

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

**Company Appeal (AT) (Insolvency) No. 113 of 2017**

**IN THE MATTER OF:**

**M/s. Bhagwan Motors Pvt. Ltd.**

**...Appellant**

**Versus**

**Harshad V. Vora**

**...Respondent**

**Present:**

**For Appellant :**

**Shri Shivam Sharma, Shri Raj Kishor  
Choudhary and Shri Sakil Ahmad, Advocates**

**For Respondent:**

**Shri Rajeshwar Kr. Gupta, Advocate**

**O R D E R**

**16.10.2017** This appeal has been preferred by the appellant – M/s. Bhagwan Motors Pvt. Ltd. (Corporate Debtor) against order dated 6<sup>th</sup> June, 2017 passed by the Adjudicating Authority (National Company law Tribunal), Ahmedabad Bench, Ahmedabad in CP No. (I.B.) 29/9/NCLT/AHM/2017 whereby and whereunder the application preferred by the respondent (Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the, “I&B Code”) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been admitted, order of moratorium has been passed and the Interim Resolution Professional has been appointed.

2. Learned counsel appearing on behalf of the appellant ‘Corporate Debtor’ submits that the impugned order dated 6<sup>th</sup> June, 2017 has been passed by the Adjudicating Authority in violation of rules of natural justice as no notice was served on the appellant. It is further submitted that notice under sub-section (1) of Section 8 was not issued by the Operational Creditor but through its lawyer/ advocate.

3. In reply, learned counsel for the respondent – ‘Operational Creditor’ disputes the stand and submits that notice was issued on the appellant before the admission of the case. He placed reliance on the order dated 26<sup>th</sup> May, 2017 of the Adjudicating Authority, Ahmedabad Bench, Ahmedabad in its support, which reads as follows:

*“Learned Advocate Mr. Rajeshwer Gupta with Learned Advocate Ms. Sumati Sharma present for Operational Creditor / Petitioner. None present for Corporate Debtor/Respondent.*

*Heard arguments of Learned Counsel for Petitioner.*

*Learned Counsel for petitioner filed track report to show that copy of petition was delivered to the Respondent on 22.05.2017.*

*Petitioner is directed to file acknowledgment of service of notice under section 8 r/w rule 5 of Insolvency and Bankruptcy Code, 2016 and Rules there under on or before 30.05.2017.*

*Petitioner is also directed to send notice of date of hearing to the respondent along with copy of this order and file proof of service.*

*List the matter on 30.05.2017 for hearing before admission.”*

4. In *M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. in Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017*, the Appellate Tribunal held that it is the duty of the Adjudicating Authority to issue notice and not the party. In this case, Adjudicating Authority directed the contesting party to issue notice, which is not in accordance with law. This apart, in absence of any service of such notice, it was not open to the Adjudicating Authority to admit the application for the said reason, the impugned order dated 6<sup>th</sup> June, 2016 cannot be upheld.

5. This apart, from the record we find that an advocate’s firm Shri Rajeshwer K. Gupta & Co. issued the notice under sub-section (1) of section 8 on behalf of the respondent on 12<sup>th</sup> March, 2017. Later on another so called notice under sub-section(1) of Section 8 was issued by the same advocate on 18<sup>th</sup> April, 2017. In both

the notice, he has not mentioned his position and relation with Operational Creditor as required under the law.

6. Learned counsel appearing on behalf of the respondent referring to the power of attorney submitted that the advocate had been provided with power of attorney on 30<sup>th</sup> March, 2017, but from the said power of attorney it appears that Mr. Rajeshwer Kumar Gupta, advocate was appointed as lawful attorney and he has been authorised to do and execute all or any acts and deeds as mentioned therein which includes recovery of dues of the goods supplied to various firms.

7. Similar issue fell for consideration before this Appellate Tribunal in "Uttam Galve Steels Limited v. DF Deutsche Forfait AG & Anr." in Company Appeal (AT) (Insolvency) 39 of 2017. In the said case, the Appellate Tribunal held and observed 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."*

8. The present case is covered by the decision in "Uttam Galva Steels Limited" (Supra). In this circumstances, we have no other option but to set aside the impugned order.

9. 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.

10. 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 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)

/ns/