

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 905 of 2020

In the matter of:

Mohit Minerals Ltd.

....Appellant

Vs.

Nidhi Impotrade Pvt. Ltd.

....Respondent

Present:

Appellant: Mr. Mritunjay Tiwary, Advocate.

Respondent: None

ORDER

(Through Virtual Mode)

08.01.2021: Upon proof of service of notice on Respondent, its appearance was awaited on the last date of hearing. Even today, nobody has turned up to defend the appeal on behalf of Respondent. In the given circumstances, we proceed to hear learned counsel for the Appellant and dispose off the appeal.

2. Application filed by the Appellant- Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) came to be dismissed at the hands of the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, Court No.II, in terms of the impugned order dated 4th September, 2020 holding the same to be not maintainable for the reasons that the demand notice was issued without any authority.

Contd/-.....

3. Heard learned counsel for the Appellant and perused the record.

4. It is well settled by now that delivery of a demand notice of unpaid operational debt by the Operational Creditor upon the Corporate Debtor under Section 8(1) of the 'I&B Code' is a sine-qua-non for initiation of Corporate Insolvency Resolution Process (CIRP) by Operational Creditor under Section 9 of the 'I&B Code'. Format in which the demand notice is to be issued by the Operational Creditor in terms of the 'Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016' is prescribed in Form-3. The delivery of notice is to be effected in the prescribed form which must emanate from the Operational Creditor or any authorized person on its behalf. In the case in hand, it is not in controversy that the demand notice in prescribed form has been issued by the lawyer of Operational Creditor and delivered upon the Corporate Debtor. Perusal of the demand notice forming Annexure A-16 to the appeal paper book at Page 227, Volume-II brings it to fore that the same has been issued by one Mr. Sumit Kumar, Advocate under instructions from and on behalf of Operational Creditor. It is the dictum of the Hon'ble Apex Court in ***“Macquaire Bank Limited v. Shilpi Cable Technologies Limited- (2018) 2 SCC 674”*** that a demand notice delivered by an Advocate duly instructed by the Operational Creditor would be a valid demand notice for purposes of initiation of CIRP. In view of the same, notice delivered could not be held to be bad in law unless it was shown that the lawyer was not duly instructed. It appears from para 10 of the impugned order that the Adjudicating Authority

was aware of this legal proposition but in the opinion of the Adjudicating Authority there was no due authorization backed by Board Resolution of the Operational Creditor. This finding is unsustainable as in case of a person other than an Advocate, the Board Resolution would be required but in the event of a demand notice being issued by an Advocate duly instructed by his client (Operational Creditor), there is no need of requirement of authority being backed by the Board Resolution.

5. Learned counsel for the Appellant has pointed out that the Adjudicating Authority itself has, in **“SVG Fashion Limited v. Arpita Filaments Pvt. Ltd.- Company Petition No. (IB)-182/9/NCLT/AHM/2018”** decided on 26th September, 2019, held:

“10.....Further, with regard to the issue of demand notice issued through advocate is also not sustainable as it is already settled by the Hon’ble Supreme Court that the Advocate can issue demand notice on behalf of his client i.e. operational creditor.”

6. It is evident that the learned Adjudicating Authority had taken the correct view which is reflected in the aforesaid order. Judicial consistency would demand that the same view, which was based on the judgment of the Hon’ble Apex Court, should have been taken in the latter case as well. Once an

Advocate was duly instructed to issue the demand notice, there was no room for holding that the notice delivered by the Advocate was not a notice delivered by an authorized person.

7. Viewed thus, the finding recorded by the Adjudicating Authority in regard to invalidity of service of mandatory demand notice under Section 8(1) of the 'I&B Code' cannot be sustained. The impugned order is set aside and the matter is remitted back to the Adjudicating Authority with direction that in the event of the application being complete in all respects, it may, having regard to the key ingredients of debt and default, pass an order of admission or otherwise as warranted under law. However, before passing such order, it may provide an opportunity to the Corporate Debtor to settle the claim of Appellant-Operational Creditor. Accordingly, the appeal is allowed.

The Appellant is directed to appear before the Adjudicating Authority on 15th February, 2021. A copy of this order be communicated to the Adjudicating Authority forthwith.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Shreesha Merla]
Member (Technical)**

AR/g