

In the National Company Law Tribunal
Mumbai Bench.

TCP No. 438/I&BC/NCLT/MB/MAH/2017

Under Section 9 of Insolvency & Bankruptcy Code 2016

In the matter of

DESIGNS OFFICE ARCHITECTS PRIVATE LIMITED : Petitioner

V/s

PATEL REALTY INDIA LIMITED : Respondent

Heard on : 22.11.2017

Order delivered on: 11.12.2017

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)
Hon'ble Shri Bhaskara Pantula Mohan (Judicial)

For the Petitioner(s): : 1. Mr. Sanjay Jain along with
2. Ms. Koshiki, Advocates.

For the Respondent(s): : 1. Mr. Dakshesh Vyas;
2. Mr. Nishant Vyas, Advocates;
3. Mr. Simran Gurnani, Solicitor

Per M.K. Shrawat, Member (Judicial).

ORDER

1. This is the Petition transferred from the Hon'ble High Court and thereafter on 14.7.2017 the Petitioner in the capacity of "Operational Creditor" has filed Form No.5 wherein made a claim of Operational Debt of ₹ 46,42,088/- (inclusive of Interest) against the Corporate Debtor viz. M/s. Patel Engineering Limited.
2. On receiving the Petition, the Respondent Debtor has raised a preliminary legal objection that no Notice of Demand under section 8 of the Insolvency Code had been served upon the Corporate Debtor which is a mandatory requirement in respect of a Petition under section 9 of the Code.
3. From the side of the Petitioner Learned Counsel Mr. Sanjay Jain appeared and stated that the Respondent was associated with the Petitioner from the year 2012. The Respondent had entered into a "Service Agreement" of 21st January 2013 whereby it was agreed upon to provide Architectural Consultancy Services for the

project for construction of building on Plot bearing CTS No. 216 A(B)(C) viz. Smondo, Residential building at Bangalore. As per the terms of the said Agreement the Respondent had agreed to pay the Petitioner professional fees of ₹3,11,86,350/-. The Petitioner as a Professional Consultant has provided consultancy services and raised Invoices. Attention was drawn on the details of the Invoices and the work done by the Petitioner. The Respondent had received those Invoices without any objection and never raised any question about the quality of the services rendered. The Corporate Debtor has also not objected about the Fees demanded in those Invoices. Against the outstanding payment as per the Invoices of ₹1,69,06,431/-, the Respondent had paid an amount of ₹1,10,37,910/- including Service Tax after deduction of TDS. Thereafter, despite repeated reminders, the Corporate Debtor had failed to make the payment of the outstanding amount to the Petitioner. The Learned Counsel has drawn our attention on the dates of several reminders. According to him, the Debt is admitted by the Respondent because a part payment had already been made. The Petitioner, through his Advocate, sent notice dated 10.05.2016 under section 433 and 434 of Companies Act, 1956 to pay the outstanding amount of ₹46,42,088/-. Admittedly a reply of the Debtor dated 28.06.2016 was received by the Petitioner. Due to failure of payment the Petitioner had submitted a Petition bearing No. (Company Petition (L) 907 of 2016) under section 433 and 434 of Companies Act, 1956 before the Hon'ble High Court. On account of a Notification No. GSR 1119(e) dated 07.12.2016 of Government of India, the said Company Petition was transferred to NCLT. As per the requirement of the Insolvency Code the Petitioner had submitted Form No.5 on 14.07.2017. He has pleaded that the Petition is maintainable because the required Notice had already been served upon the Corporate Debtor and there is no denial of this fact.

4. From the side of the Respondent Debtor it is pleaded that even in a situation when the Petition is transferred from the Hon'ble High Court, the Petitioner is required

under section 8 of the Code to deliver Demand Notice. This statutory requirement was not fulfilled, hence the Petition is to be dismissed at the very threshold.

5. Having heard the submissions of both the sides, prima facie, we are of the conscientious view that the issue of delivery of Notice of Demand as prescribed under section 8 has been held as a mandatory pre-requisite condition for admission of section 9 Petition under the Insolvency Code. As far as the facts of this case are concerned, undisputedly, this Petition is a transferred Petition from the Hon'ble High Court by virtue of the Notification GSR 1119(e) dated 07.12.2016 (supra). Another admitted factual is that the Petitioner had served upon the Respondent Debtor Notices under the old provisions of Companies Act, 1956 under section 433 and 434. The Respondent had also issued a reply on receiving those Notices. On account of these facts, although the admitted factual position was that the Respondent was aware about the claim of the Petitioner which is the purpose of serving of Notice on the Other Side, but under the changed circumstances of law, the Petitioner was required to issue once more a Notice under section 8 even in cases where the Petition is transferred from the Hon'ble High Court, as held in the case of Era Infra Engineering Limited Vs. Prideco Commercial Projects Pvt. Ltd. Company Appeal (AT) (Ins) No.31 of 2017, Order dated 03.05.2017 wherein the Hon'ble Appellate Tribunal has made certain observations as follows:-

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

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(Application to Adjudicating Authority) Rules 2016 (hereinafter referred to as I&B 'Rules' for short).

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6. *The application for initiation of corporate insolvency resolution process, thereafter can be filed by Operational Creditor after expiry of period of 10 days from the date of delivery of the notice or invoice demanding payment, as provided under sub-section (1) of section 9.*

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8. *Admittedly, no notice was issued by Operational Creditor under section 8 of the I & B Code, 2016. Demand notice by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of any expiry period of tenure of 10 days there was no question of preferring an application under section 9 of I & B Code, 2016.*

9. *The Adjudicating Authority has failed to notice the aforesaid facts and the mandatory provisions of law as discussed above. Though the application was not complete and there was no other way to cure the defect, the impugned order cannot be upheld.*

10. *For the reasons aforesaid, we set aside the order dated 12th April 2014 passed by the Adjudicating Authority. The application preferred by Operational Creditor under section 9 stands dismissed being incomplete. All orders, interim arrangement etc as has been made are vacated, moratorium as declared earlier is quashed, appointment of interim resolution professional also stands quashed. All action taken by interim resolution profession is declared illegal. The appeal is allowed with the aforesaid observations."*

6. In a latest decision the Respected Coordinated Bench, NCLT, Mumbai in the case of M/s. Inject Care Parenterals Private Limited (Operational Creditor) Vs. M/s. Vexta Laboratories Private Limited (Corporate Debtor) in TCP No.260/I&BC/NCLT/MB/MAH/2017 Order dated 01.12.2017 has held in the case of a Transferred Petition from the High Court as under :-

"8.10. Further that, regards to the question of issuance of Notice is raised by the Debtor, we have perused the Notice sent by the Operational Creditor under section 434 of the Companies Act, 1956 and also the R.P.A.D. slip to that effect and we are of the opinion that, the Notice

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under section 434 of the Companies Act, 1956 is duly received by the Debtor.

8.11. *As regards the question of issuance of Demand Notice under section 8 of The Code it is admitted fact that, the Operational Creditor has not issued the Demand Notice under section 8 of the Code after transfer of Winding-up Petition from the Hon'ble High Court as against the Debtor.*

8.12 *Accordingly, we have perused the decision of Hon'ble NCLAT in "Era Engineering Ltd. v. Prideco Commercial Projects Private Ltd. (Company Appeal) (AT) (Ins.) No.31/2017 wherein it is held as follows:*

"8. Admittedly, no notice was issued by Operational Creditor under section 8 of the I&B Code, 2016. Demand notice by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of any expiry period of tenure of 10 days there was no question of preferring an application under section 9 of I&B Code, 2016."

8.13. *Hence, in the light of above judgment we are of the opinion that, this matter also deserves **Rejection** in absence of issuance of Demand Notice U/s 8 of the Code."*

7. Respectfully following the decision of the Hon'ble NCLAT, we have no option but to refuse this Petition to be admitted being a defective Petition, however, grant a liberty to file a fresh Petition under the Code. This liberty is provided under the Notification dated 29.06.2017 [F. No. 1/5/2016-CL-V] (GSR 732(E) as under, relevant paragraph reproduced below :-

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

8. Petition is dismissed subject to the above observations. To be consigned to Records.

Sd/-

BHASKARA PANTULA MOHAN
Member (Judicial)

Date : 11.12.2017

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Sd/-

M.K. SHRAWAT
Member (Judicial)