

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 184 of 2017

IN THE MATTER OF:

**Goa Antibiotics & Pharmaceuticals
Ltd. and Anr.**

...Appellants

Versus

Lark Chemicals Pvt. Ltd.

...Respondent

Present:

**For Appellants : Shri Pallav Shishodia, Senior advocate assisted by shri
Anand Sukumar and S. Sukumaran, Advocates**

For Respondent: Shri Sanjay Kumar Ruia and Vishal Jain, C.A.

O R D E R

07.11.2017 The respondent – Lark Chemicals Pvt. Limited (Operational Creditor) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I & B Code') and sought the 'Corporate Insolvency Resolution Process' against the appellant – Goa Antibiotics and Pharmaceuticals Limited (Corporate Debtor) on the ground that the Corporate Debtor committed default on 25th November, 1998 onwards in repayment of principal amount of Rs. 1,11,30,063 along with interest of Rs.4,38,00,611/- calculated @ 30% per annum till 10th May, 2017 and also claiming further interest for the period from 11th May, 2017 onwards at the same rate.

The Adjudicating Authority by the impugned order dated 14th August, 2017 after hearing the parties admitted the application, declared moratorium

and passed directions in terms of the I & B Code requested the Insolvency and Bankruptcy Board of India (IBBI) to recommend the name of Interim Resolution Professional for his appointment. Being aggrieved this appeal has been preferred by the Corporate Debtor along with another aggrieved person.

2. Learned Senior counsel appearing for the appellant submits that demand notice under sub-section(1) of Section 8 was not issued by the Operational Creditor but by a legal firm 'Dhruve Liladhar & Co., Advocates, Solicitors and Notary'. It is further submitted that the said demand notice in Form 3 or Form 4 the legal firm has not mentioned its position and relation with the Operational Creditor.

3. Learned counsel appearing on behalf of the respondent – Operational Creditor relied on the extract from the minutes of the meeting of the Board of Directors of M/s. Lark Chemicals Pvt. Ltd. as held on 4th April, 2017 and submitted that by the said resolution the company authorised M/s. Dhruve Liladhar & Co., Advocates, Solicitors and Notary to send the demand notice on behalf of the company under the I & B Code, 2016 to the appellant – M/s. Goa Antibiotics and Pharmaceuticals.

4. We have heard the learned counsel for the parties and perused the record.

Similar issue fell for consideration before this Appellate Tribunal in *Uttam Galve Steels Limited v. DF Deutsche Forfait AG & Anr. – Company Appeal (AT) (Insolvency) 39 of 2017.* In the said case the Appellate Tribunal by its judgment dated 28th July, 2017 held as follows:

“27. From a plain reading of sub-section (1) of Section 8, it is clear that on occurrence of default, the Operational Creditor is required

to deliver the demand notice of unpaid Operational Debt and copy of the invoice demanding payment of the amount involved in the default to the Corporate Debtor in such form and manner as is prescribed.

28. *Sub-rule (1) of Rule 5 of the ‘Adjudicating Authority Rules’ mandates the ‘Operational Creditor’ to deliver to the ‘Corporate Debtor’ the demand notice in Form-3 or invoice attached with the notice in Form-4, as quoted below: -*

“Rule 5. (1) An operational creditor shall deliver to the corporate debtor the following documents, namely: -

- (a) a demand notice in Form 3; or*
- (b) a copy of an invoice attached with a notice in Form 4.”*

29. *Clause (a) and (b) of sub-rule (1) of Rule 5 of the ‘Adjudicating Authority Rules’ provides the format in which the demand notice/invoice demanding payment in respect of unpaid ‘Operational Debt’ is to be issued by ‘Operational Creditor’. As per Rule 5(1) (a) & (b), the following person (s) are authorised to act on behalf of operational creditor, as apparent from the last portion of Form-3 which reads as follows: -*

“6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [name of corporate debtor].

Yours sincerely,

<i>Signature of person authorised to act on behalf of the operational creditor</i>
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<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.”*

5. The respondent has enclosed the extract from the Minutes of the Meeting of the Board of Directors held on 4th April, 2017, as quoted below:

**“LARK CHEMICALS PVT. LTD.
Radha Bhuvan, 3rd Floor, 121 Nagindas Master Road, Fort
Mumbai – 400 001**

**EXTRACT FROM THE MINUTES OF THE MEETING OF THE
BOARD OF DIRECTORS OF M/S. LARK CHEMICALS PVT.
LTD. HELD ON 4th APRIL 2017**

The Board of Directors discussed in detail the long pending outstanding dues recoverable from M/s. Goa antibiotics & Pharmaceuticals Ltd., Goa. It was further discussed that since said M/s. Goa antibiotics & Pharmaceuticals Ltd. was discharged from the purview of SICA/BIFR vide order dated 02/06/2014 passed by the BIFR, the company intends to initiate insolvency Resolution process under the Insolvency and Bankruptcy Code 2016 and sought permission from the board to send demand notice to M/s. goa Antibiotics & Pharmaceuticals Ltd. under Insolvency and Bankruptcy Code 2016.

After due discussion, the Board approved the proposal and authorised the company to initiate steps under the Insolvency and Bankruptcy Code 2016 and also appointed M/s. DHRUVE LILADHAR & CO., Advocates, Solicitors & Notary to send demand

notice on behalf of the Company and passed the following resolution.

“RESOLVED that Company be and is hereby authorised M/s. DHRUVE LILADHAR & CO., Advocates, Solicitors & Notary to send demand notice on behalf of the Company under the Insolvency and Bankruptcy Code, 2016 to M/s. Goa Antibiotics & Pharmaceuticals Ltd., Goa”.

Sd/-

CHAIRMAN”

6. In the present case as the demand notice has been issued by a legal firm and there is nothing on record to suggest that the said legal firm holds any position with or in relation to the respondent – Lark Chemicals Pvt. Ltd. and the demand notice has not been issued in mandatory Form 3 or Form 4, as stipulated under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, we hold that the initiation of resolution process at the instance of respondent cannot be upheld. The case of the appellant being covered by the decision of the “Uttam Galve Steels Limited (Supra)”, we have no other option but to set aside the impugned order.

7. This apart, as we find that the respondent in their application under Section 9 mentioned that the Corporate Debtor committed default from 25.11.1998 onwards, as noticed by the Adjudicating Authority in the first paragraph of the impugned order dated 14th August, 2017. In absence of explanation of delay, the resolution proceeding cannot proceed. For the reasons aforesaid, we set aside the impugned order passed by the Adjudicating Authority, Mumbai Bench in C.P. No. 1066/2017.

8. In effect, order(s) passed by Ld. Adjudicating Authority appointing any 'Interim Resolution Professional', declaring moratorium, freezing of account, , and all other order(s) passed by Adjudicating Authority pursuant to impugned order and action taken by the 'Interim Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The appellant company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

9. Learned Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed, and the appellant 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 Bansi Lal Bhat]
Member(Judicial)

/ns/gc