NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 159 of 2020

[Arising out of Order dated 01.01.2020 passed by the National Company Law Tribunal, Mumbai Bench-IV, Mumbai in CP (IB) No.749/MB/C-IV/2017]

IN THE MATTER OF:

Mr. Shailendra Sharma
Director of R&M International Pvt. Ltd.
R/o Room No. 8, Prabhavati Lalji Niwas,
Tilak Nagar, Off Aarey Road, Goregoan(east),
Mumbai – 400 063 **...Appellant**

Versus

Ercon Composites
A Registered Partnership Firm
Having its office at
F, 123, MIA Phase II
Basin, Jodhpur,
Rajasthan.

R&M International Pvt. Ltd.
(Through IRP Mr. Nayana Premji Savala)
Having its Registered office at
A-3027, Oberoi Garden Estate,
Saki Vihar Road, Chandivali,
Andheri East,
Mumbai – 400072.

Mr. Nayana Premji Salava
(IRP of R&M International Pvt. Ltd.)
Having his address at
1/101-A Vishal Susheel CHS,
Nariman Road, Vile Parle East,
Mumbai,
Maharashtra-400057. **...Respondents**

Present:

For Appellant: Mr. Gurcharan Singh, Advocate

For Respondent: Mr. Ritesh Khare, Advocate for R-1

Mr. Akhilesh, Advocate for R-3

J U D G M E N T

Venugopal M. J

Preamble

The Appellant has preferred the instant Company Appeal (AT) (Insolvency) No. 159 of 2020 being 'aggrieved' with the order dated 01.01.2020 passed by the 'National Company Law Tribunal', Mumbai Bench-IV, Mumbai in CP (IB) No.749/MB/C-IV/2017.

2. The 'National Company Law Tribunal', Mumbai Bench-IV, Mumbai while passing the impugned order dated 01.01.2020 at paragraph 13 to 16 had observed the following: -

> *"13. The operational creditor had replied to the said e.mail dated 16.01.2014 on 19.1.2014 (Exhibit-2 at p-42 of the*

Reply), wherein it has been stated that during the manufacturing process, many times there are problems that are faced while cutting the strip or defective portion, and thus there may be several cut rolls in one roll.

14. Since the email dated 16.01.2014 specifically notes that 'in the last batch of carbon fiber reinforced laminates, several imperfections were found', it can only be taken that the other consignments were defect-free. Further, in the rejoinder, the operational creditor has taken a specific stand that the issue of defective quality of supplies has been raised in only one out of twenty-seven consignments, and that this issue was also resolved. Even if the

issue is assumed to be unresolved, this would only cover one consignment, and there is no reason why the other consignments ought not to be paid for, especially when seen in the context of the specific stand of the operational creditor that after the issue raised in the e.mail of 16.01.2014, four more consignments were supplied to the Corporate Debtor.

15. As regards the cheque stated to have been given, as security, this cannot be taken to be a valid defense. In terms of section 139 of the Negotiable Instruments Act, 1881, there is a presumption that the holder of a cheque received the cheque for the discharge in whole or in part, of any debt or other liability. While this is no

doubt a rebuttable presumption, the presumption stands unless the contrary is proved. The burden of proof is on the Corporate Debtor.

16. Therefore, the petition made by the operational creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount of one lakh rupees stipulated u/s 4(1) of the IBC. Therefore, the default stands established and there is no reason to deny the admission of the petition."

and admitted the petition and ordered the initiation of 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'.

Appellant's Contentions

3. The Learned Counsel for the Appellant submits that in the instant case no Demand Notice was ever served on the 'Corporate Debtor' / Second Respondent as per section 8 of the 'I&B' Code.

4. The Learned Counsel for the Appellant comes out with a plea that on perusal of the purported Demand Notice dated 25.09.2007, it can be seen that the said notice was sent to the address 'C-2098, Oberoi Gardens Estate, Off Saki Vihar Road, Chandivali, Andheri East, Mumbai – 4000072' which is not the registered address of the 'Corporate Debtor' as per master data of the 'Corporate Debtor' on MCA website.

5. The emphatic contention advanced on behalf of the Appellant is that the registered office of the address of the 'Corporate Debtor' as per MCA website is 'A-3027, Oberoi Gardens Estate, Off Saki Vihar Road, Chandivali, Andheri East, Mumbai – 4000072' which is the registered office of the 'Corporate Debtor' since January, 2016 as per record of the MCA website. In short, the plea of the Appellant is that the said Demand Notice was knowingly addressed to the wrong address of the 'Corporate Debtor' by the First Respondent.

6. The Learned Counsel for the Appellant contends that the First Respondent filed a Winding up Petition before the Hon'ble High Court of Bombay during the year 2016 and no notice in the said petition was issued by the Hon'ble High Court and as such pursuant to the notification No. GSR 1119(E) dated 07.12.2016 issued by the Central Government as per Section 434 of the

Companies Act, 2013 r/w Section 239 of the Code, the petition was transferred to the Adjudicating Authority, Mumbai Bench. But the Adjudicating Authority, before considering the said petition u/s 9 of the 'I&B' Code failed to consider the Rule 5 of the Companies (Transfer of pending proceedings) Rules, 2016, which clearly states that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7 required for admission of the petition under sections 7, 8 or 9 of the Code.

7. The Learned Counsel for the Appellant adverts to Rule 5 of the Companies (transfer of pending proceedings Rules, 2016 which enjoins as follows:-

> *"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.*
>
> *(1) …*
>
> *Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with rule 7, required for admission of the petition under sections 7,8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the*

Tribunal upto 15th day of July, 2017

failing which the petition shall stand

abated etc.....”

8. The Learned Counsel for the Appellant submits that the Demand Notice was served on the ‘Corporate Debtor’ along with the ‘Rejoinder’ filed by the First Respondent before the Adjudicating Authority and the same was accepted by the First Respondent in its reply and in this regard the mandatory provision of Section 8 of ‘I&B’ Code in regard to the serving of Demand Notice was not followed. In effect, in the present case no Demand Notice u/s 8 of the ‘I&B’ Code was served on the ‘Corporate Debtor’ before filing of the petition before the Adjudicating Authority and on this ground alone, the impugned order dated 01.01.2020 is liable to be set aside.

9. It is the stand of the Appellant that there was a pre-existing dispute as per Section 8(2)(a) of the ‘I&B’ Code and the same is apparent from the fact that the ‘Goods’ supplied by the First Respondent were defective in nature, as they were not of standard quality and in fact, the inferior quality of the goods was also accepted by the First Respondent’s e.mail dated 19.01.2014.

10. The Learned Counsel for the Appellant contends that in order to carry on the cordial business relations with the First Respondent and considering the fact that the ‘dispute’ in regard to the inferior goods was not resolved, the second Respondent issued a security cheque of Rs. 69,76,937/- as per the request of the First Respondent and on the First Respondent’s representation that the said

dispute will be resolved as soon as the cheque was issued. But the First Respondent had not resolved the dispute and submitted the cheque to the Bank which got returned with an endorsement 'Exceeds Arrangement'.

11. The Learned Counsel for the Appellant submits that the second Respondent issued a legal notice dated 21.2.2017 to the First Respondent calling upon it to make good the damages caused to it due to inferior quality of goods supplied by the First Respondent. As a matter of fact, the said legal notice was delivered to the First Respondent by 25.05.2017 for which a false reply was received by the second Respondent on 23.03.2017.

Appellant's Citations

12. The Learned Counsel for the Appellant cites the judgement of this Tribunal in the matter of **'M/s Sabari Inn Pvt. Ltd.' V. 'M/s Ramesh Associates Pvt. Ltd.' reported in (2018)142 CLA 158(NCLAT)** wherein it is held as under:-

> *"…11. From the aforesaid Rule 5, it is clear after transfer of the case the Applicant (Respondent herein) was required to submit all information, other than information forming part of the records transferred from the High Court, for admission of the*

petition under sections 7,8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017 failing which the petition shall stand abated etc.

12. As per Section 9 of the 'I&B' Code, before admission of application and its filing, a demand notice under sub-section (1) of Section 8 is required to be issued on the 'Corporate Debtor' as quoted below:-

8. Insolvency resolution by operational creditor.

-(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.

13. It is only on receipt of such notice under sub-section (1) of Section 8 of the 'I&B' Code, the 'Corporate Debtor' may either pay the amount or may dispute the claim in terms of sub-section (2) of Section 8 of the 'I&B' Code'.

14. 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 and 4 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 credtior
Position with or in relation to the operational creditor
Address of person signing

…17. Admittedly, no notice was issued under sub-section (1) of Section 8 of the 'I&B' Code'. In

terms with Rule 5, other informations were also not placed before the Adjudicating Authority.

18. The Respondent having failed to provide all the details as required under Form-5 as noticed above, the application under sections 433 and 434 of the Companies Act, 1956 cannot be treated to be an application under section 9 of the 'I&B Code' in terms of Rule 5 of Transfer Rules, 2016. In such circumstances, in view of proviso to Rule 5 of the Transfer Rules, the application under Sections 433 and 434 of the Companies Act, 1956 cannot be treated to be an application under section 9 of the 'I&B Code' in terms of Rule 5 of Transfer Rules, 2016. In such circumstances, in view of proviso to Rule 5 of the Transfer

Rules, the application under Sections 433 and 434 of the Companies Act, 1956 stands abated.

19. For the reasons aforesaid, while we set aside the impugned order dated 20th June, 2017 passed by the Adjudicating Authority, Chennai Bench in T.C.P. No. 263/(IB)/2017, also declare that the application preferred by Respondent under Sections 433 and 434 of the Companies Act, 1956 stood abated.

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

Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications and all such orders and actions are declared illegal and are set aside. The application preferred by Respondent is dismissed as abated. 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……"

13. The Learned Counsel for the Appellant relies on the decision of this Tribunal in the matter of '**Uttam Galva Steels Ltd.' V. 'DF Deutsche Forfait AG & Anr.' dated 28.7.2017 (Comp. App. (AT) (Ins.) 39/2017) reported in (2017)204 Comp. Cas. Pg. 511** wherein it is observed as under:

"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 the 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 IB 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 CPC 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, accept where there is an existence of dispute, prior to issue of notice under Section 8"

14. The Learned Counsel for the Appellant refers to the judgement of the Hon'ble Supreme Court in the matter of '**Swiss Ribbons Pvt. Ltd. & Anr.' V. 'Union of India and Ors.' writ petition (civil) no. 99 of 2018 dated 25.01.2019 reported in 2019 4 SCC p. 17** wherein it is observed and held as under:-

"…24. …On the other hand, under sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period. What is important is that at this stage, if an application is filed before the Adjudicating Authority for initiating the

corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected…"

"… 27. …On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. Also, financial creditors have specified

repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contract with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Goods may not have been supplied at all. All these qua operational debts are

matters to be proved in arbitration or in the courts of law."

15. The Learned Counsel for the Appellant seeks in aid the decision of **Hon'ble Supreme Court in the matter of 'Mobilox Innovations Pvt. Ltd.' V. 'Kirusa Software (p) Ltd.', 2018 1 SCC at pg. 353** wherein at paragraph 33, 34, 38 and 51 it is observed as under:-

"33. *The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy*

(Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor

shall within a period of 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor (Section 8(2)(b). It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and

Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an

unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section 5, may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice (Section 9(5)(i)(b) or the invoice or notice of payment to the corporate debtor

has been delivered by the operational creditor (Section 9(5)(i)(c), or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is record of such dispute in the information utility (Section 9(5)(i)(d), or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor (Section 9(5)(i)(e), it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if

the application is incomplete and has not been completed within the period of 7 days granted by the proviso (Section 9(5)(ii)(a). It may also reject the application where there has been repayment of the operational debt (Section 9(5)(ii)(b), or the creditor has not delivered the invoice or notice for payment to the corporate debtor (Section 9(5)(ii)(c). It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility (Section 9(5)(ii)(d). Section 9(5)(ii)(d) refers to the notice of an existing dispute that has so been received, as it must read with Section 8(2)(a). Also, if any disciplinary proceeding is pending against any proposed

resolution professional, the application may be rejected (Section 9(5)(ii)(e).

34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration

proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

38. It is, thus clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in

which the "existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further,

given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process

prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.

51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating

to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the

adjudicating authority has to reject the application".

First Respondent's Contentions

16. The Learned Counsel for the First Respondent submits that the second Respondent/ R&M International Pvt. Ltd. was purchasing Carbon Fibre Laminates from the First Respondent through e.mail dated 16.01.2014 had informed the First Respondent that they found several imperfections in the last batch of Carbon Fibre reinforced Laminates. Apart from this, it is the stand of the First Respondent that the Second Respondent wanted to know about the challenges involved thus establishing that there existed no pre-existing dispute. In fact, the relevant portions of the e.mail dated 16.01.2014 sent by R-2 to R-1 run as under:-

"In the last batch of Carbon fiber reinforced laminates, several imperfections were found. The snap shots of those have been attached herewith."

Kindly make a note of such imperfections and let us know the challenge involved.

17. The Learned Counsel for the First Respondent contends that on 19.01.2014 the First Respondent suggested an alternative recourse and thereafter the issue was resolved. Besides this, there were multiple transactions between the Respondent No.1 and 2 post the 'alleged dispute' on 01.02.2014,

17.02.2014, 26.02.2014 and 02.03.2014 against different invoices, clearly establishing that the issues were resolved and these would show that there existed no pre-existing dispute.

18. The Learned Counsel for the First Respondent points out that the Second Respondent's authorised signatory through letter dated 08.07.2014 had agreed to pay Rs. 79,76,937/- for the purpose of clearing all outstanding payment against the Purchase Orders.

19. In fact, the Second Respondent issued five postdated cheques bearing Nos. 135229, 135230, 135231, 135232 and 135233 respectively in favour of the first Respondent. However, the three cheques were returned by the Bank unpaid for the reason of 'insufficient fund' and fresh cheque was issued dated 03.03.2015 bearing no. 100380 for Rs. 69,76,937/- after adjusting Rs. ten lakhs which was the outstanding sum, which was again dishonoured on 05.03.2015 for the reason 'exceeds arrangement'.

20. The Learned Counsel for the First Respondent comes out with a plea that the First Respondent issued a legal notice dated 14.03.2015 u/s 138 of the Negotiable Instrument Act, 1881 requesting the Second Respondent to pay the amount of the cheque within 15 days from the date of receipt of the legal notice.

First Respondent's Citation

21. Advancing his arguments, the Learned Counsel for the First Respondent refers to the decision of this Tribunal in the matter of **'Sudhi Sachdev' V. 'APPL Industries Ltd.', 2018 SCC online NCLAT, 775 in Comp. Appl. (AT)(Ins.) 623/2018 dtd. 13.11.2018** wherein it is observed that as soon as the

proceedings are initiated u/s 138/141 of the N.I. Act, 1881, it would make the *debt* admissible.

22. The Learned Counsel for the First Respondent forcefully submits that post filing of the petition in the year 2015 before the Hon'ble High Court of Mumbai and after transfer of the said petition to the 'National Company Law Tribunal', Mumbai on 01.02.2017, the second Respondent issued a letter to the first Respondent on 21.02.2017, wrongly mentioning the details of articles being delivered by the First Respondent to the second Respondent during 2014-2016. In fact, to mislead this Tribunal, the second Respondent presented a letter dated 23.03.2017 that the first Respondent never supplied carbon fibre raw material to the second Respondent whereas the reply was denial of supply of raw material and it was made clear in this reply that the First Respondent had supplied 'Carbon Fibre Reinforced Laminates' which is different from 'Carbon Fibre Raw Material' which was mentioned to have been supplied by the First Respondent. In this regard, the First Respondent's stand is that the 'Carbon Fibre Reinforced Laminates' is a different product than 'Carbon Fibre Raw Material', hence was disputed in the reply letter dated 23.03.2017. Indeed, no action / suit / dispute was ever taken/raised by the second Respondent based on the contents of the letter dated 23.03.2017.

23. Yet another argument advanced on behalf of the First Respondent is that the 'Demand Notice' for the amount of the cheque dishonoured is in the record of the petition transferred to the 'National Company Law Tribunal' and that the mandatory information required in Form-5 is all available in the records of the

company petition transferred. Moreover, the First Respondent apprehended that the Second Respondent was likely to sell off its Assets and / or deal with them and / or create third party interest leaving the First Respondent high and dry, which perforced the First Respondent to issue a 'statutory notice' dated 23.07.2015 as per section 433 of the Companies Act, 1956. Thereafter, a petition dated 20.11.2015 before the Hon'ble High Court of Bombay for winding up of the second Respondent was filed on 03.09.2016 vide CP/552/2016.

24. The Learned Counsel for the First Respondent points out that the notification no. G.S.R. 1119 (E) dated 07.12./2016 was issued by the Ministry of Corporate Affairs as per Rule 5 of the Companies (Transfer of pending proceedings) Rules, 2016 which came into effect from 01.04.2017. The Registry of the Hon'ble High Court of Bombay on 01.02.2017 vide letter No. COM/58/2016 had transferred the winding up petition to the 'National Company Law Tribunal', Mumbai Bench and the same was numbered as CP (IB) No.749/2017.

25. The Learned Counsel for the First Respondent adverts to the proviso to Rule 5 of the Companies (transfer of pending proceedings) Rules, 2016 which reads as under: -

> "*Provided that the petitioner shall submit all information, other than information forming part of the record transferred in accordance*

with rule 7, required for admission of the petition under section 7,8 or 9 of the code...."

and contends that there was no requirement of sending a demand notice afresh, nor filing of the petition in Form-5, when the petition was transferred from the Hon'ble High Court of Mumbai, had this on record of the petition transferred.

26. The Learned Counsel for the First Respondent submits that when the Company had appeared before the 'Adjudicating Authority' and contested the matter on *'merits'*, based on the principles of Estoppel/Waiver, it cannot be allowed to raise these aspects in Appeal.

27. The Learned Counsel for the First Respondent cites an extract from **'Maxwell on the Interpretation Of Statute' (11th Edition) pgs. 377-378** which runs to the following effect:-

"A defendant in an action in a county court which has jurisdiction over the case subject to leave being given, may waive want of leave; and the defendant, even in a criminal case before justices, if the subject matter be within their jurisdiction, may waive any irregularity

in the summons, or indeed dispensed with the summons altogether, and he does so in such cases not, indeed, by appearing merely but by appearing and entering on the case on its merits. The tribunal having jurisdiction over the matter, he would not be allowed to take his chance of prevailing on the merits and to reserve his objections to a mere preliminary irregularity…"

Pleas of Third Respondent

28. The Third Respondent/Interim Resolution Professional of the Second Respondent/Corporate Debtor takes a stand that the First Respondent had deposited a sum of Rs. one lakh pursuant to the order dated 07.01.2020 passed by this Hon'ble Tribunal to meet the expenses arising out of the issuance of public notice and inviting claims. Further, a sum of Rs. 11,33,016/- was to be paid to him and in this regard, he prays for directions being issued to the Second Respondent to pay the same to him.

Assessment

29. At the outset, this Tribunal points out that it is the plea of the Appellant that the alleged Demand Notice dated 25.09.2017 of the First Respondent was sent to an address 'C-2098, Oberoi Gardens Estate, Off Saki Vihar Road, Chandivali, Andheri East, Mumbai – 4000072' and the same was not the registered address of the 'Corporate Debtor' as per the master data of the 'Corporate Debtor'/ Second Respondent on MCA website. Continuing further, the clear-cut stand of the Appellant is that the registered office of the address as per MCA website is 'A-3027, Oberoi Garden Estate, Saki Vihar Road, Chandivali, Andheri East, Mumbai – 400072 and the same is the registered office of the 'Corporate Debtor' since January, 2016 as form INC 22. In effect, the contention of the Appellant is that the Demand Notice was knowingly addressed to the wrong address of the 'Corporate Debtor'/Second Respondent by the First Respondent/ Petitioner.

30. The Appellant takes a plea that the First Respondent in its reply before this Tribunal in Appeal at page 12 had inter alia averred that a Demand Notice dated 25.02017 u/s 8(1) of the 'I&B' Code was sent to the second Respondent at his registered address but the same was returned unserved on account of Debtor's company changing its registered address and hence, there is a violation of mandatory provision of section 8 of the code i.e., serving of a 'Demand Notice' being a pre-requisite for filing of an application under 9 of the 'I&B' Code. In short, the submission made on behalf of the Appellant is that no 'Demand Notice'

u/s 8 of the 'I&B' Code was served on the Second Respondent / Corporate Debtor before filing of the petition.

31. The contra stand of the First Respondent is that in compliance with Rule 5 of the Companies (transfer of pending proceedings, Rules, 2016) though a fresh 'Demand Notice' was not essentially required to be served in Form 3/Form 4 because of the fact that in the records transferred from the Hon'ble Bombay High Court to the 'National Company Law Tribunal', statutory notice u/s 433 of the Companies Act was part of the record so transferred, yet a 'Demand Notice' dated 25.09.2017 as per Section 8(1)of the 'I&B' Code was sent to the 'Corporate Debtor'/second Respondent at its registered address but the same got returned as 'unserved' on account of the debtor's company changing its registered address without complying the procedure mandated under the Companies Act, 2013. Apart from this, the First Respondent has come out with the plea that the Demand Notice was appended with the rejoinder and was duly served upon the second Respondent along with the rejoinder and the same is on the record of the 'National Company Law Tribunal', Mumbai.

32. It is seen from the 'Company's Master Data' (Annexure A-3 pg. 51) of the Appeal paper book (vide diary no. 30460 dated 21.01.2020) that the registered office of the Second Respondent/Corporate Debtor is mentioned as under:-

A-3027, Oberoi Garden Estate,
Off Saki Vihar Road, Chandivali,
Andheri East,
Mumbai City MH – 400072 IN

33. It is to be pointed out that the First Respondent in its reply to the instant Appeal filed by the Appellant had clearly stated that a Rejoinder to the reply of the 'Corporate Debtor' was filed by it all with the copy of notice sent in form 3 before the 'Adjudicating Authority' in April, 2017.

34. The First Respondent in its reply to the present Appeal before this Tribunal has averred that as directed by the Adjudicating Authority on 04.01.2018 the First Respondent had issued a notice on the second Respondent that a Company Petition for winding up of the Second Respondent was filed for failure on its part to pay the outstanding debt amount and further that the Second Respondent was also informed that the First Respondent had tried to serve the copy of the petition on the registered address of the Second Respondent but the same was returned unserved on the account of the company changing its registered address, without a notice and, therefore, the Second Respondent was served with a copy of the petition on 18.01.2018 and the copy of the notice dated 04.01.2018 addressed to the three Directors (i) Mr. Gopal Raj (ii) Ms. Rachna Gopal Raj and Mr. Sahil Pradip Mhatre of the Second Respondent Company.

35. It transpires that on 25.09.2017, the First Respondent's Advocate had issued a Demand Notice dated 25.09.2017 in Form no. 3 (See clause (a) of sub-rule (1) of rule 5) to the Second Respondent / R&M International Pvt. Ltd., Mumbai demanding payment in respect of unpaid operational debt under the 'I&B' Code.

36. A perusal of the aforesaid Demand Notice issued by the First Respondent's Advocate dated 25.09.2017 shows that a sum of Rs. 69,76,937+interest @ 18%

p.a. was claimed from the date of filing of the petition, till payment of realisation. According to the First Respondent outstanding amount agreed by the debtor company was Rs. 79,76,937/-, out of which the debtor company paid Rs. 10 lakhs. As such the total amount of default claimed was Rs. 69,76,937/- plus interest @ 18% p.a. from the date of filing of the petition, till payment of realisation.

37. At S.No. 7 of the Form no. 3 the First Respondent / petitioner had relied upon 11 documents to prove the existence of '*Operational Debt'* and the amount in default (inclusive of the copy of payment schedule dated 08.07.2014 to creditor company, the copy of cheque of Union Bank of India dated 03.03.2015 for Rs. 69,76,937/-, legal notice issued by the First Respondent's Advocate to the debtor Company dated 23.07.2015). In short, in the aforesaid Demand Notice dated 25.09.2017 of the First Respondent's Advocate issued to the Second Respondent / Company ten days' time was specified from the date of receipt of the said notice to dispute the existence or amount of unpaid *'operational debt'* (in default) and also it was mentioned that if the debt was repaid before the receipt of the said notice, for such repayment the Company was required to demonstrate the same. Therefore, the Appellant cannot take a plea that no Demand Notice as per Form 3 of 'I&B' Code was issued to the Second Respondent.

38. Be it noted, that as per Section 8 of the 'I&B' Code an 'Operational Creditor' is required to deliver a demand notice on the occurrence of the default within ten days from the receipt of the demand notice, the Corporate Debtor shall bring to

the notice of the 'Operational Creditor' the 'existence of a dispute', if any, and the record of the pendency of the suit or arbitration proceedings before the receipt of such notice or invoice in relation to such dispute. As a matter of fact, the 'dispute' must be existing prior to the receipt of the notice and the same can be in a form other than a pending suit or arbitration proceeding.

39. It is to be remembered that a 'Demand Notice' is forerunner to the commencement of insolvency proceedings against a Corporate Debtor. An unpaid 'Demand Notice' is good enough to exhibit the Debtor's inability to pay its debts for the purpose of 'Bankruptcy Proceedings'. If a bonafide dispute is established then an 'Insolvency' petition is not the appropriate proceeding to determine the validity of a disputed debt.

40. It is to be pointed out that service of notice of demand as per section 8 of the code has to be sent by registered post or speed post as required by Rule 5(2)(a) and (b) of the Insolvency & Bankruptcy application to Adjudicating Authority Rules, 2016. Section 8 of the Code espouse the test for default to all cases of 'Applicants' that may initiate 'Insolvency Proceedings' against the 'Corporate Debtor'.

41. On 04.01.2018, the Advocate of the First Respondent had issued notice to the Directors of the Second Respondent / Corporate Debtor at Mumbai address wherein at paragraph 2 and 3 it is mentioned as under:-

"2. The said petition was sought to be served on the regd. office of the

company R&M International Pvt. Ltd. but the same could not be served at the office.

3. the matter was listed for hearing on 11.12.2017 and directions were given that notice of the petition to be given you being Directors of R&M International Pvt. Ltd. the matter is now adjourned to 22.01.2018 before National Company Law Tribunal, Court Room No. 2."

and they were to remain present if they desire so etc.

42. A defective bankruptcy notice is not curable whether it is or not, the test is whether the mistake is such which would could not possibly mislead the debtor as per decision **'A.Debtor Re (No.21/1950)ex.p; the Debtor V. Bowmaker' 1950(2) ALLER 1129DC:1951 1Ch p. 313.**

43. In fact, a change in address of the registered office of the 'Corporate Debtor' cannot be a ruse for failure of the concerned party to send/issue a 'Demand Notice' as per section 8 of the code. As a matter of fact, the service of Demand Notice to the 'Corporate Debtor' as per section 8 is a mandatory one.

44. In the decision of **Hon'ble Supreme Court 'Macquaire' V. 'Shilpi Cable Technologies Ltd.' reported in 2018 1 Comp. LJ. at p. 270** it is held that the requirement of Section 9(3) of the Code in producing a copy of the certificate from the financial institution accounts of the 'Operational Creditor' affirming the non-payment of debt is not a condition precedent for triggering the insolvency process under the Code. Suffice it to point out that the requirement u/s 9(3) of the Code is only 'Directory'.

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.

48. It is to be relevantly pointed out that in the decision **'M/s. Paper Mill P. Ltd.' V. 'Arjun Chemicals reported in 2018 91 taxmann.com.389(NCLAT)** it is observed and held that where a notice u/s 8 of the 'I&B' Code was not issued, the petition for 'Insolvency Resolution Process' is to be regarded as an incomplete and thus the order is to be set aside.

49. In reality, a 'Demand Notice' not in proper format and issued by an Advocate cannot be treated as a notice u/s 8 of the Code as per decision **'J.P. Engineers Pvt. Ltd.' V. 'Murti Udyog Ltd.' reported in Manu/NC/1416/2017.**

50. To put it succinctly, serving of 'Demand Notice' together with the *'Rejoinder'* filed by the First Respondent/'Operational Creditor' before the 'Adjudicating Authority' is not the requirement of 'Law'.

51. It cannot be lost sight off that the amount shown in 'Bank Certificate' is proof of the 'Dues'.

Waiver / Approbation and Reprobation

52. It must be borne in mind that the principle of 'Waiver' or of 'Approbation' and 'Reprobation' lies at the root of Conduct Productive of change of activation and this aspect is similar to the rule of Constructive Res Judicata as per Explanation IV of Section 11 of Civil Procedure Code. A person cannot be permitted to approbate and reprobate by firstly agreeing to abide by the terms and conditions of a given case / issue(s) and later seeking to deny the liability as per the agreed terms.

53. As far as the present case is concerned, although a plea is taken on behalf of the first Respondent / Petitioner that though a fresh Demand Notice was not essentially required to be served in Form-3/Form-4 because of the fact in the records transferred from the Hon'ble Bombay High Court in respect of the winding up petition, to the 'National Company Law Tribunal' , statutory notice u/s 433 of the Companies Act was part of the record so transferred, yet a demand notice dated 25.09.2017 u/s 8(1) of the 'I&B' Code was sent to the second Respondent's regd. address but the same was returned unserved on account of debtor's company changing its registered address, without complying the mandate procedure as per Companies Act, 2013 and that apart, the Demand Notice was appended with the rejoinder and was duly served upon the second Respondent along with the rejoinder and the same is in the record of the Tribunal, Mumbai and added further, a rejoinder to the reply was filed by the First Respondent / Operational Creditor all with the copy of notice sent in Form-3 before the Adjudicating Authority in 2017, this Tribunal is of the considered

view that service of 'Demand Notice' to the second Respondent/Corporate Debtor is mandatory as per Section 8 of the Code.

54. In the instant case the Adjudicating Authority while passing the impugned order on 01.01.2020 in CP (IB) No.749/MB/C-IV/2017 had admitted the application without there being service of demand notice to the Second Respondent / 'Corporate Debtor' which is admitted by the First Respondent/Operational Creditor in its 'Reply' filed before this Tribunal and a plea of the registered address of the Second Respondent / Corporate Debtor being changed by the debtor Company will not hold water for the failure of the First Respondent / Operational Creditor to send a notice u/s 8 of the Code. In this regard, even the Adjudicating Authority in the impugned order at paragraph 5(i) had mentioned that the 'Operational Creditor' had stated in para 8 of its 'Rejoinder' that the 'Demand Notice' was returned unserved and that the said Authority had not adverted to about the aspect of sufficiency of service of 'Demand Notice' to the Second Respondent / Corporate Debtor which is mandatory as per Section 8 of the code and as such it is held by this Tribunal that the impugned order is not a valid one in the eye of Law.

55. Although, a plea is taken on behalf of the first Respondent that a fresh Demand Notice was not essentially required to be served in Form-3/Form-4 in compliance with Rule 5 of the Companies (Transfer of pending proceedings) Rules, 2016, this Tribunal is of view that the said plea cannot be acceded to in view of Rule 5 of the Companies (transfer of pending proceedings) Rules, 2016.

56. At this juncture, this Tribunal cites the Judgement of this Tribunal in the matter of **'MesmetroStroy (FZE) Vs. BASF India Ltd. and Ors.'** in Company Appeal (AT)(Ins.) No. 229 and 230 of 2017 dated 28.11.2017 reported in (2018)142 CLA152 wherein at paragraph 15 to 17 it is observed as under:-

> *"15. Admittedly, no notice was issued under sub-section (1) of section 8 of the 'I&B' Code. In terms with Rule 5 other information were also not placed before the Adjudicating Authority.*
>
> *16. The Respondent having failed to provide all the details as required under Form 5 as noticed above, the application u/s 433 and 434 of the Companies Act, 1956 cannot be treated to be an application u/s 9 of the 'I&B' Code in terms of Rule 5 of Transfer Rules, 2016. In such circumstances in view of proviso to Rule 5 of the Transfer Rules, the application u/s 433 and 434 of the Companies Act, 1956 stands abated".*

57. Also, this Tribunal points out the judgement dated 25.10.2017 in Company Appeal (AT)(Ins.) No. 207 of 2017 in the matter of **'Transparent Technologies P. Ltd.' V. 'Multi Trade'** wherein it is at paragraph 4 it is among other things observed as follows:-

> *"4.... Though with regard to paragraph 8(f), the Respondent has denied the averments relating to serving a copy of form 5, but there is nothing on record to suggest that any notice under sub-section (1) of section 8 was issued and served or the application under Form-5 was filed. The respondent has also taken a plea that there is no requirement of furnishing the copy of the application on the appellant, however, such submission cannot be accepted...."*

58. It cannot be forgotten that the proceedings under section 138 of NI Act, 1881 pertain to criminal liability for dishonour of cheques issued and do not bar an application u/s 9 of the code as opined by this Tribunal. Likewise, the

pendency of proceedings under Or.37 of the Civil Procedure Code will not prohibit an application under Section 9 of the Code.

59. Even though on behalf of the First Respondent it is contended that the Second Respondent/Corporate Debtor had mentioned that they will be making payment all outstanding amount of Rs. 79,76,937/- as per letter of the Second Respondent dated 08.07.2014 against the purchase and the same being an admission of the debt, this Tribunal is of the considered view that since the 'Service of notice' at the registered address of the 'Corporate Debtor' was not established to the subjective satisfaction of this Tribunal and the admitted fact being that the notice sent to the Second Respondent at its registered office got returned, the said admission of debt and the reference made to the NI Act, 1881 in regard to the presumption that a *'Holder of Cheque'* received the cheque for the discharge either in whole or in part of any debt or other liability will not in any way heighten or improve the case of Appellant any further.

Conclusion

60. In view of the fact that in the instant case Section 8 notice under 'I&B' Code was not served upon the Second Respondent / Corporate Debtor and admittedly the same got returned as mentioned *Supra,* this Tribunal comes to a consequent conclusion that the impugned order dated 01.01.2020 passed by the Adjudicating Authority in CP (IB) No.749/MB/C-IV/2017 in admitting the petition is not legally tenable and the same is accordingly set aside by this Tribunal to secure the ends of justice. As a logical corollary, this Tribunal declares illegal the order passed by the 'Adjudicating Authority' in appointing

the 'Interim Resolution Professional', declaring moratorium and all other orders passed by the 'Adjudicating Authority' pursuant to the impugned order and action, if any, taken by the '' Interim Resolution Professional' (including the advertisement, if any, published in the newspaper calling for applications and all such orders) and that the petition/application filed by the First Respondent is dismissed as abated. The Adjudicating Authority is required to close the CIRP proceeding. The Second Respondent/Company is released from all the rigour of Law and is allowed to function independently through its Board of Directors with immediate effect. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' and the 'Expenses' incurred and that the Appellant will pay the fees of the said Resolution Professional for the period functioned.

61. In fine, the instant Appeal is allowed with aforesaid observations and directions. No costs. IA 389/20(Stay Application) is closed. Before parting with the case, this Tribunal grants liberty to the First Respondent/Operational Creditor to issue fresh notice to the Second Respondent/Corporate Debtor as per Section 8(1) of the 'I&B' Code and on receipt of service of such notice if there is 'Debt and Default', to file a fresh application u/s 9 of the Code before the 'Adjudicating Authority' and to seek redressal of grievances in accordance with law. It is made quite clear that when such fresh application is projected by the First Respondent/Operational Creditor the same is to be determined by the

Adjudicating authority on merits, of course in a fair, just and dispassionate manner uninfluenced and untrammeled with any of the observations made by this Tribunal, in the instant Appeal.

[Justice Venugopal M.]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI

13th January, 2021

ss