

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

**Company Appeal (AT) (Insolvency) No. 437 of 2022**

[Arising out of order dated 12.04.2022 passed by the National Company Law Tribunal, New Delhi, Court No. – IV in Company Petition No. (IB)-3017/ND/2019]

**IN THE MATTER OF:**

**Jitendra Kumar Singh**

**Having Address At:-**

**Shri Rama Prasad Singh,  
Sirpalpur, Rohtas, Bihar - 821112**

**...Appellant**

**Versus**

**1.M/s Vishakarma Tool Works**

**Having Office At:-**

**Plot No. 397, Udyog Kenra,  
Part 2, Ecotech – 3, Near Yamaha Motors,  
Surajpur, Greater Noida,  
Uttar Pradesh – 201308**

**...Respondent No. 1**

**2.M/s Mor Mukat Marketing Private Limited**

**Through Its Interim Resolution Professional**

**Mr. Pankaj Kumar Singh**

**Having Office At:-**

**A-233, Ground Floor, Bunkar Colony,  
Ashok Vihar, Phase-IV,  
New Delhi – 110052**

**... Respondent No. 2**

**Present:**

**For Appellant:**

**Mr. Kripa Shankar Prasad & Ms. Ritu Rajkumari,  
Mr. Sangam Kumar, Advocates.**

**For Respondent:**

**Mr. Siddhartha Sinha, Advocate for R1  
Mr. Ashok Juneja, Mr. Pankaj Kumar Singhal, for  
IRP/R2.**

**J U D G E M E N T**

**Justice Rakesh Kumar Jain, Member (J).**

This appeal is filed by Jitendra Kumar Singh, Suspended Director of M/s Mor Mukat Marketing Pvt. Ltd. (Corporate Debtor) against the Order dated 12th April 2022 passed by the National Company Law Tribunal,

New Delhi (Court No. IV) in Company Petition No.IB-3017(ND)/2019 by which an application filed under Section 9 of the Insolvency and Bankruptcy Code 2016(for short the Code) by M/s Vishakarma Tool Works (Operational Creditor) has been admitted, Corporate Insolvency Resolution Process (CIRP) has been initiated and Insolvency Resolution Professional (IRP) has been appointed followed by moratorium as envisaged under Section 14(1).

2. In brief, the operational creditor filed an application under Section 9 of the Code to initiate CIRP against the corporate debtor for non-payment of the outstanding dues of Rs.3031780/- arising out of sale of the pet moulds, injection moulds and various other plant and machinery of various description to the corporate debtor.

3. According to the operational creditor, the corporate debtor had been accepting the delivery of the products without any protest or demur as the goods were sent only after approval of sample but from the last one and half year it deliberately avoided the payment of the dues, concocting story of goods being of defective nature. The operational creditor had raised invoices dated 5th April 2016, 25th April 2016, 28th March 2016, 26th August 2016 and 22nd November 2016 of an amount of Rs.1108740/-, 395760/-, 244800/-, 2473449/- and 359040/- respectively.

4. The operational creditor has alleged that before filing the application under Section 9 of the Code, mandatory notice provided in Section 8 of the Code was sent on 12th of September 2019 calling upon the corporate debtor

and its Directors to pay the outstanding amount of Rs.3031789/- (after adjusting the credit balance and receipts) and after waiting sufficiently for the positive reaction of the corporate debtor, application under Section 9 was filed as a last resort.

5. On the other hand, case of the corporate debtor is that various moulds and machine parts were bought from the operational creditor and payment was made. Thereafter, the corporate debtor placed order for which operational creditor raised three invoices 0021, 001 and 002 dated 28.02.2016, 05.04.2016 and 25.04.2016 for an amount of Rs.240000/-, 395760/-, 1108740 respectively. It is also alleged that the moulds were defective and the operational creditor did not take back the defective moulds nor were replaced as promised.

6. The learned Tribunal, while initiating CIRP, observed that in order to prove existing dispute the operational creditor has placed reliance on selective Whatsapp messages without there being any corroborative piece of evidence. The corporate debtor appears to have not raised any issue before the Tribunal regarding the non-compliance of the mandatory provisions of Section 8 in regard to the service of notice upon the corporate debtor at its registered office. However, in the present appeal, filed by one of the suspended Directors of the corporate debtor, it has been argued that proceedings initiated under Section 9 are per se illegal because mandatory notice, provided under Section 8 of the Code was not served upon the corporate debtor at its registered office address. It is also submitted by learned counsel for the appellant that

the Tribunal has erred in not placing reliance upon the Whatsapp messages(chat) in order to hold that there was a pre-existing dispute between the parties. The learned counsel for the appellant, during the course of hearing, has referred to the whatsapp chat in order to show that there were defects in the product which was supplied by the operational creditor to the corporate debtor and has relied upon the decisions of this Tribunal in the case of Vinod Mittal Vs. Rays Power Experts Pvt. Ltd. CA (AT) (Ins.) No. 851 of 2019 and M/s Bhandari Hosiery Exports Limited and Ors. Vs. M/s In-Time Garments Pvt. Ltd., Company Appeal (AT) (Insolvency) No.143 of 2019 in order to show that if notice under Section 8 is not served at the registered office of the corporate debtor then the whole proceedings are vitiated. Learned counsel for the appellant has drawn our attention to Company master data (Annexure A/11) wherein the registered address has been shown as 332-A, Sant Nagar, East of Kailash, New Delhi and contended that the notice has otherwise been sent at the registered address i.e. Plot No.388/389, Biscuit Factory Road, Nasir Ganj Diga, Danapur, Patna. In this regard he has relied upon the decisions of this Tribunal rendered in the case of Jyoti Strips Pvt. Ltd. Vs. J.S.C. Ispat Pvt. Ltd. Company Appeal (AT) (Insolvency) No.775 of 2020 and Mr. Shalender Sharma, Director of R&M International Pvt. Ltd. Vs. Ercon Composites Company Appeal (AT) (Ins.) 159 of 2020.

7. On the other hand, counsel appearing on behalf of the Respondent has submitted that the debt is acknowledged in the books of accounts of the Corporate Debtor and has referred to the decisions of the Hon'ble Supreme

Court in the case of Mahabir Cold Storage Vs. CIT 1991 Supp.(1) SCC 402, A.V. Murthy Vs. B.S. Nagabasavanna (2002) 2 SCC 645 and Asset Reconstruction Company(India) Ltd. Vs. Bishal Jaiswal and Another (2021) 6 SCC 366. It is further submitted that whatsapp chat has been selectively used by the corporate debtor in order to highlight existing dispute for avoiding the CIRP proceedings initiated in terms of Section 9 of the Code otherwise there are whatsapp chat between the parties of making the payment which was not readily available with the corporate debtor and after waiting for a year and a half, a lame excuse has been made to avoid payment of the outstanding dues which have been shown regularly in the books of accounts of the period, before and after, the filing of the application under Section 9. It is also argued that besides the whatsapp chat between the parties, no other corroborative piece of evidence has been brought on record which may include a notice referring to the defective goods for which they were not liable to make the payment etc.

8. In respect of the notice issued under Section 8, It is submitted that firstly, it has not been the case of the corporate debtor before the Tribunal and has been raised for the first time by the suspended Director in this appeal and secondly, the notice was duly served at the address of the registered office of the corporate debtor situated in the State of Bihar, taken from the company master data and also upon one of the Director R.K. Gupta who had been participating in the whatsapp chat which satisfies the mandate of Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

9. We have heard learned counsel for the parties and perused the record with their able assistance.

10. It is pertinent to mention that as per the scheme of the Code, Section 8 provides that an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt, copy of an invoice demanding payment of the amount involved in the default, to the corporate debtor in such form and manner as may be prescribed and within 10 days of the receipt of the demand notice, the corporate debtor is required to inform the operational creditor about the existence of a dispute, pendency of a suit or Arbitration proceedings, before the receipt of such notice or invoice, the payment of unpaid operational debt by sending attested copy of the electronic transfer of the unpaid amount from the bank account of corporate debtor, by sending an attested copy of record that operational creditor has encashed the cheque issued by the corporate debtor and after the expiry of period of 10 days from the date of delivery of the notice or invoice demanding payment under Section 8(1), if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under 8(2), the operational creditor may file an application under Section 9 to the Adjudicating Authority for initiating Insolvency Resolution Process.

11. From the perusal of the aforesaid provisions i.e. Section 8 and 9 of the Code, it is apparent that a notice of the unpaid amount to the corporate debtor is a sine qua non. The form and manner of the demand notice is provided in Rule 5 of the Rules of 2016 which says that an operational creditor has to

deliver to the corporate debtor a demand notice in Form III or a copy of the invoice attached with notice in Form IV. The demand notice, referred to Section 8(2) of the Code has to be delivered to the corporate debtor at the registered office by hand, registered post or speed post with acknowledgement due or by electronic email service to the Whole Time Director or designated partner or key managerial personnel, if any, of the corporate debtor. The legislature has used the word “or” in Rule 5(2)(a&b) which means that the demand notice could be served either at the registered office or upon the Whole Time Director. It means that service upon one of the entities is the sufficient compliance of Section 8(2) of the Code and both are not necessary. In the case of Jyoti Strips Pvt. Ltd. (supra) it has been held that Section 8 of the Code read with Rule 5 of the Rules provides that service of demand notice has to be served upon the corporate debtor at its registered address. But no such issue was involved in it that in case it is not served upon a Whole Time Director then it would be an insufficient compliance. It is not the case of the appellant that notice was not served upon the whole Time Director. As a matter of fact the notice was served upon R.K. Gupta who is the Director of the Company and had been in conversation with the representative of the operational creditor on whatsapp.

12. In these facts and circumstances, we are of the considered opinion that there has been sufficient compliance of Section 8(2) of the Code and even if it is presumed, for the sake of arguments, that no notice was served upon at the registered address i.e. East of Kailash though the operational creditor has been continuously insisting that the

registered address of the corporate debtor, obtained from the master data, is of the State of Bihar where the notice was sent.

13. As regards the second question, there is no quarrel with the law laid down by this Tribunal that the electronic evidence i.e. email or even whatsapp can also be looked into in order to find out the fact about an existing dispute between the parties which can be used as a shield by the corporate debtor to avoid the attack of the operational creditor with the filing of an application under Section 9 of the Code but in the present case, operational creditor has been shown in the books of accounts of the corporate debtor as sundry creditor and had admitted the debt even in the whatsapp chat but has selectively referred to the chat regarding defect in the supplied goods and raised this issue when the application under Section 9 was filed. In this regard, the findings recorded by the Tribunal does not call for any interference and are hereby upheld.

14. No other point has been raised.

15. As a consequence of the aforesaid discussion, we do not find merit in the present appeal and the same is hereby dismissed as such though without any orders as to costs.

**[Justice Rakesh Kumar Jain]  
Member (Judicial)**

**[Ms. Shreesha Merla]  
Member (Technical)**

**New Delhi**

**25<sup>th</sup> July, 2022**

Sheetal