had not issued the 'Advisor Assignment Completion Certificate' as required under Clause 14(g) of the offer letter. In the absence of the Appellant satisfying its 'scope of services' and the 'Advisor Assignment Completion Certificate', the third invoice dated 31.03.2017 of the Appellant/Operational Creditor for Rs.45 lakhs was not honoured by the Respondent/Corporate Debtor.

62 It is the case of the Respondent/Corporate Debtor it is not correct to state that the 'Default' is continuing as alleged by the Appellant or at all. Per contra there is no 'Default' since the Appellant had failed to honour its obligations under the 'offer letter' and as such the 'Appellant' is disentitled to claim any amount from Respondent/Corporate Debtor under the offer letter dated June, 2016.

63 The Respondent/Corporate Debtor comes out with the plea that before the 'Adjudicating Authority' it had raised a 'Bona fide and Genuine Dispute' and the same is required to be determined in a Civil Suit before the Competent Court of Law and that the Insolvency Proceedings are not the appropriate proceedings for the recovery of 'Disputed Claim'.

64 By way of 'Rejoinder', the Appellant/Operational Creditor before the 'Adjudicating Authority' had stated that Mr Utpal Mehta was duly authorised to file the Insolvency and Bankruptcy Code proceedings for the Appellant/Applicant in various Tribunals across the country and that the Appellant/Applicant had inadvertently attached the 'authority letter' in regard to the proceedings in Ahmedabad. In fact, the Deponent was authorised by the Appellant/Company for initiating 'CIRP' against the 'Corporate Debtor'. In fact, Mr Utpal Mehta was given the delegated authority by way of 'Blanket Approval Letter' to initiate Section 9 I&B Code proceedings in Ahmedabad.

65 At the time of filing the Application, the Deponent of the Appellant had no knowledge in regard to the Reply dated 27.03.2018 received by the Appellant company. A Reply dated 27.03.2018 of the Respondent/Corporate

Debtor issued for the sake of a legal formality cannot be considered to be an evidence of existence of a 'Dispute'.

66 The Appellant/Operational Creditor had raised the invoice for the first 'milestone' on 17.06.2016 and on the date when the invoice was raised by the Appellant, the company had not received any service tax exemption from the Tax Department as such, the company is liable to pay Rs.3 lakhs to the Appellant as per the invoice dated 17.06.2016, the date of billing of the 'first milestone'.

67 In regard to the 'second milestone', it is the stand of the Appellant/Applicant that it managed to arrange the working capital facilities from IDBI Bank Ltd for Rs.360 crores and a copy of the sanction letter from IDBI Bank was produced before the 'Adjudicating Authority'. Since the 'second milestone' was leaked to the issuance of the sanction letter by IDBI Bank, the invoice for 'second milestone' of Rs.30 lakhs was raised on 30.12.2016. As regards the 'third milestone', IDBI Capital was to earn a total fee of Rs.1.50 crore upon financial closure of Rs.1200 crores of working capital facilities from the Lenders. Apart from this, the fee was payable to IDBI Capital proportionate to the limits tide up by IDBI Capital for the company. Because of the fact IDBI Capital had completed the financial tie up of Rs.360 crores with IDBI Bank, and invoice of Rs.45 lakhs was raised for the 'third milestone' on 31.03.2017. As such, the Appellant had denied that it failed in fulfilment of the 'scope of services' as contemplated in the 'Offer Letter'.

68 In fact, the Appellant/Applicant had rendered services to the Respondent/Corporate Debtor, who had duly acknowledged that it owes a

sum of Rs.78,00,000/- to the Appellant/Applicant/Operational Creditor. As such, there is no room for adjudication of any dispute by the Civil Court. Further, the 'Statement of Confirmation of Balance' signed by the Corporate Debtor go to prove that the debt of Rs.20,00,000/- was duly acknowledged by the Respondent/Corporate Debtor.

69 In so far as the Power Of Attorney is concerned, it is an authorisation by a 'Principal' to and in favour of its 'Agent' to perform an Act. Such an authorisation can only be of acts which are in the contemplation and knowledge of the 'Principal' as on date when such an authorisation is given. An insolvency proceedings if initiated in Law shall be valid as if it was executed by the Donee of the power in the name, with signature and seal of the Donor.

70 Suffice is for this Tribunal to pertinently point out that the Power of Attorney Holder is the Agent of the Guarantor and in respect of an authorisation of a company, the same will mean a specific authorisation by the Board of Directors of the Company through a Resolution being passed as per decision of the Hon'ble Supreme Court in State Bank of Travancore V. Kingston Computer India Fyi Ltd reported in (2011) 11 SCC 524.

71 It is to be pointed out that Rule 10 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 enjoins that till such time the Rules of Procedure for conduct of proceedings under the I&B Code are notified, an application made under Section 7(1) shall be filed before the Adjudicating Authority in accordance with Rules 20,21,22,23,24 and 26 of Part III of NCLT Rules, 2016. Indeed, Rule 23(1) of NCLT Rules, 2016 deal

with presentation of petition or appeal before the 'Tribunal' by an authorised representative.

72 In Form I of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 the manner in which an application under Section 7 of the Code is to be preferred by a financial creditor is mentioned. Therefore, it is candidly clear that the I&B Code and the Rules recognise a Financial Creditor/a juristic person, to act only through an authorised representative. Apart from that Entry 5 and (Part I) of Form NO.1 specifies the Financial Creditor to submit 'name and address of the person authorised to submit application on its behalf' and requires the authorisation to be enclosed. The signature block of Form I requires the authorised persons detail to be inserted and includes, among other things, the position of the authorised person in relation to the 'Financial Creditor'. As such it is clear that it is quite evident that an authorised individual of a Financial Creditor can prefer an application under Section 7 of the I&B Code.

73 There is no two opinion of the prime fact that an application under 7 of the I&B Code is not to be equated with that of plaint being filed in a 'Civil Suit' before the competent Court of Law. An 'Adjudicating Authority' can exercise its judicial discretion based on the facts and circumstances of the given case in permitting the concerned party to file documents or the additional documents.

74 The 'onus' is on the Appellant/Operational Creditor to show about the debt due and payable in Law by the Respondent/Corporate Debtor. It is to be remembered the non-furnishing of requisite information by the

Appellant/Operational Creditor, in the present case, that the Appellant/Operational Creditor before the 'Adjudicating Authority' under Part V of the Application in reality, has not mentioned about the receipt of Reply from the Respondent/Corporate Debtor notwithstanding the said omission about the furnishing of Reply by the Respondent/Corporate Debtor is not fatal in the considered opinion of this Tribunal.

75 Furthermore, an opportunity in law is to be provided to the 'Appellant/Operational Creditor' to furnish the additional information required to the subjective satisfaction of the 'Adjudicating Authority'. In regard to the occurrence of default and the aspect of 'Default' committed by the 'Respondent/Corporate Debtor' as per Section 3(12) of the I&B Code, the same is 'Ex Facie' to be established by the Appellant/Operational Creditor.

76 At this juncture, this Tribunal points out the decision of the Hon'ble Supreme Court in Surendra Trading Co V. Juggilal Kamlapat Jute Mills Co Ltd reported in (2017) 16 SCC Page 143 as Spl Page 149 wherein at paragraph 5, 6, 22, 23.2, 24, 25 and 28, it is observed and held as under:-

"5. One of the conditions, with which we are concerned, is that application under sub-section (2) has to be complete in all respects. In other words, the adjudicating Authority has to satisfy that it is not defective. In case the adjudicating Authority, after the scrutiny of the application, finds that there are certain defects therein and it is not complete as per the provisions of sub-section (2), in that eventuality, the proviso to sub-section (5) mandates that before rejecting the application, the adjudicating

Authority has to give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice.

6. Sub-section (5) of Section 9, thus, stipulates two time periods. Insofar as the adjudicating Authority is concerned, it has to take a decision to either admit or reject the application within the period of fourteen days. Insofar as defects in the application are concerned, the adjudicating Authority has to give a notice to the applicant to rectify the defects before rejecting the application on that ground and seven days' period is given to the applicant to remove the defects.

22. Let us examine the question from another lens. The moot question would be as to whether such a rejection would be treated as rejecting the application on merits thereby debarring the applicant from filing fresh application or it is to be treated as an administrative order since the rejection was because of the reason that defects were not removed and application was not examined on merits. In the former case it would be travesty of justice that even if the case of the applicant on merits is very strong, the applicant is shown the door without adjudication of his application on merits. If the latter alternative is accepted, then rejection of the application in the first instance is not going to serve any purpose as the applicant would be permitted to file fresh application, complete in all aspects, which would have to be entertained. Thus, in either case, no purpose is served by treating the aforesaid provision as mandatory.

23.2. When the application is listed before the adjudicating Authority, it has to take a decision to either admit or reject the application. For this

purpose, fourteen days' time is granted to the adjudicating Authority. If the application is rejected, the matter is given a quietus at that level itself. However, if it is admitted, we enter the third stage.

24. Further, we are of the view that the judgments cited by NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating Authority has to pass the Order is not mandatory but directory in nature would equally apply while interpreting the proviso to sub-section (5) of Section 7, Section 9 or subsection (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.

25. Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like to enter a caveat.

28. In fine, these appeals are allowed and that part of the impugned judgment of NCLAT which holds the proviso to subsection (5) of Section 7 or the proviso to sub-section (5) of Section 9 or the proviso to sub-section (4) of Section 10 to remove the defects within seven as mandatory and on failure, applications to be rejected, is set aside. No costs."

77 In the instant case before the 'Adjudicating Authority', the Appellant/Operational Creditor in its Rejoinder to CP/IB/245/2018 at paragraph 9 had stated that 'at the time of filing the application, the Deponent

did not have knowledge as regards the Reply dated 27.03.2018 received by the applicant company'. Therefore, the omission to mention about the Reply of the Respondent/Corporate Debtor dated 27.03.2018 in the application filed by the Appellant/Operational Creditor at Sl.No.8 in Part 'particulars of operation debt (Document, records and evidence of default) and the contra averment made to the effect that 'no response to Demand Notice/Invoice attached with Notice dated 21.03.2018 served in Form 4 from the Corporate Debtor' cannot be put against the Appellant/Operational Creditor to its disadvantage, as opined by this 'Tribunal'.

78 As regards the plea of the Respondent/Corporate Debtor the Deponent of the application who filed the application before the 'Adjudicating Authority' 'without any authority' that Mr. Utpal Mehta has the authority through the authority letter dated 23.04.2018 that he has the authority to 'accept service of process on behalf of the Company in respect of its application under Section 9 of the I&B Code, 2016, before the Hon'ble National Company Law Tribunal (NCLT), Kolkata Bench for initiating 'CIRP' for 'Corporate Debtor' JBF Petrochemicals Ltd' and as such the application filed before the 'Adjudicating Authority' is not maintainable. The Appellant/Operational Creditor through its senior Vice President of the Company Mr. Utpal Mehta had filed a 'Rejoinder' to the Reply of the Respondent/Corporate Debtor averring that Mr. Utpal Mehta was authorised to file the I&B proceedings for the Appellant/Applicant/Operation Creditor before the numerous Tribunals across the country.

79 Further, it is represented on behalf of the Appellant/Operational Creditor before this 'Tribunal' that the blanket approval letter dated 06.03.2018 delegating authority to Mr. Utpal Mehta (Senior Vice President of the Appellant Company) to initiate Section 9 I&BC proceedings in Ahmedabad shows that he is authorised by the Appellant Company for initiating CIRP against the Respondent/Corporate Debtor. As such the contra stand taken on behalf of the Respondent/Corporate Debtor that the 'Deponent' of the Section 9 application had 'No Authority' to file the application representing the Appellant/Operational Creditor before the 'Adjudicating Authority' under Section 9 of the Code seeking to initiate CIRP against the Respondent/Corporate Debtor is not acceded to by this 'Tribunal'.

80 A mere running of the eye of the 'Application' filed by the Appellant/Operational Creditor before the 'Adjudicating Authority' (CP.(IB)No245/NCLT/AHM/2018) seeking to initiate CIRP against the Respondent/Corporate Debtor exhibits that Mr. Utpal Mehta had signed the said Application in its capacity/status as the authorised signatory of the Appellant/Operational Creditor/Applicant.

81 In this connection, it is not out of place for this 'Tribunal' to pertinently point out that the Appellant/Operational Creditor/Applicant through a Senior Vice President Mr. Utpal Mehta before the 'Adjudicating Authority' in its 'Rejoinder' (To the Reply of the Respondent/Corporate Debtor) at paragraph 6 had mentioned that the 'Applicant' herein inadvertently attached the authority letter with regard to the proceedings in 'Ahmedabad'.

82 Continuing further, when the Appellant/Operational Creditor/Applicant had categorically made an averment at paragraph 6 of the 'Rejoinder' (To the reply of the Respondent/Corporate Debtor in CP.(IB)No245/NCLT/AHM/2018) to the effect that Mr. Utpal Mehta was authorised by the Appellant Company for initiating CIRP process against the Corporate Debtor. The attachment of the 'Authority Letter' dated 23.04.2018 relating to the proceedings in Ahmedabad 'inadvertently' by the Appellant/Operational Creditor/Applicant cannot be taken advantage of by the Respondent/Corporate Debtor in any manner, in the considered opinion of this 'Tribunal'.

83 As regards the 'Office Circular' dated 21.11.2017 Mr. Garla had delegated the power among other things to file application on behalf of the Appellant/Operational Creditor before the Tribunal to Mr. V . Goptnath and Ms Cristina Dsouza, Company Secretary and Compliance Officer. When the power was delegated to Ms Cristina Dsouza by Mr. Garla to file application or lodge the same before the Registry on behalf of the Company, it includes an authority to sign the affidavit on behalf of the Company. To take a plea that Ms Cristina Dsouza could not have authorised Mr. Utpal Mehta to sign the affidavit in support of the application on behalf of the Appellant/Company is an untenable one because of the fact that an 'Agent' is a person employed to do any act for another or to represent another in dealings with third parties. In Law, an 'Agent' is responsible to the 'Principal' for the performance of his act.

84 If an Agent holding an express or implied authority to name another person to act for the 'principal' in the business of the agency, has named another person, then such person is not a sub-agent, but an agent of the principal for such part of the act to be performed as entrusted to him.

85 An Agent appointing another person is merely the messenger of the principals' direct authority. The term ratification as used with reference to the Law of Agency is applicable only to acts performed on behalf of the ratifier as per decision *Raja Rai Bhagwal Dayal Singh V. Debi Dayal Sahu* 12 CWN Page 393.

86 In Law, if an act is done by a person on behalf of another but the same is done without his 'Knowledge'/'Authority', he has the option to ratify such act and in case of 'ratification' or 'post facto approval' then, it will follow as a corollary that the said act was performed by his authority. The act of ratification may be made in an express or by implication by means of the conduct of the person on whose behalf the acts are performed.

87 Be it noted, it is to be remembered that the well known maxim 'Delegatus Non Potest Delegare' is not of universal application and if the employment is of such a character, that it has to be performed by another the rule does not apply and whereby usage, such duties are performed by a sub-agent, the usage will be implied as per decision *Sardar Bir Singh V. Noor Ahmed* reported in AIR 1972 Gauhati 122.

88 To be noted, that because of the 'Trade Custom' the delegation of special branches of assignment/work is permissible and well recognised in Law. An 'Authority' to delegate may be implied whenever the act to be performed or

done by the 'Sub-Agent' is a ministerial one and does not involve the exercise of any skilled or discretion (vide *Ex parte Birmingham Banking Co*; (1868) LR 3 CH 651) or is an act subsidiary to the main purpose of the transaction (*Re.London and Mediterranean Bank, ex parte Birmingham Banking Co* (1868) 3 CH APP 651; *Re.Marshall, Ex pert Sutton*, (1788) 2 COX EQ CAS 84). It cannot be gainsaid that an authority to sign may be delegated as per decision *Brown V. Tombs* (1891) 1 QB 253.

89 An Agency will be of such a character that it cannot be carried out effectively without the help of Sub-Agents in which event 'delegation' is a justifiable one as per decision *Leiboak Syndicate V. Finlay Flaming & Co reported in AIR 1923 Ran 84*.

90 If the business exigency from time to time make it necessary the carrying out of the instructions of a Principal by a person other than the 'Agent' originally instructed for the purpose and in that event, the rule should be relaxed as per decision *De Bussche V. Alt*, (1874-80) ALL ER Rep 1247.

91 If in the course of an employment, unexpected and unforeseen exigency arise to perform the task of 'Agency', naturally an 'Agent' has the need/necessity to employ a substitute and it can be safely and securely be presumed that the parties to the contract originally had intended that such a delegation of authority ought to exist in the nature of certain business or based on the customs/usage of trade, as opined by this 'Tribunal'.

92 Viewed from the above perspective, the contra views arrived at by the 'Adjudicating Authority' in the impugned order that 'since Ms Christina D'souza herself did not possess authority to sign affidavit on behalf of the

Company, she could not have further authorised Mr. Utpal Mehta to sign affidavit in support of the application on behalf of the Company' are clearly unsustainable as held by this 'Tribunal'.

93 The stand of the Appellant/Operational Creditor is that the Respondent/Corporate Debtor was a signatory to the offer letter dated June, 2016 in terms of which the Appellant had provided the assistance in arrangement of working capital facilities to the Corporate Debtor and raised invoices dated 17.06.2016, 30.12.2016 and 31.03.2017.

94 It is the case of the Appellant/Operational Creditor that Respondent/Corporate Debtor had not raised any grievance in regard to the services provided by the Appellant/Operational Creditor and made a part payment of Rs.20 lakhs in respect of the 1st invoice dated 17.06.2016 and there was a balance sum of Rs.3 lakhs being outstanding towards the 1st invoice. Further, the Appellant/Operational Creditor issued a confirmation of balance as on 30.09.2017 showing an outstanding of Rs.78 lakhs and the same was signed and confirmed by the Respondent/Corporate Debtor on 30.10.2017.

95 According to the Learned Counsel for the Appellant/Operational Creditor, the Appellant's scope of services would include assistance in arranging the working capital requirement and it contained no clause whatsoever of any guarantee/commitment to arrange the same, the Respondent/Corporate Debtor to avail its liability took a plea before the 'Adjudicating Authority' that nothing was payable, since the loan, later was not disbursed.

96 It is the version of the Appellant that the process between 'sanction and disbursal' is between the Respondent/Corporate Debtor/Borrower and the lender/Bank and that the Appellant/Operational Creditor had no role and indeed the Appellant/Operational Creditor is making a claim for the due amount in respect of the services rendered by it, as per the terms of the 'Offer Letter' for arranging the same.

97 An emphatic stand taken on behalf of the Appellant is that the service tax exemption of Rs. 3 lakhs included in the 1st invoice dated 17.06.2016 was payable by the Respondent/Corporate Debtor, because of the fact that the alleged exemption claimed by the 'Corporate Debtor' was applicable with effect from 22.08.2016, but the 1st invoice was raised on 17.06.2016.

98 But the defence of the Respondent/Corporate Debtor is that the claim of Rs.3 lakhs in respect of service tax is not due and payable by the Corporate Debtor because the Respondent/Corporate Debtor is entitled to the ab initio exemption from service tax for any services rendered by the Appellant/Operational Creditor under Notification No. 12/2013 ST dated 01.07.2013 issued by the Central Government coupled with the authorisation issued by the Deputy/Assistant Commissioner of Central Excise.

99 According to the Respondent/Corporation that the Appellant/Operational Creditor had clubbed the amount of Rs. 3 lakhs which is neither an operational or financial debt within the amount of Rs.20 lakhs which is impermissible in Law and that the Appellant/Operational Creditor is not entitled to initiate proceedings under Section 9 of the Code, resting on such claim.

100 In respect of the 2nd tranche of Rs.30 lakhs, the contention of the Respondent/Corporate Debtor is that the same was payable only upon issuance of sanction letter by the IDBI Bank and that the IDBI Bank on 31.01.2017 had issued a sanction letter for part finance and even prior to the sanction letter, the Appellant had raised an invoice for Rs.30 lakhs towards the 2nd tranche, on 30.12.2016 in a premature fashion.

101 Also that as against the working capital of Rs.1500 crores, only Rs.283 crores (Rs.202 crores by IDBI Bank and Rs.80 crores by the Indian Overseas Bank) was sanctioned, which was also not disbursed. Likewise as against 'SBLC' of Rs.550 crores, the Appellant/Operational Creditor could arrange only the sanction of Rs.217 crores, which was also not disbursed. In fact, the Appellant had failed to arrange for 'sanction' from 'Other Lenders' of the Respondent/Corporate Debtor as mentioned in the Offer Letter resulting in the non-fulfilment of the 'scope of services' leading to an existence of dispute because of the fact that there was a non-compliance of the assignment within the time specified in the 'Offer Letter'.

102 In respect of the 3rd invoice dated 31.03.2017 for Rs.45 lakhs, the same was not payable as no sum was really disbursed to the Respondent/Corporate Debtor and there was no 'financial closure'. As such there is no legal liability to make the purported payment of a sum of Rs.45 lakhs and that the 3rd invoice was raised in a premature manner.

103 A closer scrutiny of the 'Offer Letter' for arrangement of working capital facility June 2016 Clause 9 deals with 'remuneration' for the scope of services and Clause 9.1 'payment conditions' (a) refers to the payment of invoices

raised towards professional services that shall be made within 15 calendar date from the date of invoice etc.

104 It cannot be brushed aside that Clause 14(g) of the Offer Letter under the caption Client's obligations/support reads as under:-

"The Client shall provide Advisor Assignment completion certificate within 14 calendar days of submission of the Final Report confirming that Advisor has completed the assignment in accordance with the terms of the proposal."

105 More importantly, Clause 16 of the Offer Letter June 2016 under the Head Clarification specifically mentions that 'this Offer Letter is not and cannot under any circumstances be construed as constituting a commitment by the advisor to provide any advances, loans, or financing in any form to the Companies or any third party. This letter is exclusively meant for the company for the purpose of outlining the scope of services as envisaged by the Advisor, and should be treated in strict confidence.

106 Besides the above, Clause 19 of the Offer Letter June 2016 (entered into between the Appellant/Operational Creditor and Respondent/Corporate Debtor under the Head 'Client' specifies that 'IDBI Capital' is providing services to the company in relation to the transaction. It will not regard any person (including any person who is a Director or employee of the company) as its Client in relation to the transaction and will not be responsible to any other person for providing protections afforded to Clients of IDBI Capital or advising any other person involved in the 'Transaction'.

107 In the instant case, it is to be pointed out that the Respondent/Corporate Debtor had not raised any 'Dispute' much less a 'Pre-Existing Dispute' pertaining to either the 'sum' or quality of services provided by the Appellant/Operational Creditor prior to the issuance of the Demand Notice.

108. In Law, there must be an 'Acknowledgement Of Liability' in respect of the property or the right in question and it should be by a litigant/party against whom, such property or right is claimed, as per decision *Nallathambi Nadar V. Ammal Nadachi* AIR 1964 Mad. Page 171 at p. 171 (Full Bench).

109. An Acknowledgement of Liability pre-supposes that an individual acknowledging possesses some interest, thereby he is bound by statement. Further, an Acknowledgement of Liability is to involve an admission of a subsisting jural relationship between the parties and consciousness and an intention of continuing such a relationship, till it is terminated in a lawful manner.

110. An 'Acknowledgement' in terms of Section 18 of the Limitation Act, 1963 must be of a liability, the said liability, being alive or in existence, as on the date of the 'Acknowledgement'. An 'Acknowledgement' must be prior to the lapse of the prescribed period either for a suit or an application in respect of such property or right as per decision *Shivam Construction Co V. Vijaya Bank*, Ahmedabad AIR 1997 Guj. 24 at Spl Pages 29, 30.

111 Although the Respondent/Corporate Debtor had issued a Reply dated 27.03.2018 to the Demand Notice dated 21.03.2018, issued by the Appellant/Operational Creditor denying and disputing its liability to make

payment in respect of the claim made by the Appellant/Operational Creditor and there exists no 'operational debt' due and payable to the Appellant/Operational Creditor and further that the Respondent/Corporate Debtor in regard to the issuance of balance confirmation dated 30.10.2017 affirmed by it to and in favour of the Appellant/Operational Creditor, the same according to it was issued as a matter of general practice and, therefore, it will not constitute an 'Acknowledgement of Liability.' On perusal of the contents of the confirmation of balance as on 30.09.2017 certified by the Accounts Executive of the Respondent/Corporate Debtor unerringly points out that the said 'Confirmation of Balance dated 30.10.2017' is an 'unambiguous and unequivocal' one and it clearly binds the Respondent/Corporate Debtor to the debit balance of Rs.78,00,000/-and this sum outstanding of Rs.78,00,000/- reflecting in the Book of Accounts of the Appellant/Operational Creditor and as such the Respondent/Corporate Debtor cannot wriggle out of the predicament in which it is placed.

112 Indeed, the Confirmation of Balance dated 30.10.2017 signed by the Accounts Executive of the Respondent/Corporate Debtor was not dealt with in the impugned order in CP(IB) No.245/NCLT /AHM/2018 dated 21.01.2020 by the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad Bench) which has resulted in serious prejudice being caused to the Appellant/Operational Creditor.

113 A mere glance of the 'Demand Notice dated 21.03.2018' issued by the Appellant/Operational Creditor to the Respondent/Corporate Debtor shows that the same was issued as per Form 4 of the Insolvency & Bankruptcy

(Application to the Adjudicating Authority) Rules, 2016. Likewise the application was filed by the Appellant/Operational Creditor as per Form 5 of the Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016. Therefore, the contra pleas taken on behalf of the Respondent/Corporate Debtor that the 'Demand Notice' and the 'Application' filed were not in conformity with Form 4 and 5 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 are devoid of merits.

114 In the present case, the existence of 'Debt' and the Respondent/Corporate Debtor's 'Default' are established in respect of the application filed by the Appellant/Operational Creditor before the 'Adjudicating Authority' under Section 9 of the I&B Code, 2016 and, therefore, it is not incumbent on the part of the 'Adjudicating Authority' to take into account of the reasons for the Respondent/Corporate Debtor's Default.

115 In the light of foregoing detailed discussions, this 'Tribunal' looking into the surrounding facts and circumstances of the instant case in a threadbare fashion comes to a consequent conclusion that the 'Adjudicating Authority' had committed an error in dismissing the Application in CP(IB)No.245/2018 (filed by the Appellant/Operational Creditor under Section 9 of the Code) on the basis that (i) There was a 'Pre-Existing Dispute' (ii) there was no Default on the part of the Respondent/Corporate Debtor (iii) inadequacy of services of the Applicant disentitled it to claim any money from the Corporate Debtor under the Offer Letter dated June, 2016 and (iv) the Deponent i.e. Ms Utpal Mehta had filed the application without any proper authority. Therefore, this 'Tribunal' is perforced to interfere with the impugned order dated 21.01.2020

in CP(IB) No.245/NCLT/ AHM/2018 and sets aside the same in furtherance of Substantial cause of Justice. The ‘Appeal’ succeeds.

DISPOSITION

116 In fine, the Company Appeal (AT)(Ins) No.524/2020 is allowed. No costs. The ‘Adjudicating Authority’ is directed to restore the CP(IB) No.245/NCLT/ AHM/2018 to its file, to admit the same and to proceed further in accordance with Law.

NB: This judgement is pronounced)
as per Rule 92 of NCLAT Rules, 2016.)

[Justice M. Venugopal]
Member(Judicial)

(V.P. Singh)
Member(Technical)

(Dr. Ashok Kumar Mishra)
Member(Technical)

20th December, 2021

Akcbm