

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 133 of 2017**

[Arising out of order dated 10<sup>th</sup> August, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai in CP/537/(IB)/CB/2017]

**IN THE MATTER OF:**

**Shriram EPC Limited**

**... Appellant**

**Versus**

**Rio Glass Solar SA**

**... Respondent**

**WITH**

**Company Appeal (AT) (Insolvency) No. 197 of 2017**

[Arising out of order dated 10<sup>th</sup> August, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai in CP/537/(IB)/CB/2017]

**IN THE MATTER OF:**

**T. Shivaraman**

**... Appellant**

**Versus**

**Rio Glass Solar SA & Anr.**

**... Respondents**

**Present: For Appellants : Shri Arun Kathpalia, Senior Advocate with Ms. Pooja M. Saigal, Ms. Khyati Sharma and Shri R. Sridharan, Advocates**

**For Respondents : Shri Rajshekhar Rao, Ms. Ranu Purohit and Shri Chaitanya Puri, Advocates**

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

**SUDHANSHU JYOTI MUKHOPADHAYA, J.**

In both these appeals, as common order is under challenge and common question of law is involved, they were heard together and disposed of by this common judgement.

2. Respondents – ‘Rio Glass Solar SA’ (Operational Creditor), a company incorporated under the laws of Spain, preferred an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’) seeking to set in motion the ‘Corporate Insolvency Resolution Process’ against the appellant ‘Shriram EPC Limited –‘ Corporate Debtor’

3. Learned Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai, by the impugned order dated 10<sup>th</sup> August, 2017 in CP/537/(IB)/CB/2017, admitted the application, ordered Moratorium, appointed ‘Interim Resolution Professional’ with order of prohibition in terms of I&B Code against which the appellant-‘Corporate Debtor’ preferred one of this appeal (Company Appeal (AT) (Insolvency) No. 133 of 2017).

4. Other appeal (Company Appeal (AT) (Insolvency) No. 197 of 2017) has been preferred against the same order dated 10<sup>th</sup> August, 2017 passed in CP/537/(IB)/CB/2017 by the other aggrieved person.

5. Learned counsel for the appellants submitted that the application under Section 9 of the I&B Code was not maintainable for different reasons. According to him, the demand notice under sub-Section (1) of Section 8 was not given by the respondent –‘Operational Creditor’ but through Advocate/Lawyers’ Firm, which is not permissible. Reliance has been placed on the decision of this Appellate Tribunal in “*Uttam Galva*

*Steels Limited Vs. DF Deutsche Forfait AG & Anr.*”- Company Appeal (AT) (Insolvency) No. 39 of 2017, wherein this Appellate Tribunal by judgement dated 28<sup>th</sup> July, 2017 held as follows :

“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,*

<i>Signature of person authorised to act on behalf of the operational creditor</i>
<i>Name in block letters</i>
<i>Position with or in relation to the operational creditor</i>
<i>Address of person signing</i>

*"*

*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."*

6. In the present case, we find that the notice dated 5<sup>th</sup> May, 2017 under sub-Section (1) of Section 8 has been issued and signed by a Law Firm which is at Page 196, namely, 'Advani & Co. – Barristers-At-Law'. Even in the end portion of the said notice, the signature is made as ' M/s. Advani & Co.' and not the signature of any individual.

7. Learned counsel for the respondent has also not disputed the aforesaid fact and there is nothing on record to suggest that the

person/Law Firm was authorised by the ‘Operational Creditor’ or the Law firm is holding any position within the office of the ‘Operational Creditor’.

8. For the reasons aforesaid and in view of the decision in “*Uttam Galva Steels Limited Vs. DF Deutsche Forfait AG & Anr.*”, we hold that the application under Section 9 preferred by the respondent-‘Operational Creditor’ was not maintainable.

9. The other plea taken by the learned senior counsel for the appellant is that the application under Section 9 in Form-5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as ‘Adjudicating Authority Rules’) has not been signed by the ‘Operational Creditor’, but by the “Power of Attorney holder”. Reliance has been placed on Form-5 enclosed at Page 206, which has been signed by four ‘Advocates’, as is apparent from Serial Nos. 6 and 7 of the said Form, as quoted below :

6.	NAME, ADDRESS AND AUTHORITY OF PERSON SUBMITTING APPLICATION ON BEHALF OF OPERATIONAL CREDITOR (ENCLOSE AUTHORISATION)	M/s. S.R. RAJAGOPAL, S. R. RAGHUNATHAN, ROHAN RAJASEKARAN AND PREETHI, S. ARAS, Advocates Having Office at : New No. 18, Old No. 9, Sadasivam Street Gopalapuram, Chennai 600086.  Vakalatnama filed as Annexure VII;
7.	NAME AND ADDRESS OF PERSON RESIDENT IN INDIA AUTHORISED TO	M/s. S.R. RAJAGOPAL, S. R. RAGHUNATHAN, ROHAN RAJASEKARAN AND PREETHI, S. ARAS, Advocates Having Office at : New

	ACCEPT THE SERVICE OR PROCESS ON ITS BEHALF	No. 18, Old No. 9, Sadasivam Street Gopalapuram, Chennai 600086.  Vakalatnama filed as Annexure VII
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10. The question whether a ‘Power of Attorney holder’ can file an application for initiation of ‘Corporate Insolvency Resolution Process’ fell for consideration before this Appellate Tribunal in “*Palogix Infrastructure Limited Vs. ICICI Bank Limited*”-Company Appeal (AT) (Insol.) No. 30 of 2017. Therein this Appellate Tribunal by judgement dated 20<sup>th</sup> September, 2017 held :

*“32. The 'I&B Code' is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.*

*33. Therefore, we hold that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'.”*

11. In the present case, as the application under Section 9 has been signed and filed by ‘Power of Attorney holders’ for the said reason also, we hold that the application under Section 9 preferred by the Respondent-‘Operational Creditor’ was not maintainable.

12. The next plea taken by the learned counsel for the appellants is that the respondent, which is a foreign company of Spain, has not submitted a copy of any "Certificate from Financial Institutions maintaining accounts" of the 'Operational Creditor' confirming that there is no payment of an 'Unpaid Operational Debt' by the 'Corporate Debtor', in terms of Clause (c) of sub-Section (3) of Section 9 of the I&B Code.

13. From the record, we find that one 'CaixaBank', having its Corporate Banking Unit at 'Paseo De La Castellana, 7 P1 28046, Madrid', has given a chart which has been filed by the Respondent, and which is not recognized as 'Financial Institution of India' under the I&B Code.

14. The question whether filing of a copy of certificate from the 'Financial Institution' maintaining accounts of the 'Operational Creditor' confirming that there is no payment of unpaid operational debt by the 'Corporate Debtor' as prescribed under clause (c) of subsection (3) of Section 9 of the 'I & B Code' is mandatory or directory was considered by this Appellate Tribunal in "*Smart timing Steel Ltd. Vs. National Steel and Agro Industries Ltd.*" - Company Appeal (AT) (Insol) No. 28 of 2017. The Appellate Tribunal by its judgement dated 19th May 2017 while held that certificate from the 'Financial Institution' maintaining accounts of the 'Operational Creditor' confirming that there is no payment of unpaid operational debt by the 'Corporate Debtor', as prescribed under clause (c) of sub-section (3) of Section 9 of the 'I & B Code' mandatory, observed and held 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.*

*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, 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 non-*

*compliance, 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 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."*

15. Learned counsel appearing on behalf of the respondent has also not disputed the aforesaid fact that the Report of M/s. CaixaBank is not recognised and any other record of default has not been enclosed by the respondent. For the said reason also, the impugned order cannot be upheld.

16. In view of the finding recorded above, we set aside the impugned order dated 10<sup>th</sup> August, 2017 passed by learned Adjudicating Authority in CP/537/(IB)/CB/2017.

17. 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 application preferred by Respondent under Section 9 of the I&B Code 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.

18. Learned Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed, and the appellant company 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.

[Justice Bansi Lal Bhat]  
Member (Judicial)

[Justice S.J. Mukhopadhaya]  
Chairperson

NEW DELHI

2<sup>nd</sup> November, 2017

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