

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

**Company Appeal (AT) (Insolvency) No. 154 of 2017**

**IN THE MATTER OF:**

**Mr. Senthil Kumar Karmegam**

**...Appellant**

**Vs.**

**1. Dolphin Offshore Enterprises  
(Mauritius) Pvt. Ltd.**

**2. Unison Engineering & Construction  
Private Ltd.**

**...Respondents**

**Present: For Appellant: - Mr. Arun Saxena and Ms. Nalini,  
Advocates.**

**O R D E R**

**02.11.2017-** The appellant, Director of Corporate Debtor has preferred this appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') against the order dated 20<sup>th</sup> June, 2017 passed by the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench in C.P. No. 594/I&BP/2017 whereby and whereunder the application preferred by the respondent – Dolphin Offshore Enterprises (Mauritius) Pvt. Ltd. (hereinafter referred to as 'Operational Creditor') for initiation of 'Corporate Insolvency Resolution Process' has been admitted, order of moratorium has been declared and the Insolvency Bankruptcy Board of India has been requested to recommend the name of an Interim Resolution Professional (IRP).

2. One of the plea taken by the appellant is that the demand notice under sub-Section (1) of Section 8 was not issued by the Operational Creditor but

by an advocate on behalf of the 'Operational Creditor', which is not permissible. The other ground taken is that the Bank Certificate attached is not in terms of the provisions of sub-section (3)(c) of Section 9 of the I & B Code.

3. Notices were issued on respondents including the Corporate Debtor through the Interim Resolution Professional but in spite of service of notice, they did not appear to oppose nor disputed the facts.

4. Learned counsel appearing on behalf of the appellant brought to our notice the purported demand notice dated 17<sup>th</sup> March, 2017 from which we find that the notice was issued by one Ms. Prinyanka Patel, Advocate on behalf of Operational Creditor.

5. Similar issue fell for consideration before this Appellate Tribunal in ***Uttam Galve Steels Limited v. DF Deutsche Forfait AG & Anr. – Company Appeal (AT) (Insolvency) 39 of 2017*** wherein this Appellate Tribunal 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,

Signature of person authorised to act on behalf of the operational creditor
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Name in block letters
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Position with or in relation to the operational creditor
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Address of person signing
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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 as the demand notice has been given by an advocate and there is nothing on record to suggest that the advocate in question holds any position with or in relation to the respondent – Dolphin Offshore Enterprises (Mauritius) Pvt. Ltd. and the demand notice has not been issued in mandatory Form 3 or Form 4, as stipulated, under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the initiation of resolution process cannot be upheld. The case of the appellant being covered by the decision of the Uttam Galve Steel Limited (Supra), we have no other option but to set aside the impugned order.

7. We accordingly set aside the impugned order passed by the Adjudicating Authority, Mumbai Bench in C.P. No. 594/I&BP/2017.

8. In effect, order(s) passed by Ld. Adjudicating Authority appointing any 'Interim Resolution Professional' or declaring moratorium, freezing of account, if any, and all other order(s) passed by Adjudicating Authority pursuant to impugned order and action taken by the 'Interim Resolution Professional', including the advertisement 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, 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.

9. Learned Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed, and the appellant 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 S.J. Mukhopadhaya)  
Chairperson

(Justice Bansi Lal Bhat)  
Member(Judicial)

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