

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 158 of 2017

IN THE MATTER OF:

Jord Engineers India Ltd.

...Appellant

Versus

Valia & Company

...Respondent

Present:

For Appellant : **Shri Pallav Shishodia, Senior Advocate assisted by
Shri R.N. Singh and Shri Rajiv Kumar, Advocates**

For Respondent : **Ms. Vatasala Kak, Advocate**

ORDER

13.10.2017 The respondent – Valia & Company (Operational Creditor) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the '**I&B Code**') for initiation of 'Corporate Insolvency Resolution Process' against the appellant – Jord Engineers India Ltd. (Corporate Debtor) on the ground that the corporate debtor defaulted in making payment against the goods supplied by the Operational Creditor i.e. Iron, Steel and Raw Material in between 2011 and 2012 amounting to Rs.4,72,28,431 with interest of Rs. 10,70,493 for delayed payment.

The Adjudicating Authority (National Company Law Tribunal) Mumbai Bench by order dated 31st July, 2017 admitted the application, ordered moratorium and called for names of Interim Resolution Professional from Insolvency and Bankruptcy Board of India. The aforesaid order dated 31st July, 2017 is under challenge.

2. The main plea taken by the appellant is that Section 9 application was not maintainable being incomplete and in absence of proper demand notice under sub-section (1) of Section 8 of the I&B Code.
3. Shri Pallav Shishodia, learned Senior Counsel appearing on behalf of the appellant referred to letter dated 26th April, 2017 written by one Mr. Amir Arsiwala, Advocate purported to be demand notice under sub-section (1) of Section 8. Reliance has also been placed on the decision of this Appellate Tribunal in Uttam Galve Steels Limited v. DF Deutsche Forfait AG & Anr. in Company Appeal (AT) (Insolvency) 39 of 2017 wherein this Appellate Tribunal held that notice by a lawyer cannot be treated to be a notice under sub-section (1) of Section 8 for the reasons mentioned therein.
4. Learned counsel appearing on behalf of the respondent – Financial Creditor submits that the advocate was given a letter of retainership on 10th February, 2017 for initiation of proceedings, civil, criminal and under the I&B Code, which reads as follows:

“LETTER OF RETAINER

10th February 2017

To,

*Amir Arsiwala, Advocate,
4th Floor, Cambatta Building,
East Wing, above Eros Cinemas,
42, M.K. Marg, Churchgate,
Mumbai- 400 020*

Sir,

This is with reference to our meeting at your office on the 6th of February, 2017, in relation to various legal matters for which I require your services. In particular, I require your services to initiate proceedings –civil, criminal and under the Insolvency and Bankruptcy Code, 2016- against debtors

of my proprietorship concern. In this regard, I propose to retain your services on an ongoing basis as my legal advisor and attorney on the terms and conditions set out below:

TIME PERIOD:

- 1. This retainer shall initially be for a period of one year from the date of this letter. It may be extended by mutual consent.*
- 2. FEES: As compensation for being retained, you shall be a fixed monthly sum of Rs. 35,000 during the period this retainer is valid.*
- 3. NON-EXCLUSIVE: It is expressly clarified that this retainer is non-exclusive, and that you will not be considered an employee of my concern.*
- 4. DUTIES: While the retainer is subsisting, it shall be your duty to dispatch all notices, demand notices, statutory notices, etc, to my debtors on my behalf seeking repayment of the dues owed to me. For this purpose, you shall have the authority to dispatch such communications on my behalf on your letter head after obtaining my approval to the draft of the notice. It is expressly stated that it shall also be your responsibility to initiate any and all legal proceedings required against my debtors. However, it is clarified that the fees for the same may be charged separately by you at mutually agreeable rates.*
- 5. You undertake to perform your duties in an utmost impartial manner and agree to provide your expertise to assist me with my legal disputes.*
- 6. You acknowledge that by virtue of your position, it is extremely likely that you will be exposed to sensitive information relating to my affairs. In this regard you undertake to maintain strict confidentiality of all information provided by me to you, and not disclose the same without my consent.*
- 7. You shall keep the original of this letter of retainer after signing it and provide me with a copy.*

*Sincerely,
Sd/-*

*Mr. Girish Valia
Proprietor*

*Agreed & Accepted
sd/-*

*Amir Arsiwala,
Advocate”*

5. As noticed, similar issue fell for consideration before this Appellate Tribunal in '*Uttam Galva Steels Limited*' (*Supra*). In the said case the Appellate Tribunal's judgment dated 28th 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 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 – Valia & Company 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 Steels Limited (Supra), we have no other option but to set aside the impugned order.

7. In effect, order(s) passed by Ld. Adjudicating Authority appointing any 'Interim Resolution Professional', declaring moratorium, freezing of account and all other order (s) passed by Adjudicating Authority pursuant to impugned order and action 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, 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 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.

[Justice S.J. Mukhopadhaya]
Chairperson

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

[Balvinder Singh]
Member (Technical)