

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 132 of 2017

IN THE MATTER OF:

Centech Engineers Private Limited & Anr. ... Appellants

Versus

Omicron Sensing Private Limited ... Respondent

**Present: For Appellants : Shri Rahul Chitnis and Shri Aaditya Pande,
Advocates**

For Respondent : Shri Dhaval Deshpande, Advocate

ORDER

05.10.2017

I.A. No. 486 of 2017 :

Delay in re-filing the appeal is condoned. I.A. No. 486 of 2017 stands disposed of.

Company Appeal (AT) (Insolvency) No. 132 of 2017 :

This appeal has been preferred by the appellants-‘Corporate Debtor’ against order dated 6th July, 2017 passed by the learned Adjudicating Authority (National Company Law Tribunal), Mumbai Bench (hereinafter referred to as ‘Adjudicating Authority’) in C.P. No. 1112/I&BP/2017, whereby and whereunder the application preferred by the respondent-‘Operational Creditor’ under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’) for initiation of ‘corporate insolvency resolution process’ against

the appellants has been admitted, Moratorium has been declared, name of the Interim Resolution Professional called for and order passed in terms of the I&B Code.

2. Learned counsel for the appellants submitted that the demand notice in Form-3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as 'Adjudicating Authority Rules') in terms of Rule 5, was not issued by the 'Operational Creditor' but by the Advocates Associates, namely, 'SPS & Associates'. Reliance has been placed on a decision of this Appellate Tribunal in '**Macquarie Bank Limited Vs. Uttam Galva Metallilcs Limited**' – **Company Appeal (AT) (Insol.) No. 96 of 2017**, wherein by an order dated 17th July, 2017, the Appellate Tribunal held as follows :

"17. In view of such provision we hold that an advocate/lawyer or Chartered Account or a Company Secretary or any other person in absence of any authority by the 'Operational Creditor', and if such person do not hold any position with or in relation to the 'Operational Creditor', cannot issue notice under Section 8 of 'I & B Code', which otherwise can be treated as a lawyer's notice/pleader's notice, as distinct from notice under Section 8 of 'I & B Code'.

18. *The demand notice/invoice Demanding Payment under the I & B Code required to be issued in Form -3 or Form-4. By the said notice, 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), as claimed, is to be paid, 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 or Form -4 is served, the 'Corporate Debtor' will understand the serious consequences of non-payment of 'Operational Debt', otherwise like any normal pleader notice/ Advocate notice or like notice under Section 80 of C.P.C. or notice for initiation of proceeding under Section 433 of the Companies Act 1956, the 'Corporate Debtor' may decide to contest the suit/case if filed, as distinct Corporate Resolution Process, where such claim otherwise cannot be contested, except where there is an existence of dispute, prior to issuance of notice under Section 8."

3. In the present case, admittedly the notice has been given by 'Associate of Advocates' and there is nothing on the record to suggest that the 'Associate of Advocates' was authorised by the respondent-'Operational Creditor' or was holding any position with or in relation to the respondent company, the so-called notice cannot be treated as notice under Section 8 of the I&B Code.

4. The aforesaid fact is also accepted by the learned counsel appearing on behalf of the respondent-'Operational Creditor', who submits that the due amount has already been paid by the appellants-'Corporate Debtor'.

5. In view of the aforesaid admitted position that the notice under Section 8 was not issued in terms of the provisions of the Adjudicating Authority Rules and I&B Code, we have no option but to set aside the impugned order dated 6th July, 2017. The same is accordingly set aside.

6. 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 dated 6th July, 2017 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 the parties 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.

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

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Balvinder Singh)
Member(Technical)