

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

**Company Appeal (AT)(Insolvency) No. 703 of 2023**

[Arising out of order dated 12.05.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench - V in CP(IB) No. 4427/IB/MB/2019].

**IN THE MATTER OF:**

**Digvijay Kathiwada**  
**3A, Pratap Plaza,**  
**Near Bank of Baroda, Sunmil Compound,**  
**Lower Parel(W), Mumbai – 400 013**

**...Appellant**

**Versus**

**Haren Sanghvi & Associates**  
**512, A/B, Swastik Disa Corporate Park,**  
**5<sup>th</sup> Floor, Kohinoor Mills Compound,**  
**Opp. Shreyas Cinema, L.B.S. Marg,**  
**Ghatkopar (W), Mumbai – 400 086**

**...Respondent No.1**

**CDigital Arts and Crafts Private Limited**  
**Ground Floor, 69/72,**  
**West More Building,**  
**Sir Pochkanwala Road,**  
**Worli Colony, Mumbai – 400 030**

**...Respondent No.2**

**Lalit Zaverchand Shah**  
**Office No.421, Grohitam Building,**  
**4<sup>th</sup> Floor, Sector – 19, Vashi,**  
**Opp. APMC Grain Market,**  
**Next to Mathadi Bhavan,**  
**Navi Mumbai, Maharashtra – 400 703**

**...Respondent No.3**

**Present:**

**Appellant:** **Mr. Raghenh Basant, Ms. Anne Mathew, Ms. Kaushitaki Sharma, Advocates**

**For Respondents:** **Advocate D. Bhattacharyya, Advocate Deeti Ojha, Advocate Subhoday Banerjee**

## J U D G M E N T

**[Per: Barun Mitra, Member (Technical)]**

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 ("**IBC**" in short) by the Appellant arises out of the Order dated 12.05.2023 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-V) in CP(IB) No.4427/IB/MB/2019. By the impugned order, the Adjudicating Authority has admitted the Section 9 application filed by the Respondents seeking initiation of Corporate Insolvency Resolution Process ("**CIRP**" in short) of the Corporate Debtor. Aggrieved by the impugned order, the present appeal has been filed by erstwhile Director of the Corporate Debtor.

2. The Learned Counsel for the Appellant making his submissions stated that the Adjudicating Authority had erroneously allowed the Section 9 application filed by Operational Creditor-Haren Sanghvi & Associates/Respondent No.1 on the ground that existence of debt and default committed thereto by the Corporate Debtor stood established. The Adjudicating Authority had seriously erred in passing the impugned order without examining the fact that demand notice required to be issued by the Operational Creditor as mandated by Section 8 of the IBC had not been complied to by the Operational Creditor. It was also asserted that the requirement of serving Section 8 demand notice being a statutory pre-requisite, non-service thereof cannot be viewed as a curable defect.

3. It was further contended that the Appellant had never received any demand notice from the Operational Creditor and the latter has also failed to provide any proof of delivery of the same on the Corporate Debtor. It has been pointed out that the postal receipt and tracking report of the said demand notice which has been placed on record by the Operational Creditor in support of their claim that demand notice was served lacks credence since it only depicts that the said demand notice had been served by the Advocate of the Operational Creditor on the Operational Creditor and not on the Corporate Debtor. On this ground alone that no Section 8 demand notice had been served on the Corporate Debtor, the maintainability of Section 9 application becomes questionable and the Adjudicating Authority should have verified this aspect before considering the Section 9 application. In support of their contention, the Learned Counsel of the Appellant has referred to the judgment of this Tribunal in the matter of ***Shailendra Sharma, Director of R&M International Pvt. Ltd. v. Ercon Composites 2021 SCC OnLine NCLAT 3*** which held that an application filed under Section 9 of the IBC without serving notice under Section 8 is not maintainable and failure to serve the demand notice is not a curable defect.

4. It has also been submitted that the address of the Corporate Debtor at which the said demand notice was allegedly sent was also not the registered address of the Corporate Debtor but had been wrongly sent to the corporate office of the Corporate Debtor. Contending that this service of statutory notice on the Corporate Debtor at its registered office renders the process of service to be contrary to the scheme of IBC and therefore legally unsustainable. It is

the case of the Appellant that the Operational Creditor has failed to provide proof of correct service of notice on the Corporate Debtor. Even the grounds cited by the Advocate for the Operational Creditor on failure to give proof of service of Section 8 notice on the Corporate Debtor per se are flimsy grounds and lack credulity.

5. Refuting the submissions made by the Appellant, the Learned Counsel for the Respondent No.1 denied the contention of the Corporate Debtor that the statutory demand notice had not been served on the Corporate Debtor. The Operational Creditor had followed the due process of law in serving the demand notice in terms of Section 8 of the IBC. It was forcefully argued that this plea of non-service of demand notice should have been raised during the proceedings before the Adjudicating Authority and that not having been done then cannot be agitated now at this belated stage before the Appellate Tribunal.

6. Advancing their arguments further it was asserted that the Section 8 demand notice dated 04.11.2019 was addressed to the Corporate Debtor with a copy of the same also endorsed to the Operational Creditor by the legal counsel of the Operational Creditor. The wrong proof of delivery submitted by the Advocate of the Operational Creditor was on account of clerical error. Moreover, since the office premises of the Advocate of the Operational Creditor had to be shifted due to Covid pandemic and there has been a lapse of more than three and a half years since then, the proof of service of the demand notice could not be traced as the proof seems to have been misplaced. As regards the contention of the Corporate Debtor that the demand notice had

been wrongly served upon the Corporate Office and not the registered office, it was pointed out that there have been numerous communications exchanged between the corporate office of the Corporate Debtor and the Operational Creditor. Moreover, even if the Section 8 demand notice was served at the corporate office, the same cannot be held against the Operational Creditor since the Section 9 application had been addressed to the registered office and this fact has not been controverted by the Corporate Debtor.

7. It has also been contended that the impugned order has duly considered all the other objections too which had been raised by the Corporate Debtor and recorded its findings. It has correctly come to the conclusion that there is no requirement that a firm has to be registered in case it wants to file a Section 9 application. The contention raised by the Appellant that the Section 9 application is barred by limitation was also found to have been devoid of substance by the Adjudicating Authority at paragraphs 16-18.

8. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

9. To appreciate the facts of the case, at the outset, it would be useful to refer to Sections 8 and 9 of the IBC read with Rule 5 of the Insolvency and Bankruptcy, (Application to Adjudicating Authority) Rules, 2016:

***“8. Insolvency resolution by operational creditor-***

*(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.*

*(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor -*

*(a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;*

*(b) the payment of unpaid operational debt-*

*(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or*

*(ii) by sending an attested copy of the record that the operational creditor has encashed a cheque issued by the corporate debtor.*

*Explanation: For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.”*

***“9. Application for initiation of corporate insolvency resolution process by operational creditor.***

*(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under subsection (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.*

*(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.*

*(3) The operational creditor shall, along with the application furnish-*

- (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 confirming that there is no payment of an unpaid operational debt by the corporate debtor; and*
- (d) such other information as may be specified.*

*(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.*

*(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—*

- (i) admit the application and communicate such decision to the operational creditor and the corporate debtor i,—*
  - (a) the application made under sub section (2) is complete;*
  - (b) there is no repayment of the unpaid operational debt;*
  - (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*
  - (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*
  - (e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.*

*Provided that Adjudicating Authority, shall before rejecting an application under sub clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.*

(6) *The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section"*

***“Rule 5 Insolvency and Bankruptcy, (Application to Adjudicating Authority) Rules, 2016***

***5. Demand notice by operational creditor.***-(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.*

*(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,*

*(a) at the registered office by hand, registered post or speed post with acknowledgement due; or*

*(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.*

*(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any."*

10. A plain reading of Section 8 of IBC indicates that the prerequisites necessary to trigger CIRP under Section 9 of the IBC is the existence of a debt due and its default by the corporate debtor and a corresponding delivery of demand notice of the said unpaid and undisputed debt and further that there has been no payment of the unpaid and undisputed debt within the period of 10 days of receipt of demand notice and that no real pre-existing dispute is discernible.



11. The Learned Counsel for the Appellant/Corporate Debtor has contended that the Adjudicating Authority in this case has erroneously commenced the insolvency process under Section 9 of IBC though the Appellant/Corporate Debtor was not served any notice upon them under Section 8 of IBC. It has also been asserted that the Operational Creditor has failed to adduce valid proof of delivery of demand notice. There appears to be force in the contention of the Appellant since material placed on record at page 163 of the Appeal Paper Book to substantiate that demand notice had been served clearly shows that the demand notice had been served by the Advocate of the Operational Creditor on the Operational Creditor and not on the Corporate Debtor. The explanation offered by the Operational Creditor is that Section 8 demand notice dated 04.11.2019 was addressed to the Corporate Debtor but on account of clerical error the proof that was attached was the notice copy which had been endorsed to the Operational Creditor by the legal counsel of the Operational Creditor. Admittedly the Operational Creditor has not been able to produce the notice copy addressed to the Corporate Debtor since their Advocate has misplaced the same and the said letter dated 26.06.2023 has been placed at page 11 of reply affidavit of the Operational Creditor. The Appellant has vehemently contended that these grounds cited by the Advocate for the Operational Creditor on failure to give proof of service of Section 8 notice on the Corporate Debtor are flimsy and lack credulity. Moreover, we also notice that admittedly the Section 8 notice was sent to the corporate office and not to the registered office of the Corporate Debtor.

12. There is no doubt in our minds that in terms of the statutory construct of the IBC, an application for initiation of corporate insolvency resolution process can be filed by Operational Creditor only after expiry of period of 10 days from the date of delivery of the Section 8 demand notice on the Corporate Debtor. If we look at the impugned order, it has held at paragraph 19 that the Corporate Debtor was served with a notice dated 04.11.2019 which notice was not responded to by the Corporate Debtor. However, there is no specific finding recorded on whether the notice was actually served on the Corporate Debtor, a factum which has been seriously contested by the Corporate Debtor. Further it is the case of the Appellant that the proof of service claimed by the Operational Creditor was wrong proof of service.

13. In the facts of the present case, where the delivery of the Section 8 notice has itself been questioned by the Corporate Debtor there arises a need to verify as to whether the statutory provisions of IBC code have been duly complied with. In view of the mandatory provision under Section 8 of IBC read with Rule 5 of Insolvency and Bankruptcy, (Application to Adjudicating Authority) Rules, 2016 which entails that for initiation of insolvency resolution by an Operational Creditor a demand notice has to be served by the unpaid Operational Debtor on the Corporate Debtor, we feel that the contention of the Appellant deserves due consideration.

14. Having given thoughtful consideration to the submissions made on behalf of the Appellant and having examined the material available on record with reference to the applicable mandatory statutory provisions of the IBC, we are clearly of the view that the order of the Adjudicating Authority is silent

on the actual delivery of the Section 8 notice which is a bone of contention between the two parties. We are of the considered opinion that this aspect needs to be appropriately examined and hence remand the matter back to the Adjudicating Authority to consider the Section 9 application afresh with particular reference to actual and proper delivery of the demand notice on the Corporate Debtor. In result, the appeal is allowed. The impugned order dated 13.05.2023 is set aside. The orders passed by the Adjudicating Authority initiating CIRP against the Corporate Debtor and appointing interim Resolution Professional and all other orders pursuant to the impugned order are declared illegal and set aside. The interim Resolution Professional shall be paid the actual expenses incurred and nominal fees by the Operational Creditor on production of invoices. No order as to costs.

**[Justice Ashok Bhushan]**  
**Chairperson**

**[Barun Mitra]**  
**Member (Technical)**

Place: New Delhi  
Date: 06.12.2023

**PKM**