

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION**

Company Appeal (AT) (Insolvency) No. 220 of 2017

(Arising out of Order dated 5th September, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi in Company Petition No.(IB)-203(ND)/2017)

IN THE MATTER OF:

M/s. J.P. Engineers Pvt. Ltd.

...Appellant

Vs.

M/s. Indo Alusys Industries Ltd.

...Respondent

Present: For Appellant: -Mr. Sanjeev Sindhvani, Senior Advocate with Mr. P. Nagesh and Mr. Dhruv Gupta, Advocates.

For Respondent: - Mr. Virender Ganda, Senior Advocate with Mr. Ruchi Mahajan, Ms. Anannya Ghosh, Mr. Dushyant M and Mr. Tarun, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant-‘Operational Creditor’ preferred an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “I&B Code”). The Adjudicating Authority (National Company Law Tribunal), New Delhi, having rejected the application by order dated 5th September, 2017 in Company Petition No.(IB)-203(ND)/2017, the present appeal has been preferred.

2. The main ground taken by the Adjudicating Authority is that the notice under sub-section (1) of Section 8 of the 'I&B Code' has not been issued by 'Operational Creditor' or its Authorised Representative having position with or in relation to the 'Operational Creditor' but by an Advocate. Reliance has been placed on this Appellate Tribunal decision in ***"M/s. Uttam Galva Steels Limited v. DF Deutsche Forfait AG & Anr. Company Appeal (AT) (Insolvency) No. 39 of 2017"***.

3. Learned counsel appearing on behalf of the Respondent submitted that the Lawyer notice is permissible and as per Companies Act, 2013, an act of any Authorised person can be rectified by Board of Directors, which has been done in the present case. Reliance has been placed on Hon'ble Supreme Court decision in ***"Maharashtra State Mining Corporation Vs. Sunil S/O Pundikaro Pathak, 2006(5) SCC 96"***, wherein the meaning of ratification is explained by the Hon'ble Supreme Court and held that a subsequent ratification of an act is equivalent to a prior authority to perform such act.

4. Learned counsel appearing on behalf of the Respondent- 'Corporate Debtor' submitted that notice under sub-section (1) of Section 8 of the 'I&B Code' was issued on 9th May, 2017 by one Mr. Sharad Tyagi, an Advocate on behalf of the Appellant-'Operational Creditor'. He relied on decision of this Appellate Tribunal in ***"Uttam Galva Steel Ltd. (supra)"***. It was further submitted that the Appellant-

‘Operational Creditor’s’ application was not maintainable under Section 9 of the ‘I&B Code’ on account of notice of dispute to the Appellant. Reliance was placed on Hon’ble Supreme Court’s decision in **“Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– 2017 SCC OnLine SC 1154”**.

5. According to counsel for the Respondent-‘Corporate Debtor’, the application filed by the Appellant-‘Operational Creditor’ was not only incomplete and defective in absence of statutory affidavit in terms of Section 9(3)(b) of the ‘I&B Code’, there being ‘dispute in existence’ and other defects, the application under Section 9 of the ‘I&B Code’ was not maintainable.

6. In **“Uttam Galva Steel Ltd. (supra)”**, this Appellate Tribunal decided the issue whether 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’ can issue notice under sub-section (1) of Section 8 of the ‘I&B Code’ or not. The answer of the Appellate Tribunal is in negative, as quoted below: -

“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 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 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, admittedly notice has been issued by an Advocate and there is nothing on the record to suggest that the said Lawyer has been authorised by Board of Directors of the Appellant or

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holding any position with or in relation with the Appellant. In this background, we hold that the Adjudicating Authority rightly held that the notice issued by the lawyer on behalf of the Appellant cannot be treated as notice under Section 8 of the 'I&B Code'.

8. In so far as ratification of Power of Attorney is concerned, it will not cure the defects in preferring the appeal under Section 9 of the 'I&B Code', which can be preferred by the 'Operational Creditor' only after ten days of issuance of notice under sub-section (1) of Section 8 of the 'I&B Code' and in the requisite Form-5, in terms of Section 9(3)(b) of the 'I&B Code'. The 'Operational Creditor' is required to mention whether the 'Corporate Debtor' has raised any dispute pursuant to demand notice.

9. In ***"MobiloX Innovations Pvt. Ltd. (supra)"***, the Hon'ble Supreme Court while dealing with Section 9 of the 'I&B Code' observed:-

"54. 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. 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.”

10. In the present case, we find that the Appellant-‘Operational Creditor’ filed an application but curiously it has not made clear that a notice of dispute has been received by the Appellant-‘Operational Creditor’. For the reasons aforesaid and in the light of decision in

“MobiloX Innovations Pvt. Ltd. (supra)” the Adjudicating Authority rightly rejected the claim.

11. Even otherwise, on merit the Adjudicating Authority noticed that the claim as made by the Appellant-‘Operational Creditor’ is not sustainable under ‘I&B Code’. From the rejoinder’s referred by ‘Operational Creditor’ makes it clear that the petition under Section 9 of the ‘I&B Code’ has been filed not on behalf of the ‘Operational Creditor’ in relation to its alleged outstanding owed from the Respondent-‘Corporate Debtor’, but also for and on behalf of another firm namely ‘M/s. J.P.Engineers’ allegedly taken over by the Appellant-‘Operational Creditor’ since 4th November, 2016.

12. From the record we also find that before purported notice under sub-section (1) of Section 8 issued by lawyer pursuant to notice under Section 138 of the Negotiable Instruments Act, 1881, by letter dated 4th March, 2017, the Respondent-‘Corporate Debtor’ disputed the claim and brought to the notice of the Respondent that they did not match the invoice number of the invoices received and paid by the ‘Corporate Debtor’. In view of the fact there is an ‘existence of dispute’, we hold that the petition under Section 9 of the ‘I&B Code’ was even otherwise not maintainable.

13. For the reasons aforesaid, no interference is called for against the impugned order dated 5th September, 2017. We find no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member (Judicial)

(Balvinder Singh)
Member(Technical)

NEW DELHI

6th December, 2017

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