

National Company Law Appellate Tribunal, New Delhi
Principal Bench

COMPANY APPEAL (AT) (Insolvency) No. 775 of 2020

(Arising out of Order dated 18th June, 2020 passed by National Company Law Tribunal, New Delhi, Bench-V in Company Petition (IB) No.- 495/ND/2020)

IN THE MATTER OF:

Jyoti Strips Private Limited
Through its Director
Having its Registered Office at:
B-103 Mithapur Extension,
Badar Pur New Delhi 110044
Having its Corporate Office at:
Plot 100 – 106 HUDA Sector 59 Phase II,
Ballabgarh Faridabad 121004
Email: capooja@jyotistrips.com

.....Appellant

Versus

JSC Ispat Private Limited
Having its registered office at:
Y14/1 Loha Mandi
Naraina New Delhi
New Delhi 110028
Email: jscispat@hotmail.com
Through its Authorised Representative.

...Respondent

Appellant: Ms. Prachi Johri, Advocate.
Respondent: Mr. Amit Dhall, Advocate.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. This Appeal has been filed by the Appellant/Operational Creditor under Section 61(1) of the Insolvency and Bankruptcy Code 2016 (in short the 'Code'/'IBC') against the Impugned Order dated 18.06.2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-V) in CP (IB) No. 495/ND/2020, by which Order, the

Adjudicating Authority has dismissed the Petition preferred by the Appellant herein on the ground that the provisions of Section 8 of the Code read with Rule 5 of the Insolvency and Bankruptcy Rules, 2016 has not been complied with. The Learned Adjudicating Authority has observed as follows;

*“9. In the light of aforesaid discussion, when we shall consider the case of the applicant, then we are of the considered view that under Rule 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, there are two modes for sending demand notice, one is, either at the registered office by hand, registered post or speed post with acknowledgement due, or second one, by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor, and on the basis of the facts stated in the application, we find, as per rule 5(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, the applicant had to send the demand notice either by hand, through registered post or speed post with acknowledgement due at the registered office of the Corporate Debtor or by electronic mail service to a whole time director, designated partner or key managerial personnel of the corporate debtor, and on the basis of the facts stated in the application, we find, the applicant had sent the demand notice on 23.10.2019 through the speed post, as well as through courier service but both have which returned as **“Addressee left without instructions”**. Also, the applicant has sent the demand notice through electronic mail on 23.10.2019 but the Operational Creditor has nowhere mentioned in the application, whether it is sent on the email id of the whole time director, designated partner or key managerial personnel of the corporate debtor. Therefore, it can be said that the applicant has not delivered notice under Section 8 of Insolvency and Bankruptcy Code, 2016, in accordance with the provision of Rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016.*

10. So, under such circumstances, in our opinion, the applicant has not complied with the provision contained under Rule 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority)

Rules, 2016, therefore, we are of the considered view that the applicant has not delivered the demand notice as required U/s 8 of the IBC, which is the mandatory provision of law and so on this ground in the absence of delivery of demand notice as required U/s 8 of IBC, the present CP No.(IB)3036/ND/2019 filed by the applicant/operational creditor is not complete and not maintainable and liable to be dismissed.”

Submissions of Appellant

2. Learned Counsel for the Appellant submitted that the Learned Adjudicating Authority has erred in holding that provisions of Section 8 read with Rule 5 of the Insolvency and Bankruptcy, Rules, 2016 have not been complied with; that the notice sent by speed post returned with an endorsement ‘addressee left without instructions’, which service ought to have been held by the Adjudicating Authority as deemed ‘sufficient’; that Section 27 of the General Clauses Act stipulates that the service shall be deemed to be effected by properly addressing and posting the registered post, unless proved to the contrary. Learned Counsel further submitted that the Learned Adjudicating Authority ought to have taken into consideration Rule 35 of the (Companies Incorporation Rules 2014) wherein it has been stipulated as follows;

“(6) In case of delivery by post, such service shall be deemed to have been effected-

- (i) in the case of a notice of a meeting, at the expiration of forty eight hours after the letter containing the same is posted; and*
- (ii) in any other case, at the time at which the letter would be delivered in the ordinary course of post.”*

3. It is the case of the Appellant that, that the email was addressed to the email id of the Company available in the master data of the Corporate Debtor and the Company being a legal person it has to be necessarily be construed that the email id is that of the Key Managerial Personnel. Learned Counsel placed reliance on Section 20 of the Companies Act 2013, which permits submission of a notice upon an officer of a Company by electronic means. Section 20(1) of the Companies Act 2013 is reproduced as hereunder;

“20(1). A document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by registered post or by speed post or by courier service or by leaving it at its registered office or by means of such electronic or other mode as may be prescribed: Provided that where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.”

4. Learned Counsel further contended that the term ‘Officer’ as defined under Section 2(59) includes any Director, Manager or Key Managerial Personnel or any person in accordance with whose directions or instructions the Board of Directors or anyone or more of the Directors is or are authorized to act. It is further contended that the Corporate Debtor has also made part payments and therefore the Learned Adjudicating Authority ought

to have admitted the Application specifically keeping in view that the notice under Section 8 was delivered by email and also to the address given below on 23.10.2019.

To,
JSC Ispat Private Limited
Having its registered office at:
Y 14/1 Loha Mandi
Naraina New Delhi
New Delhi 110028
Email: jscispat@hotmail.com

Contentions of the Respondent

5. Learned Counsel appearing for the Respondent vehemently contended that the Appellant/Operational Creditor had failed to serve the statutory Demand Notice as per Section 8 of the Code and the documents which have been filed alongwith the Petition under Section 9 itself show that there has been non-service of the Demand Notice; that the Appellant was having the email id of the Directors of the Respondent Company and was also in the knowledge that the Registered Office of the Corporate Debtor is situated at Plot No.- 124, Sector 24, Faridabad, Haryana at which address, the goods supplied by the Appellant were delivered and payments were also made by the Respondent. It is argued that the provisions of Section 27 of the General Clauses Act shall not apply as the Appellant was very much aware that the Respondent has already shifted from the address mentioned in the notice and furthermore the Appellant was required to serve the notice at the address which is mentioned on the invoices issued by the Appellant from time to time. Learned Counsel contended that Section 20 of the Companies Act, 2013 can be made applicable only when the said Office is being used by

the Respondent and there has been repeated communication from the said address exchanged between the parties, as also the remarks which have been mentioned on the courier document show that the Respondent has shifted from the said premises; that this Section cannot be made applicable as the Appellant has also not taken any steps to serve the notice to the Key Managerial Staff/Director of the Company which is well within the knowledge of the Appellant.

6. The brief point for consideration in this Appeal is whether the Learned Adjudicating Authority was justified in dismissing the Company Petition (IB) No. 495/ND/2020, on the ground that the Appellant has not complied with the provisions of Section 8 of the Code read with Rule 5 of the Insolvency and Bankruptcy Rules, 2016.

7. For better understanding of the case the relevant Sections of the Insolvency and Bankruptcy Code, 2016 are reproduced as hereunder;

“Sec. 8:

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

- (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or*
- (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.*

Explanation.--For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

Sec. 9 of the Insolvency and Bankruptcy Code 2016:

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) 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

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

National Company Law Tribunal Rules, 2016:

Rule 38 *Service of Notices and processes.- (1) Any notice or process to be issued by the Tribunal may be served by post or at the e-mail address as provided in the petition or application or in the reply;*

(2) The notice or process if to be served physically may be served in any one of the following modes as may be directed by the Tribunal;-

(a) by hand delivery through a process server or respective authorised representative;

(b) by registered post or speed post with acknowledgement due; or

(c) Service by the party himself.

(3) Where a notice issued by the Tribunal is served by the party himself by hand delivery, he shall file with the Registrar or such other person duly authorised by the Registrar in this behalf, the acknowledgement together with an affidavit of service and in case of service by registered post or by speed post, file with the Registrar, or such other person duly authorised by the Registrar in this behalf, an affidavit of service of notice along with the proof of delivery,

(4) Notwithstanding anything contained in sub-rules (1) and (2), the Tribunal may after taking into account the number of respondents and their place of residence or work or service could not be effected in any manner and other circumstances, direct that notice of the petition or application shall be served

upon the respondents in any other manner, including any manner of substituted service, as it appears to the Tribunal just and convenient.

(5) A notice or process may also be served on an authorised representative of the applicant or the respondent, as the case may be, in any proceeding or on any person authorised to accept a notice Or a process, and such service on the authorised representative shall be deemed to be proper service.

(6) Where the Tribunal directs a service under sub-rule (4), such amount of charges, as may be determined by the Tribunal from time to time, but not exceeding the actual charges incurred in effecting the service, shall be deposited with the registry of the Tribunal by the petitioner or applicant."

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

5. Demand notice by operational creditor.—

(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.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of Section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

6. Application by operational creditor.--(1) An operational creditor, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under Section 9 of the Code in Form, 5, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) The applicant under sub-rule (1) shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

Thus the language of Section 9 leaves no doubt that delivery of Demand Notice is necessary, for initiating the Corporate Insolvency Resolution Process under Section 9 of the Code. In the instant case admittedly the notice was sent to '*JSC Ispat Private Limited, Y 14/1 Loha Mandi, Naraina New Delhi, New Delhi 110028,*' whereas the Registered Address is '*JSC ISPAT Limited, Plot No. 124, Sector 24, Faridabad, Haryana*'. It is also not in dispute that the Legal Notice dated 18.09.2019 sent by 'registered post acknowledgment' due was sent to the aforementioned Registered Address which was received by the Respondent Company and replied to. Subsequently the Demand Notice under Section 8 dated 23.10.2019 was sent to the New Delhi Address which, has not been received as per the contention of the Appellant Counsel. There are no substantial reasons given by the Appellant as to when the Legal Notice was sent to the Registered

Address and was duly served, as to why the Notice under Section 8 was sent to a different address.

8. On a pointed query from the Bench with respect to the receipt of the email addressed to the Respondent Company, the Learned Counsel submitted as an Officer of the Court that the email was in 'Spam'. It is an admitted fact that the Demand Notice dated 23.10.2019 sent through speed post and courier to the New Delhi Address was returned with an endorsement 'addressee left without instructions'. Therefore, the contention of the Learned Counsel appearing for the Appellant that the Learned Adjudicating Authority ought to have relied on Section 20 of the Companies Act 2013, read with Rule 35, is untenable keeping in view that the postal endorsement was not 'refused' or 'house locked' or addressee not in station but rather the 'addressee had left without instructions'.

9. Be that as it may, Section 8 of the Code read with Rule 5 of the Rules clearly stipulates that the service of Demand Notice to the Corporate Debtor on the 'Registered Address' is a mandatory one. The Learned Counsel for the Appellant placed reliance on the decision of this Tribunal in **'Bijay Pratap Singh' V/s. 'Unimax International & Anr.' Company Appeal (AT) (Ins) No. 1273 of 2019 dated 15.06.2020** stating that this Tribunal while Adjudicating a matter with respect to Section 8 Notice having been returned as 'unclaimed', held that it was deemed sufficient and relied on Section 27 of the General Clauses Act and Section 20 of the Companies Act 2013 read with Rule 35 of the Companies Rule, 2014. The facts in the instant case are different as, at the cost of repetition, the notice was not 'unclaimed' but

rather it was not delivered to the Registered Address and had returned with an endorsement 'addressee left without instructions'.

10. This Tribunal in **'Mr. Shailendra Sharma Director of R&M International Pvt. Ltd.' V/s. 'Ercon Composites & Ors.' Company Appeal (AT) (Ins) No. 159 of 2020** while dealing with a similar issue held as follows;

"45. It is to be pointed out that an 'Operational Creditor' shall deliver to the 'Corporate Debtor' a Demand Notice in Form-3 or a copy of an invoice attached with a notice in Form-4 as per Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Demand Notice or the copy of the invoice demanding payment referred to in sub-section 2 of section 8 of the code may be delivered to the 'Corporate Debtor' at the registered office by hand, registered post or speed post with acknowledgement due or by electronic mail service to a whole time Director or designated partner or key managerial personnel, if any, of the 'Corporate Debtor'. Besides these, a copy of Demand Notice of invoice demanding payment shall also be filed with an information utility.

46. Be it noted, that only if a 'Demand Notice' / Invoice demanding payment under the code is issued, the 'Corporate Debtor' will appreciate in right earnest the consequences flowing on account of failure to pay the 'operational debt'. Also, that, after transfer of the case from Hon'ble High Court to the Tribunal (in respect of the winding up petition) an 'Operational Creditor' is required to submit all information including the details of the proposed Insolvency professional.

47. An application filed u/s 9 of the 'I&B' Code, 2016 without serving notice u/s 8 of the code is not maintainable. Indeed, a mere failure to serve the 'Demand Notice' is not a curable defect. A 'Bankruptcy' notice sets in motion the entire process leading to 'Bankruptcy' and it is to be rigidly and narrowly construed."

11. In the instant case, the documentary evidence establishes that the Appellant was very much in the knowledge of the Registered Address as the Legal Notice dated 18.09.2019 issued prior to the Demand Notice was addressed to the Registered Address and furthermore a perusal of the invoices on record (Annexure A-6) also evidences that the Appellant herein had supplied the goods to the Registered Address of the Respondent Company.

12. We have perused the 'Master Data' relied upon by the Appellant Counsel and also the subject email and note that there is no documentary evidence on record to establish that the email was sent as per the provisions mandated under Rule 5 of the Insolvency and Bankruptcy Rules, 2016. Hence, we concur with the findings given by the Learned Adjudicating Authority with respect to the fact that the Appellant herein had nowhere mentioned in the Application to whom the email was addressed to as it is clearly stipulated in Rule 5(1) of the Insolvency and Bankruptcy Rules 2016, that the notice shall be delivered by electronic mail service to a whole time Director or Designated Partner or Key Managerial Personnel, if any, of the Corporate Debtor.

13. Keeping in view all the aforementioned reasons read with Section 8 of the Code and Rule 5 of the Insolvency and Bankruptcy Rules 2016, this Tribunal is of the opinion that the Learned Adjudicating Authority has rightly dismissed the Application by giving a liberty to file fresh case in accordance with the provisions of law after delivery of Demand Notice upon the Corporate Debtor as per Rule 5 of the Insolvency and Bankruptcy Rules

2016. However, having regard to the fact that this Application was dismissed way back on 18.06.2020, we request, that on issuing fresh notice to the Corporate Debtor and on filing of a fresh Application under Section 9 of the Code, the Learned Adjudicating Authority shall decide the admissibility or otherwise of the Application as expeditiously as practicable. It is to be noted that we have not expressed any view on the merits of the case.

For all the aforementioned reasons, this Appeal fails and is accordingly dismissed. No order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
05th February, 2021

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