NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

COMPANY APPELLATE JURISDICTION

Company Appeal (AT) (Insolvency) 39 of 2017

(arising out of order dated 10th April, 2017 passed by National Company Law Tribunal, Mumbai Bench in CP No. 45/Mah/2017 of 2017)

IN THE MATTER OF:

Uttam Galva Steels Limited ...Appellant

v.

DF Deutsche Forfait AG & Anr. ...Respondents

Present: **For Appellant**: - Mr Sudipto Sarkar and Mr Virendra Ganda, Sr. Advocates, Mr Arvind Kumar Gupta, Mr Sumesh Dhawan, Ms Purti Marwaha Gupta, Mr Mahesh Agarwal, Mr Anuj Kumar, Ms Vatsala Kak and Mr Rajeev Kumar, Advocates.

For Respondents: - Mr Vivek Sibal, Senior Advocate, Ms Pooja M Saigal, Mr Akshay Gupta, Advocates and Mr Sahil Bhatia, POA for the Respondent.

J U D G E M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Respondents – both of whom claim to be Operational Creditor (s) filed a joint application under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as I&B Code) for

initiation of corporate insolvency resolution process against Appellant – Corporate Debtor. By impugned order dated 10th April, 2017, Learned Adjudicating Authority (National Company Law Tribunal) Mumbai Bench while rejected the objection as were raised by the Appellant, admitted the application and directed to refer the matter to the Insolvency & Bankruptcy Board of India to recommend name of Interim Resolution Professional for his appointment.

2. Ld. Counsel for the Appellant – Corporate Debtor challenged the impugned order on different count. It was submitted that there is a pre-existing bonafide dispute between the parties and therefore, the insolvency application under Section 9 of the I&B Code is not maintainable. In support of aforesaid submission, it was contended that: -

(i) there is no privity of contract with the Respondents;

(ii) Respondents violated the contractual terms;

(iii) Appellant disputed execution of contract;

(iv) There is dispute about quantum of default;

(v) There is a dispute as to who is the defaulter (whether the default can at all be attributed to Uttam Steels in view of actual liability being that of a 3rd party);

(vi) There is a dispute as to whether the Respondents are Operational Creditors of the Appellant etc.

3. It was pointed out that the Respondents had issued a winding up notice on 8th December 2016 much prior to the issuance of so called notice under Section 8 of the I&B Code. Pursuant to which, the Appellant disputed the claim by a detailed reply dated 3rd January 2017. Apart from that, the Respondents are relying on a document dated 27th December 2013 to fix liability on the Appellant, which has not been signed by Appellant and was brought to the notice of the Respondents in the year 2013 itself.

The Ld. Counsel for the Appellant referred to an e-mail dated 10.4.2014 forwarded by one of the Respondent to demonstrate existence of bonafide dispute between the parties and submitted that in view of bonafide pre-existing dispute, in terms of sub-Section (6) of Section 5 of the I&B Code, the joint insolvency application is not maintainable.

4. It was further pointed out that the notice under Section 8 of I&B Code dated 28.2.17 was issued jointly by two Respondents, both of whom claimed to be 'Operational Creditors' but not by Respondents themselves but through their Advocate, Ms Sonu Tandon. According

to Appellant the joint petition under Section 9 by two separate Operational Creditors is not permissible and Demand Notice under Section 8 in Form-3 or Form-4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as Adjudicating Authority Rules) was not issued by the 'authorised persons' in accordance with law.

5. It was further submitted that the certificate of 'financial institution' as prescribed and mandatory under clause (c) of sub-Section (3) of Section 9 of the I&B Code was not filed by Respondents in support of their claim that there is no payment of the unpaid operational debt. Further, according to Appellant, the bank certificate dated 6th March 2017 submitted by Respondents is defective on multiple counts as it was not issued by a notified "financial institution", but has been issued by **'Misr Bank'** which is not recognised as a "financial institution" in India as per sub-section (14) of Section 3 read with clause (c) of sub-section (3) of Section 9 of the I&B Code. It was further contended that the affidavit in the insolvency application was also defective and incomplete. According to the Ld. Counsel for the Appellant, the affidavit in support of insolvency application should have been filed, as prescribed in Form-5 of the Adjudicating Authority Rules.

6. On the other hand according to Ld. Counsel for the Respondents a joint petition by 'Operational Creditors' is maintainable. Joint petition *per say* would indicate or suggest the joinder of more than one cause of action to enable the parties/litigants to institute a proceeding jointly in the court of law by pleading *inter-alia* a commonality of interest of reliefs. He further submitted that 'AIC Handles GmbH' (supplier) who entered into sales contract with the Appellant (Uttam Galva Steels Limited) for sale of steel billets for a value of US$ 10,800,000 and raised an invoice for US$ 10,787,040. According to Respondents, no disputes were raised by the Appellant with regard to delivery of the goods, either in terms of the quality or quantity. The debt, which was secured by a collateral security in the form of a Bill of Exchange for US$ 5,387,040 and US$ 5,400,000 was thereafter, assigned to 1st Respondent by forfeiting agreement by supplier.

7. He also highlighted facts relating to sale of goods through sale contracts. It was submitted that transaction was single and the same has not been split in two cause of actions as is erroneously contended by the Appellant. It is only the right to receive payment under the Bills of Exchange that has now been vested in the two entities i.e., 1st Respondent and 2nd Respondent. Therefore, in

essence, there is no joinder of cause of action but only right to receive the payment under the Bills of Exchange having been vested in two entities and, therefore, a joint petition has been filed by two entities with respect to single cause of action and the same is maintainable under Section 9 of the I&B Code.

8. 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, which is as follows: -

> *"**23A. Presentation of joint petition**. - (1) The Bench may permit more than one 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."*

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

9. 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.

10. Insofar as issuance of notice under Section 8 of the I&B Code through a lawyer is concerned, according to Respondents, notice under Section 8 can also be given through a lawyer. Ld. Counsel for the Respondents submitted that settled position is that the procedures are hand maiden of justice which cannot defeat the substantive rights of the parties. The matter of procedure is within the realm of curial law and are not to be read in a manner that defeat the very purpose and the intent 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.

11. 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 Section 8 of the I&B Code. Since the requirement of certificate 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 in response to the demand notice or not. Ld. Counsel submitted that in the present case a certificate of bank *albeit* incorporated under the law of Germany has been produced to affirm that no payment has been received.

12. It was also submitted that the Appellant has accepted that the end customer is "Aartee Commodities (UK) Limited" which has to make payment (though this assertion is being denied by the Respondents) and such end customer has not made payment to the

Appellant, therefore, non-payment of the invoice is an admitted fact and require no further elaboration by way of independent certificate in the manner interpreted by the Appellate Tribunal. However, as the certificate of the foreign bank has been produced in support of the claim that no amount has been received by the Respondents any other interpretation would frustrate the rights of a foreign entities to file an insolvency petition as an 'Operational Creditor' under the I&B Code.

13. The question involved in this appeal are:-

(i) Whether a joint application by two or more 'operational creditors' under Section 9 of the I&B Code is maintainable ?

(ii) Whether it is mandatory to file 'certificate of recognised financial institution' along with an application under Section 9 of the I&B Code ?

(iii) Whether the demand notice with invoice under Section 8 of the I&B Code can be issued by any lawyer on behalf of an Operational Creditor ? and

(iv) Whether there is an existence of dispute, if any, in the present case ?

14. To decide the issues, it is desirable to notice the difference between Section 7 and 9 of I&B Code. Apart from the fact that some of the questions already stand decided by this Appellate Tribunal but in this appeal, we have given main thrust on the questions not decided earlier i.e., maintainability of a joint application under Section 9 of the I&B Code and whether a notice under Section 8, can be given through a lawyer.

15. Initiation of insolvency resolution process by 'Financial Creditor' **either by itself or jointly** with other Financial Creditors is provided in Section 7 of the I&B Code. As per sub-section (1) of Section 7 of the I&B Code, the trigger of filing of an application by a Financial Creditor **by himself or jointly with other Financial Creditors** before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Sub-section (2) of Section 7 of the I&B Code provides that a Financial Creditor to make an application on the prescribed form and manner and with documents as prescribed in sub-section (3) of Section 7 of the I&B Code. The relevant provision of Section 7 of the I&B Code reads as follows:-

> *"**7.- Initiation of corporate insolvency resolution process by financial creditor** - (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

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

3) The financial creditor shall, along with the application furnish— (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified; (b) the name of the resolution professional proposed to act as an interim resolution professional; and (c) any other information as may be specified by the Board."

16. Unlike Section 7 of the I&B Code, before making an application to the Adjudicating Authority under Section 9 of the I&B Code, the requirements under Section 8 of the I&B Code are required to be fulfilled, as apparent from the said provision, as quoted below: -

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 an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed. Persons who may initiate corporate insolvency resolution process. Initiation of corporate insolvency resolution process by financial creditor. Insolvency resolution by operational creditor. (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, and 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 repayment 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 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 repayment of the operational debt in respect of which the default has occurred.

17. Under sub-section (1) of Section 8 of the I&B Code, an 'Operational Creditor' on occurrence of a default, is required to deliver the notice of payment of unpaid debt or get copy of the invoice payment of the defaulted amount served on the Corporate Debtor. This is the condition, precedent under Section 8 & 9 of the I&B Code, unlike Section 7 before making an application to the adjudicating authority under Section 9 of the I&B Code. Under sub-Section (1) of Section 9 of the Code, the right to file an application accrues after expiry of ten days from the delivery of Demand Notice or copy of invoice, as the case may be. If the Operational Creditor does not receive payment from the Corporate Debtor or notice of dispute under sub Section (2) of Section 8, the Operational Creditor only thereafter may file an application before the Adjudicating Authority for the initiation of corporate insolvency resolution process.

18. An application under Section 9 of I&B Code is required to be filed in such format and manner and accompanied by such fee, as may be prescribed. The Operational Creditor along with the application is required to furnish documents as mentioned in clause (a), (b), (c) and (d) of sub-Section (3) of Section 9 of I&B Code, and quoted below: -

"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 sub-section (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."

19. From the aforesaid provisions of Section 8 and 9 of I&B Code, it is clear that unlike Section 7, a notice under Section 8 is to be issued by an "Operational Creditor" individually and the petition under Section 9 has to be filed by Operational Creditor individually and not jointly.

20. Otherwise also it is not practical for more than one 'operational creditor' to file a joint petition. Individual 'Operational Creditors' will have to issue their individual claim notice under Section 8 of the I&B Code. The claim will vary which will be different. Date of notice under Section 8 of the I&B Code in different cases will be different. It will have to be issued in format(s). Separate Form-3 or Form-4 will have to be filled. Petition under Section 9 in the format will contain, separate individual data.

21. The Respondents have relied on Rule 23A on the NCLT Rules, 2016 but as the said Rule has not been adopted by Section 10 of the I&B Code, 2016, the Rule 23A is not applicable to the application under Section 9 of the I&B Code,2016. For the reasons aforesaid, we hold that a joint application under Section 9 by one or more 'operational creditor' is not maintainable.

22. Second question raised is, whether it is mandatory to file 'certificate of recognised financial institution' along with an application under Section 9 of the I&B Code ?

23. The aforesaid issue was considered by this Appellate Tribunal in "*Smart Timing Steel Limited vs National Steel and Agro Industries*

Limited". By judgment dated 19th May 2017 in Company Appeal (AT) (Insolvency) No. 28 of 2017, Appellate Tribunal while held that filing of 'certificate of recognised financial institution' maintaining account of the 'Operational Creditor' confirming that there is no payment of unpaid operational debt made by the Corporate Debtor is mandatory, observed as follows: -

> *"11. On perusal of entire Section (3) along with sub-sections and clauses, inclusive of proviso, it would be crystal clear that, the entire provision of sub-clause (3) of Section 9 required to be mandatorily followed and it is not empty statutory formality.*
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> *12. Sub-section (2) stipulates filing of an application under Section (1) only in the form and manner and accompanied with such fees as may be prescribed. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (hereinafter referred to as 'Adjudicating Authority Rules 2016' for short) are also enacted in exercise of the power conferred by Clauses (c), (d), (e), (f), of sub-section 239 read with sections 7, 8, 9 and 10 of the 'I & B Code'. The rules provide the procedure required to be followed by filing an application by corporate insolvency resolution process. As per Rule 6 of the 'Adjudicating Authority' Rules 2016, an operational creditor shall make an application for initiating the corporate insolvency process under section 9, in Form 5 accompanied with documents and records required therein. As per sub-rule (2) of Rule 6 it is mandatory again to dispatch a copy of application filed with the adjudicating authority, by registered post or speed post to the registered office of the Corporate Debtor.*

13. The provisions of sub-section (3) mandates the operational creditor to furnish copy of invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor, an affidavit to the effect that, 9 there is no notice given by the corporate debtor relating to dispute of unpaid operational debt, 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 such other information as may be stipulated. Sub-section (5) of section 9 is procedure required to be followed by Adjudicating Authority. One can say that procedural part is not mandatory but is directory.

14. The provision being "directory" or "mandatory" has fallen for consideration before Hon'ble Supreme Court on numerous occasions. In Manilal Shah Vs. Sardar Sayed Ahmed (1955) 1 SCR 108, the Hon'ble Apex Court held that where statute itself provide consequences of breach or noncompliance, normally the provision has to be regarded as having mandatory in nature.

15. One of the cardinal principles of interpretation of statute is that, the words of statute must prima facie be given their ordinary meaning, unless of course, such construction leads to absurdity or unless there is something in the context or in the object of the statute to the contrary. When the words of statute are clear, plain and unambiguous, then, the courts are bound to give effect to that meaning, irrespective of the consequences involved. Normally, the words used by the legislature themselves declare the legislative intent particularly where the words of the statute are clear, plain and unambiguous. In such case, effort must be to give a meaning to each and every word used by the legislature and it is not sound principle of construction to brush aside words in statute as being redundant or surplus, and particularly when such 10

words can have proper application in circumstances conceivable within the contemplation of the statute.

16. For determination of the issue whether a provision is mandatory or not, it will be desirable to refer to decision of Hon'ble Supreme Court in State of Mysore Vs. V.K.Kangan (1976) 2 SCC 895. In the said case, the Hon'ble Supreme Court specifically held: "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."

16. Therefore, it is clear that the word 'shall' used in sub-section (3) of section 9 of I& B Code is mandatory, including clause 3 therein. "

24. In this case, we find that the Certificate dated 6th March 2017 attached by Respondents has not been issued by any 'financial institution' as defined in sub-section (14) of Section 3 of the I&B Code, 2016 but has been issued by **Misr Bank** which is a foreign bank and is not recognised as a 'financial institution'. The said Certificate has been issued by 'collecting agency' as distinct from "Financial

Institution" and genuity of the same can not be verified by the Adjudicating Authority. We also find that the affidavit in support of insolvency application, as prescribed in Form-5 of the 'Adjudicating Authority Rules' has not been filed, which mandates that 'no notice of dispute received to be returned or it is returned when dispute was raised', has to be enclosed by the 'operational creditor'. In absence of such certificate from 'notified Financial Institution', and as Form-5 is not complete, we hold that the application under Section 9 of the I&B Code, was not maintainable.

25. Next question is whether the demand notice with invoice under Section 8 of the I&B Code can be issued by any 'lawyer on behalf of an the Operational Creditor'?

26. To determine the said issue it is desirable to refer to Section 8 of the I&B Code, 2016 which reads as follows: -

> ***"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 an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed. Persons who may initiate corporate insolvency resolution process. Initiation of corporate insolvency resolution process by financial creditor. Insolvency resolution by operational creditor.*
>
> *(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, and 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 repayment 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 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 repayment of the operational debt in respect of which the default has occurred."

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 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.

33. 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

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.

34. The other question raised is whether there is existence of dispute, if any, in the present case ?

35. From bare perusal of record it is clear that the Respondents issued a winding up notice on the Appellant on 8th December 2016 i.e., much prior to issuance of Lawyer's notice purported to be under Section 8 of the I&B Code. On 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.

36. 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 II 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.*
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> *18. Once the term "dispute" is given its natural and ordinary meaning, upon reading of the Code as a whole, the width of "dispute" should cover all disputes on debt, default etc. and not be limited to only two ways of disputing a demand made by the operational creditor, i.e. either by showing a record of pending suit or by showing a record of a pending arbitration. The intent of the Legislature, as evident from the definition of the term "dispute", is that it wanted the same to be illustrative (and not exhaustive). If the intent of the Legislature was that a demand by an operational creditor can be disputed only by showing a record of a suit or arbitration proceeding, the definition of dispute would have simply said dispute means a dispute pending in Arbitration or a suit.*
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> *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 sub-section (2) of Section 8 would become surplus usage.*
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> *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*

adjudication of disputes, notice becomes irrelevant and such an interpretation renders the expression 'existence of a dispute, if any, in sub-section (2) of Section 8 itiose. 24. The statutory requirement in sub-section (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' (if 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 of pace of life, if one discovers the true meaning of sub-section (2)(a) of Section 8 of the 'I & B Code', having regard to the context of Sections 8 and 9 of the Code, it emerges both from 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 sub-section (6) of Section 5 of the 'I & 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 (a)-(c) only. The words 'and record of the pendency of the suit or arbitration proceedings' under sub-section (2)(a) of 16 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 subsection (6) of Section 5 of the 'I & B Code' and that such disputes are within the ambit of the expression, 'dispute, if 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 subsection (6) of Section 5 of the 'I & B Code', it would violate the definition of operational debt under sub-section (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 alongwith expression operational debt as defined in Section 5(21) 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 any".

30. Therefore, it is clear that for the purpose of sub-section (2) of Section 8 and Section 9 a '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 if issued by one of the party, a labourer/employee who may claim to be operation 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 debit 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 foods, 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 malafide 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 20 case the question will arise whether a petition under Section 9 will be maintainable particularly when it was a suit or 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 (5) 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."

37. In view of the decision of "*Kirusa Software Pvt. Ltd. v. Mobilox Innovations Pvt. Ltd*", as a notice of winding up dated 8th December

2016, was issued by Respondents and the claim was disputed by Appellant by detailed reply dated 3rd January 2017 i.e., much prior to purported notice under Section 8, issued by Lawyer and a suit between the parties is pending, we hold that there is an existence of 'dispute', within the meaning of Section 8 read with sub-section (5) of Section 5 of I&B Code and, therefore, the petition under Section 9 preferred by Respondents against the Appellant was not maintainable.

38. In view of detailed reasons and finding recorded above, we hold the impugned order is illegal and set aside the impugned order dated 10th April 2017 passed by the Learned Adjudicating Authority, Mumbai Bench in Company Petition No. 45/Mah/2017 of 2017.

39. In effect, order (s), if any, passed by Ld. Adjudicating Authority appointing any 'Interim Resolution Professional' or declaring moratorium, freezing of account and all other order (s) passed by Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The joint application preferred by Respondent under

Section 9 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The appellant company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

40. Learned Adjudicating Authority will fix the fee of 'Interim Resolution Professional ', if appointed and the Respondents will pay the fees of the Interim Resolution Professional, for the period he has functioned. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

Sd/-
(Mr. Balvinder Singh)
Member (Technical)

Sd/-
(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

28th July, 2017

RC