

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**COMPANY APPEAL (AT)(Insolvency) No.608 of 2020**

(Arising out of Order dated 8.6.2020 passed by the National Company Law Tribunal,  
New Delhi Bench in Company Petition No. (IB) 1895 /ND/2019)

**IN THE MATTER OF :**

**Ashok Agarwal**  
**Proprietor of M/s Shree Marketing** .. Appellant  
**G-308, Preet Vihar, Vikas Marg,**  
**New Delhi 110002.**

**Versus**

**Amitex Polymers Private Limited**  
**17 Tribhuan Complex Ishwar Nagar,** ...Respondent  
**Friends Colony, New Delhi 110065.**

**Present:**

**For Appellant : Mr.Pankaj Bhagat, Advocate**

**For Respondent: Notice delivered – yet no appearance**

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

**Venugopal M.J**

**Preamble**

The Appellant has focused the instant appeal being dissatisfied with the impugned order dated 8.6.2020 passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi Bench) in (IB) No.1895/ND/2019 in dismissing the application filed by the Appellant/Petitioner/Operational Creditor (under Section 9 of The Insolvency and Bankruptcy Code 2016.

2. Earlier, the 'Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) while passing the impugned order dated 8.6.2020 in (IB) No.1895/ND/2019 at Paragraphs Nos.10 to 14 had observed the following:

10. "At this juncture, we would like to mention this fact that the Appellant admit that he filed the present application for the amount which has been settled in Civil Suit No.6912/2016 and on the basis of a consent decree, the said amount became due and for that amount, the present application has been filed. Therefore, we would like to consider this whether decree comes under the definition of Corporate Debt or not. AT this juncture, we would like to quote the following definition of Section 3(10) and the same is quoted below:

*Creditor "means any person to whom a debt is owed and includes a financial creditor, an 'Operational Creditor', a 'Secured Creditor, an 'Unsecured Creditor' and a 'Decree Holder'.*

11. From the perusal of the aforesaid definition, we find that of course definition of creditor includes a 'Financial Creditor', an 'Operational Creditor', 'Secured Creditor', 'Unsecured Creditor' and a 'Decree Holder' but this definition does not shows that the 'Decree Holder' means a 'Financial Creditor' or an 'Operational Creditor'. The words financial creditor and operational creditor are

defined under section 5(7) and 5(20) of IBC Code and the same are quoted below:

*"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;*

*"Operational Creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.*

12. At this juncture, we would also like to refer the definitions of financial debt and operational debt and the same are quoted below:

### **Section 5(8) of IBC, 2016**

*"Financial Debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-*

- (a) money borrowed against the payment of interest*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on nonrecourse basis;*

- (f) *any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*Explanation – For the purposes of this sub-clause:*

- (i) *any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
- (ii) *the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016;]*
- (iii) *any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- (iv) *any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bond or financial institution;*
- (v) *the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;*

### **Section 5(21) of IBC, 2016**

*"Operational Debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the 6[payment] 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;*

13. *If we shall read all the definitions together then we find that the Financial Creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to whereas an Operational Creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. Since the present application has been filed under Section 9 of the IBC, therefore, we can say that the applicant claimed that on the basis of consent decree an Operational Debt became due but when we shall read the definition of Operational Debt then we find that the decree is not included as an Operational Debt, of course definition of Creditor include decree holder but definition of Operational Creditor does not include decree holder.*

14. *At this juncture, we would like to refer the latest decision of Honourable National Company Law Appellate Tribunal passed in the matter of Digamber Bhondwe Vs.JM Financial Asset Reconstruction Company Limited in which Honourable National Company Law Appellate Tribunal held that "we further reject the submission that because in Section 3(10) of The Insolvency and Bankruptcy Code 2016 in definition of 'Creditor" the "Decree Holder" is included. It shows that decree give cause to initiate application under Section 7 of The Insolvency and Bankruptcy Code 2016. Section 3 is in Part I of The Insolvency and Bankruptcy Code 2016. Part II of The Insolvency and Bankruptcy Code 2016 deals with "Insolvency Resolution And Liquidation for Corporate Person", & has its own set of definitions in Section 5. Section 3(10) definition of "Creditor" includes "financial*

*creditor”, “operational creditor” “decree-holder” etc. But Section 7 of Section 9 dealing with “Financial Creditor” and “operational creditor” do not include “decree holder” to initiate CIRP in Part II.” And when we shall consider the case in hand in the light of aforesaid decision then we are of the considered view that a decree-holder does not come within the definition of Operational Creditor, therefore, the present application is not maintainable.” and ultimately held that the present application was not maintainable as the applicant is not an ‘Operational Creditor’ and dismissed the application.*

**Appellant’s submissions:**

3. The Learned Counsel for the Appellant contends that the Appellant is the proprietor of M/s Shree Marketing and that the Appellant/Operational Creditor is engaged in many other things, in the business of procuring and selling of Goods/Materials/operational supplies, industrial etc., to increase their profit by payment aggregation and providing goods material at competition price by directly buying from large manufacturers and enabling its customers to increase business efficiencies against cash payment or on credit basis.

4. The Learned Counsel for the Appellant points out that the Respondent/Corporate Debtor had approached the Appellant/Operational Creditor and represented that it was in requirement of Goods/Material manufactured/supplied by the appellant and requested the Appellant/company to supply the same to it. Accordingly, the Respondent/Corporate Debtor placed the ‘Purchase Order’ dated 17.2.2011 and the Corporate Debtor through its purchase orders offered to make payment within a period of 45 to 60 days but the payment was agreed to be made within 30 days from the date of invoices.

5. The Learned Counsel for the Appellant comes out with a plea that the Appellant/Operational Creditor supplied the chemicals/materials to the Respondent/Corporate Debtor through its 'Purchase Orders' against which necessary 'Invoices' were raised. As a matter of fact, copies of 'Invoices' were sent to the Respondent/Corporate Debtor together with chemicals/materials and the same was acknowledged by the Respondent by affixing its 'Rubber Stamp' and signature on the back of the respective Invoices. Added further, the Invoices clearly stipulate that the payment shall be made from the date of Invoice as agreed between the parties.

6. It is the grievance of the Appellant that the Respondent/Corporate Debtor had failed to make the balance payment, which was duly agreed up and therefore, the Appellant/Operational Creditor had approached the Respondent/Corporate Debtor on numerous occasions demanding balance payment. To put it up shortly, there were various communications and visits including but not limited to 29.4.2011, 25.5.2011, 4.5.2011, 11.5.2011, 13.5.2011, 20.6.2011, 24.6.2011, 31.8.2011, 27.9.2011 and 28.9.2011 by the Appellant/Operational Creditor demanding the payment of the balance 'Debt' amount.

7. The Learned Counsel for the Appellant/Operational Creditor brings to the notice of this Tribunal that there is an admitted 'Debt' of Rs.7,50,000/- (Rupees Seven Lakhs Fifty thousand only) towards Principal amount, in respect of Goods received by the Respondent/Corporate Debtor admitted to be paid in the 'Settlement Agreement' dated 16.8.2018. According to the Appellant, a Civil Suit in C.S.No.6912 of 2016 was filed by the appellant against the Respondent/Corporate Debtor and Another and during the pendency of the said suit, the 'Settlement Agreement' dated 16.8.2018 was entered into and executed between the Respondent/Corporate Debtor and the Appellant/Operational Creditor and further that the 'Corporate Debtor' had promised and assured to pay the whole sum.

8. The Learned Counsel for the Appellant adds to point out that the Respondent/Corporate Debtor had submitted a 'Written Undertaking' dated 25.10.2018 before the Learned Additional District Judge, Saket Court, New Delhi and in view of the fact the aforesaid 'Debt' was admitted on two occasions, both by way of 'Written Agreement' and 'Undertaking' and recorded in the presence of Learned Additional District Judge, Saket Court, New Delhi, 'Admissions', 'Promise', 'Assurance' and 'Undertaking' to pay the 'Debt' is squarely covered under Section 25(3) of the Indian Contract Act, 1872.

9. The Learned Counsel for the Appellant submits that in the Civil Suit in C.S.NO.6912 of 2016, a 'Civil Decree' dated 25.10.2018 was passed by the Learned Additional District Judge, Saket Court, New Delhi. In this connection, it is the version of the Appellant that since the 'Decree' is in the nature of 'Consent Decree', the same also would fall and get covered under the ingredients of Section 25(3) of the Indian Contract Act, 1872.

10. The Learned Counsel for the Appellant contends that the Appellant/Operational Creditor issued a 'demand notice' under Form 3 on 11.3.2019 and in fact, the said notice was sent though Speed Post on 13.3.2019 at the registered postal address and email on the registered email as was available on the web portal of the Registrar of Company, 'Ministry of Corporate Affairs'.

11. The Learned Counsel for the Appellant forcefully contends that despite to notice having been served upon the Respondent/Corporate Debtor failed to pay the balance amount and also not responded to the notice. Therefore, the Appellant/Operational Creditor was per forced to file the Company Petition before the Adjudicating Authority.



12. The Learned Counsel for the appellant submits that the Respondent/Corporate Debtor was once again served with a 'Notice' together with a 'Paper Book' of the Company Petition in (IB)No.1895/ND/2019 and that the Respondent/Corporate Debtor had appeared and filed its 'Reply' on 26.12.2019.

13. The Learned Counsel for the Appellant takes a stand that during the pendency of the Company Petition, the Respondent/Corporate Debtor deposited with the Appellant/Petitioner numerous cheques as detailed in the 'Reply' but the said cheques were dishonoured, which unerringly points out that the 'Debt' was due, the same being admitted by the Respondent. That apart, the Company Petition was 'Heard' in which the judgement was reserved on 22.1.2020. In reality, during the inter period, viz. 'Reservation Judgement' on 22.1.2020 and passing of the judgement on 8.6.2020, the Respondent/Corporate Debtor deposited a sum of Rupees Six Lakhs in the accounts of the Appellant which shows that the Respondent/Corporate Debtor admitted its liability, as recorded in its (1) 'Settlement Agreement', (2)'Undertaking", (3) 'Court Decree', (4) Issuance of Cheques'.

14. The Learned Counsel for the Appellant emphatically submits that a 'Decree Holder' can also file a winding up petition, in spite of the option of enforcing the 'Decree' by filing a 'Execution Petition'. Further, it is the stand of the Appellant that a Liability is only crystallized in the form of a 'Decree' or 'Award'.

15. The Learned Counsel for the Appellant refers to the order of the Honourable Madras High Court dated 31.03.2015, In the Matter of Sims Metal Management Limited v. Sabari Exim Private Limited reported in 'India Kanoon 'at Paragraph 2, it is observed as under:

"2. It is trite to say that winding-up of proceedings and a suit for recovery of money are not one and the same. It is also

established that the right to move a petition for winding-up is a statutory right of a creditor (Eurometal Limited v. Aluminium Cables Conductors (U.P.Pvt.Ltd.)). The position that when a suit is filed for recovery of the amount, a petition for winding-up is also simultaneously maintainable, is well settled.

16. In the decision of Seethai Mills Ltd. V. N.Perumalsamy and Another, reported in (1980)1 MLJ P 443, the Division Bench of the Madras High Court had observed as follows:

....."The question for consideration, therefore, is whether, simply because a creditor has instituted a suit against a Company and obtained a decree, he has no remedy under Section 434(1)(a) and he has to confine his remedy only under Section 434(1)(b) of the Act. We are of the opinion that there is no such mutually exclusive dichotomy between Section 434(1)(a) and Section 434(1)(b) of the Act. From the very language of Section 434(1)(b), it may be stated that it does not even contemplate a money decree or order for payment of money and it generally uses the expression "if execution or other process issued on a decree or order of any court in favour of a creditor of the Company'. Therefore, the decree or order that is contemplated by Section 434(1)(b) is not confined only to a money decree or an order for payment of money. On the other hand, it is general in nature. However, what we have to concentrate on is, whether a person who had obtained a decree for money against a Company will cease to be a creditor because of that fact, so as to take his case out of creditor, who has instituted a suit and obtained a decree against the Company, will still be a creditor of the Company to whom money is due by the Company. It may be that the original debt had merged in the decree and the person, who was originally a creditor, had become a decree-holder afterwards, but that does not in any way destroy his character as a creditor or the character of the money due to him from the Company as a debt. Thus, the position

is that merely because a decree is obtained the creditor does not cease to be a creditor of a Company.”

17. The Learned Counsel for the Appellant cites the decision in the Matter of Madhuban Pvt.Ltd. v.Narain Dass Gokal Chand [1971] 41 Comp Cas 685 at 692-693 stated therein as follows (P.692):

*The learned counsel submitted that it was not necessary in the case of a creditor holding a decree against the company to serve a notice. Specific provision, on the other hand, was made for taking out execution of the decree in such a case, which was not done in this case. The argument, of the learned counsel, however is without any merits. Clauses (a) and (b) provide two alternative methods of showing that the company is unable to pay its debts. **A creditor does not cease to be a creditor, if he obtains a decree in his favour against the company.** Clause (a) becomes applicable when a creditor has served on the company a demand under his hand requiring it to pay the sum due and the company has neglected to pay the same.*

*The provision, in Clause (b) that if the creditor has a decree of a court in his favour and the execution is returned unsatisfied in whole or in part, the company shall be deemed to be unable to pay its debts, does not mean that the effect of Clause (a) is negative in the case of a decree-holder creditor. The object of the two clauses is the same, that is, to show that the company concerned is unable to pay its debts. Action can be taken under either of them’.*

18. In another decision reported in 2014 183 CC 395(BOM) (Intesa Sanpaolo SPA V. Videcon Industries Limited), wherein at Paragraph 42, it is held as under:

42. It is trite to say that winding-up proceedings and a suit for recovery of money are not one and the same. **It is also established that the right to move a petition for winding-up is a statutory right of a creditor.** (Euromental Limited Vs. Aluminium Cables Conductors (U.P.Pvt.Ltd.). **The position that when a suit is filed for recovery of the amount, a petition for winding-up is also simultaneously maintainable, is well settled."**

19. The Learned Counsel for the Appellant adverts to the judgement of the Honourable Supreme Court dated 29.1.2019 in Civil Appeal No.1291 of 2019 (Arising out of SLP (Civil) No.6221 of 2018) Swaraj Infrastructures Pvt.Ltd. V. Kotak Mahindra Bank Ltd. Dated 29.01.2019 held as under :

*"20. We may only end by saying that cases like the present one have to be decided by balancing the interest of creditors to whom money is owing, with a debto company which will not go in the red since a winding up petition is admitted against it. It is not open, for persons like the appellant to resist a winding up petition which is otherwise maintainable without there being any bona fide defence to the same. We may also hasten to add that the respondent cannot be said to be blowing hot and cold in pursuing a remedy under the Recovery of Debts Act and a winding up proceeding under the Companies Act, 1956, simultaneously. **Here, it is important to refer to the judgement of Lord Atkin in Lissenden v. C.A.C.Bosch, Ltd., (1940) 1 All E.R.425, at 436-437,***

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**which says:** 'The doctrine of election could have no place in the present case. The applicant is not faced with alternative rights. It is the same right that he claims, but in large degree. In *Mills v. Duckworth*, (1938) 1 All E.R.318, a plaintiff who had been awarded damages for negligence had taken the judgement sum out of a larger sum paid into Court and had then appealed against the quantum of damages, and was met by a similar objection to his appeal. Greer, L.J., in overruling the objection, pointedly said, at p.321: "He (the plaintiff) said: 'I am not going to blow hot and cold. I am going to blow hotter.'" **Here the applicant is not faced with a choice between alternative rights.** He has exercised an undisputed right to compensation, and claims to have a right to more. One has not lose one's right to a second helping. It is most respectfully submitted that one has taken the first." **When secured creditors like the respondent are driven from pillar to post to recover what is legitimately due to them, in attempting to avail of more than one remedy at the same time, they do not "blow hot and cold", but they blow hot and hotter."**

46. If a creditor, with or without a decree of an Indian Court, can file a petition for winding up based upon a original cause of action, pending the suit and after decree, there is no warrant to deprive a creditor with a decree of foreign Court to present a petition for winding up, independently of the decree, in the Company court having jurisdiction.

20. The Learned Counsel for the Appellant relies on the judgement of Honourable Supreme Court in the Matter of K.Kishan v. Vijay Nirman Company Private Ltd., dated 14.8.2018 in Civil Appeal No.21285 of 2017 – Annexure C., wherein it is observed that though 'Arbitral Awards' can be accepted as 'Operational Debt' it should be of nature of 'Undisputed Debt' and further in the case of Sushil Ansal v. Ashok Tripathi & Others Company Appeal No.452 of 2020 passed by the Hon'ble NCLAT on 14.8.2020 to enable the initiation of 'CIRP' by the 'Operational Creditors'.

21. The Learned Counsel for the appellant points out that in the judgement dated 14.8.2018, this Tribunal in the Matter of Sushil Ansal v. Ashok Tripathi & Others in Company Appeal No.452 of 2020 had observed and held that a 'Decree Holder' cannot institute a Petition under Section 7 of The Insolvency and Bankruptcy Code 2016.

22. In fact, as against the judgement of this Tribunal in Dinesh Kumar & Ors. V. Sushil Ansal & Ors. (vide its Co.Appeal AT(Ins)452 of 2020 dated 14.8.2020 a Civil Appeal Diary No(s).20399/2020 was filed by the appellant Dinesh Kumar and Others and that the Honourable Supreme Court on 9.10.2020 at Paragraph 3 had observed the following and issued a notice, including the newly added Respondent returnable in 4 weeks.

### **An Appraisal**

23. At the outset, this Tribunal relevantly points out that in the petition by the Appellant/Operational Creditor for initiation of 'CIRP' under section 8 and 9 read with Section 14 and 33 of The Insolvency and Bankruptcy Code 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 under Part IV of Particulars of

Operational Debt, 'Debt' in S.No.1, the total amount of 'Debt' was mentioned as Rs.7,50,000/- (Rupees Seven Lakhs Fifty Thousand only), towards Principal amount in respect of Goods received by the Corporate Debtor and admitted, to be paid in the 'Settlement Agreement' dated 16.8.2018.

24. Besides the above, Rs.1,35,000/- (Rupees One lakh Thirty Five Thousand only) towards Penalty of Rs.5,000/- (Rupees Five Thousand only) per instalment per month as per 'Undertaking' given by the Corporate Debtor (Respondent) and recorded as per order dated 25.10.2018 by the Learned Additional District Judge, Saket Court, New Delhi in Civil Suit No.6912 of 2016 in the case of Ashok Agarwal(Appellant) V. Amitex Polymers Pvt.Ltd and Anr.(First Respondent/Corporate Debtor). In fact, the total dues were mentioned as Rs.8,85,000/- (Rupees Eight Lakhs Eighty Five Thousand only).

25. The real grievance of the appellant is that the aforesaid Debt sum is payable, as admitted by the Respondent/Corporate Debtor and as recorded in its 'Undertaking' and 'Consent Decree' passed by the Learned Additional District Judge, Saket Court, New Delhi dated 25.10.2018, as per 'Settlement Agreement' executed on 16.8.2018 between the Operational Creditor and Operational Debtor.

26. Before the 'Adjudicating Authority', the Respondent/Corporate Debtor took a stand that the Company Petition filed by the Appellant/Petitioner was not maintainable and the same was to be dismissed in view of the fact that the outstanding amount is not a 'Debt' as contemplated under the definition of Section 3(11) of I & B Code, 2016.

27. A careful perusal of the reply filed by the Respondent/Operational Creditor before the Adjudicating Authority clearly indicates that the Appellant/Petitioner describes himself to be a proprietor of the firm

M/s 'Shree Marketing' and by means of that definition of the word 'person' as per Section 3(23) of the Code, though it includes 'individual' it does not include within its ambit of sole proprietary concern. In short, the plea of the Respondent/Corporate Debtor is that the Appellant/alleged Operational Creditor in the petition before the Adjudicating Authority is that the dispute was settled despite the Court that the Respondent/Corporate Debtor by the Appellant/Operational Creditor because of the reason that the Appellant/Petitioner had received 10 post dated cheques for specifying amounts therein with Schedule being indicating and therefore the Company petition filed by the Appellant/Operational Creditor is to be dismissed in the interests of justice.

28. The other plea taken on behalf of the Respondent/Corporate Debtor before the Adjudicating Authority was that the demand notice was not received by the Respondent/Corporate Debtor and even though the notice was sent on 13.11.2019, which was booked from the 'Jungpura SO', the same was not delivered to the Registered Office/Pincode of the Respondent/Corporate Debtor and that the notice was returned to the 'Jungpura SO'.

29. In this connection, it is not out of place for this Tribunal to make a relevant mention that the 'Adjudicating Authority' in the impugned order at Paragraph 8 had clearly mentioned that the tracking report clearly showed that 'address' furnished by the Appellant/Operational Creditor was insufficient and could not be delivered on the registered address of the Corporate Debtor, rather it was returned.

30. Furthermore, the Adjudicating Authority in the impugned order had proceeded to observe that in the 'e-mail' sent on 1.4.2019, it was mentioned that the notice which Appellant/Petitioner sent was returned with a remark 'Left' and thereafter, the applicant sent the demand notice



through e-mail "amitexppr@hotmail.com". Also that the Adjudicating Authority had stated in the impugned order that the 'master data' enclosed by the Applicant as Annexure Page 2 also showed the name of the Directors of the Corporate Debtor Company (Respondent) but in the master data, e-mail ID of the Director was not given rather one e-mail ID of which the Applicant(Appellant) claimed to send the demand notice was given . But from perusal of the same, it cannot be said that this e-mail ID is one of the persons as required under Rule 5(2) of the Adjudicating Authority Rule. In fact, the Adjudicating Authority in the impugned order opined that the e-mail ID on which the Applicant(Appellant) had delivered the demand notice was neither of a whole time Director or Designated Partner or Managerial Director, Corporate Debtor and held that the demand notice as required under section 8(1) of Insolvency and Bankruptcy Code was not delivered etc.

31. In regard to the plea taken on behalf of the Respondent/Corporate Debtor before the Adjudicating Authority that notice was served on the Company's official e-mail ID at its registered office, it is to be pointed out that a Company, a juristic entity cannot be served personally and if the registered office of a company is locked/closed, then if no one on behalf of the Company had received the notice(s), then the Appellant/Petitioner/Operational Creditor cannot be found fault with especially bearing in mind the presumption to be raised under Section 27 of the General Clauses Act.

32. To put it precisely, in decision of the Honourable Supreme Court in the case of State of Madhya Pradesh v. Hiralal and others (1996) 7 SCC 523, it is observed and held that when notice/letters are sent and rather received back 'not available in the house', 'house locked' or 'shop closed' respectively, the notices should be deemed and treated to be served on the 'Addressee'.

33. Be it noted that in the decision of *Nasha Toys Pvt Ltd. Versus Harshad Corporation* [2002] 110 CompCas 324 Gauhati , it is held that if notices under section 434(1)(a) of the Companies Act is received back with the unserved remarks "addressee left", it amounts to sufficient service if the notice was sent to the registered office.

34. Before the Learned Adjudicating Authority, the Respondent/Corporate Debtor, according to the Appellant was regularly appearing and hence the non-serving of notice to the Respondent/Corporate Debtor at the extreme cannot be put against the Appellant/Operational Creditor in the considered opinion of this Court.

35. In view of the fact that service of notice under section 8 of the 'The Insolvency and Bankruptcy Code 2016', Respondent/Company at its official e-mail ID as available in the web site portal is a valid service, it is held by this Tribunal to be a valid and proper service upon the Respondent/Corporate Debtor, in the eye of law.

36. At this stage, this Tribunal relevantly points out the definition under Section 3(10) of the Code which speaks of 'Financial Creditor' meaning in person to whom a debt is owed and includes a 'Financial Creditor', 'Operational Creditor', 'Secured Creditor', 'Unsecured Creditor' and a 'Decree-Holder'.

Section 3(11) of the Code rules to 'Debt' meaning a liability or obligation in respect of a claim which is due from any person and includes a 'Financial Debt', 'Operational Debt'.

Section 3(12) of The Insolvency and Bankruptcy Code 2016 defines 'default' meaning non-payment of debt when whole or any part or instalment of any amount of debt has become due and become payable and is not (paid) by the debtor or the Corporate Debtor, as the case may be.

Section 3(23) of The Insolvency and Bankruptcy Code 2016 says 'person' includes

- a) an individual;
  - b) a Hindu Undivided Family;
  - c) a Company;
  - d) a trust;
  - e) a partnership;
  - f) a limited liability partnership; and
  - g) any other entity established under a statute;
- and includes a president outside India;

Section 5(20) of The Insolvency and Bankruptcy Code 2016 defines an 'Operational Creditor' meaning a person to whom an Operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Section 5(21) of The Insolvency and Bankruptcy Code 2016 pertains to an 'Operational Debt' meaning a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any legal authority.

Section 5(7) of The Insolvency and Bankruptcy Code 2016 deals with Financial Creditor means any person to whom a financial debt is owed and includes a person to whom such has been legally assigned or transferred to.

37. It is significant to point out that Section 9(3)(c) of the Code is a procedural provision, which is directory in the nature, seen in the light of 'Adjudicating Authority' Rules read with Code clearly demonstrate.

38. In fact, the Insolvency Proceedings can be ignited against the Corporate Debtor, if a default is committed in payment of the debt that is due and becomes payable by the Corporate Debtor.

**39. Decree:**

For a fuller and better appreciation of the controversies centering around the present case, it is worthwhile, for this Tribunal to refer to the 'Consent Decree' dated 25.10.2018 in C.S.No.6912 of 2016 passed by the ADL.District Judge/03-South East/Saket Court Complex, New Delhi, in the matter of Ashok Agarwal Proprietor of M/s Shree Marketing,G-349, Preet Vihar, Vikas Marg, New Delhi 110002 –Plaintiff (Appellant) V. Amitex Polymers Private Limited,17 Tribhuan Complex Ishwar Nagar, Friends Colony, New Delhi 110065 -1<sup>st</sup> defendant (Respondent) which runs as under :

*"It is ordered that suit of the present matter has been settled between the plaintiff and the defendant at the total amount of Rs.7,50,000 (Rupees Seven Lac Fifty Thousands only) to be paid in monthly instalments as per the settlement agreement dated 16.08.2018, Ex.P-1 starting from 20.09.2018 (total six months). In case of default of any installment, a penalty of Rs.5000 per installment per month shall be paid by the defendants from 15.11.2018 onwards. Statement of counsel for the plaintiff and AR of defendant are recorded separately. Court fee be refunded to the plaintiff as per Section 16A of the Court Fee Act.'*

40. In the instant case, the Appellant/Petitioner has come out with a plea that the Respondent/Corporate Debtor had admitted to pay a sum of Rs.7,50,000/- towards the Principal sum in respect of goods received by the Respondent/Corporate Debtor, as per 'Settlement Agreement' dated 16.8.2018 etc. Furthermore, Rs.1,35,000/- towards 'Penalty' of Rs.5,000/- per instalment per month as per 'Undertaking' given by the

Respondent/Corporate Debtor and the same was recorded by the Learned Additional District Judge, Saket Court, New Delhi in Civil Suit No.6912 of 2016 in the case of Ashok Agarwal v. Amitex Polymers Pvt.Ltd.(Respondent/Corporate Debtor) and Another. Therefore the total dues claimed by the Appellant/Operational Creditor as per 'Consent Decree' passed by the Competent Court of law is Rs.8,85,000/- as seen from Part IV of Application wherein the "Particulars of Operational Debt' were mentioned.

41. Even a 'person' who is a proprietor of a firm is an 'Individual' as per Section 3(23) inclusive definition of The Insolvency and Bankruptcy Code 2016, in the considered opinion of this Court. As such, the Appellant is not incompetent in his 'Individual' capacity as proprietor of M/s Shree Marketing, New Delhi.

42. This Tribunal aptly points out the decision in Punjab National Bank Dharamshala V. Premsagar Chaudhary and others reported in AIR 1996 Himachal Pradesh at P 86, wherein it is observed and held that it can be safely inferred that in terms of compromise, the 'Judgement Debtor'/was to make payment of those it can be presumed that there is a subsequent order directing the payment of money is embodied in terms of compromise and thus, the execution is well within time. It may not be out of place to clarify here that as per terms of compromise, the 'Joint Debtor'- 3<sup>rd</sup> objector, was to pay Rs.30,000/- which in fact actually paid and was to further keeping on paying Rs.3,000/- p.m commencing from 7.3.1989 and the starting point of limitation would be when the default committed in the payment of such payment in terms of compromise.

43. Considering the fact that the Appellant/Operational Creditor in the Company petition in IB 185/ND/2019 before the National Company Law Tribunal, the Principal Bench had come out with a plea that the Respondent/Corporate Debtor owes a sum of Rs.8,85,000/- and for which

a demand notice dated 11.3.2019 was issued to the Respondent/Corporate Debtor for which no reply was issued by the Respondent/Corporate Debtor to the Appellant/Operational Creditor and this Tribunal taking note of the prime fact that the Appellant/Operational Creditor is a 'Decree Holder' as per the 'Consent Decree' passed on 25.10.2018 in Civil Suit No.6912 of 2016 by the Learned Additional District Judge, Saket Court, New Delhi, this Court comes to an irresistible and inescapable conclusion that a 'Decree Holder' is no way excluded from the purview of the ambit of the term 'Operational Creditor' as per Section 5(20) of The Insolvency and Bankruptcy Code 2016 and the contra view taken by the 'Adjudicating Authority' in the impugned order is clearly held by this Tribunal as an unsustainable one in the eye of Law.

44. In the present case, the Appellant/Operational Creditor supplied the goods based on invoices beginning from 19.2.2011 to 26.3.2011 amounting in all to a sum of Rs.7,28,072/- and in due discharge of legal liability/lawful debt towards payment of dues/Invoices by the Respondent/Corporate Debtor had paid a sum of Rs.1,10,221/- as mentioned by the Appellant/Operational Creditor in the Application in Part IV under caption of 'Particulars of Operational Debt'.

45. In totality, a sum of Rs.7,50,000/- being the due amount towards 'Principal' and Rs.1,35,000/- towards 'Penalty' is equal to Rs.8,85,000/- was claimed by the Appellant/Operational Creditor for the goods supplied by the Appellant/Operational Creditor through the various Invoices as stated supra, it is bounden duty of the Respondent/Corporate Debtor to pay the due amount in issue.

46. The other aspect of the matter to be significantly pointed out is that the Respondent/Corporate Debtor through its purchase orders had offered to make payment to the Appellant/Corporate Debtor within a period of 45-60 days and in fact the payment was agreed to be made within 30 days from the date of Invoice. As a matter of fact, the Respondent/Corporate Debtor had not made any payment in respect of the due amount even after the 'Consent Decree' passed by the Competent Court of law.

47. Section 3(10) of The Insolvency and Bankruptcy Code 2016 defines 'Creditor' and even in the said definition a 'Decree Holder' cannot be excluded to file an Application under the Code. Going by the definition 3(10) of 'Creditor', it includes 'Financial Creditor', 'Operational Creditor'.

48. Be that as it may, in the light of detailed qualitative and quantitative discussions and also this Tribunal keeping in mind the entire conspectus of the attendant facts and circumstances of the instant case in a holistic fashion comes to a resultant conclusion that the impugned order passed by the National Company Law Tribunal, New Delhi Bench dated 8.6.2020 as an incorrect and invalid one in the eye of law. Viewed in that perspective, this Tribunal to prevent aberrational justice and to promote substantial cause of justice set aside the impugned order in IB 1895 dated 8.6.2020 passed by the National Company Law Tribunal, New Delhi Bench. Resultantly the Appeal succeeds.

**DISPOSITION :**

49. In fine, the instant Appeal is allowed. The impugned order in IB 1895 dated 8.6.2020 passed by the National Company Law Tribunal, New Delhi Bench is set aside by this Tribunal for the reasons assigned in the instant Appeal. No costs. I.A.1622 of 2019 (seeking exemption to file certified copy of the impugned order dated 8.6.2020) is closed. However, the Appellant/Operational Creditor is directed to file certified copy of the impugned order dated 8.6.2020 in IB No.1895 by the 'Adjudicating Authority'(National Company Law Tribunal, New Delhi Bench) within 2 weeks from Today.

**[Justice Venugopal M]  
Member(Judicial)**

**[Kanthi Narahari]  
Member (Technical)**

5<sup>th</sup> February, 2021  
HR