

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

**Company Appeal (AT) (Insolvency) No. 196 of 2018**

**IN THE MATTER OF:**

**Prajna Prakash Nayak**

**...Appellant**

**Vs.**

**ASAP Info Systems Pvt. Ltd. & Anr.**

**...Respondents**

**Present: For Appellant: - Mr. Arun Kathpalia, Mr. Shankh Sengupta, Mr. Aanchal Kapoor and Ms. Bani Brar, Advocates**

**For Respondents:- Mr. Ashok Kumar Juneja, Ms. Renu Tyagi and Mr. Mithilesh Kumar, Advocates for RP (R-2)**

**ORDER**

**11.07.2018**— This appeal has been preferred by the appellant Prajna Prakash Nayak, shareholder and Managing Director of M/s Business Arts India Private Limited (Corporate Debtor) against Order dated 19<sup>th</sup> April 2018 passed by the Adjudicating Authority,( National Company Law Tribunal ), (NCLT), Hyderabad Bench, Hyderabad. By the impugned order the application preferred by 1<sup>st</sup> Respondent M/s ASAP Info Systems Pvt. Limited, (Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I & B Code' 2016) has been admitted, order of moratorium has been passed and Resolution Professional has been appointed with certain directions on 6<sup>th</sup> July 2017.

2. Learned counsel for the appellant submitted that the notice under Section 8(1) of the 'I & B Code' 2016 was never served on the Corporate

Debtor. It was also submitted that Adjudicating Authority has not served any notice on the Corporate Debtor before admitting the application under Section 9.

3. Learned counsel appearing on behalf of the respondent submitted that the Corporate Debtor avoided to receive the notice though the notice was sent in the registered office of the Corporate Debtor as shown in the web site of the Ministry of Corporate Affairs.

4. Further, according to him the notice for date of hearing was also served on the Corporate Debtor, which the Corporate Debtor acknowledged by email.

5. From the record, we find that the notice under Rule 5 (1) of the 'I & B Code' 2016 (Application to Adjudicating Authority) Rules 2016 i.e. Demand Notice under Section 8(1) was issued by the Operational Creditor on 29<sup>th</sup> August 2017. It was not served on the Corporate Debtor and returned with the note "insufficient address". The Adjudicating Authority at paragraph 4 of the impugned order though noticed that notice sent to the Corporate Debtor returned unserved with insufficient address, in spite of the same the application under Section 9 was entertained on the ground that the address of the Corporate Debtor as appearing on the website was mentioned by the Operational Creditor.

6. The legislative intent of issuance of Demand Notice under Section 8(1) is not a mere formality but a mandatory provision. Only after service of notice under Section 8(1) and on completion of 10 days, if payment towards the demand is not made, an Operational Creditor accrues right to file application under Section 9 and not before such date.

7. In that view of aforesaid admitted position and in absence of service of Demand Notice, we hold that application under Section 9 of 'I & B Code' 2016 was not maintainable.

8. This apart, we find that the Adjudicating Authority had not issued any Notice on the Corporate Debtor before admission of the application under Section 9 which was required to be issued in the light of the decision of this Appellate Tribunal in ***“Innoventive Industries Ltd. Vs. ICICI Bank and Ors. (Company Appeal (AT)(Ins.) No. 1 and 2 of 2017)”***.

9. The direction given to Operational Creditor to serve notice of date of hearing on the Corporate Debtor is not in accordance with the NCLT Rules, 2016 and cannot be treated to be a notice issued and served by the Adjudicating Authority. It is also against sub-Section (2) of Section 424 of the Companies Act, which is applicable to 'I & B Code' 2016.

10. In view of the aforesaid findings, we have no other option but to set aside the impugned order dated 19<sup>th</sup> April, 2018 in CP (IB) No. 48/9/HDB/2018.

11. In effect, order (s), passed by the Adjudicating Authority appointing 'Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action taken by the '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. The Adjudicating Authority will now close the proceeding. The 'Corporate

Debtor' (company) is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

12. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed, and the 'Corporate Debtor' will pay the fees of the 'Interim Resolution Professional', for the period he has functioned. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)  
Chairperson

(Justice Bansi Lal Bhat)  
Member(Judicial)

sm/uk