

Lawyers can issue notice under Insolvency Code – Supreme Court of India

In a recent Judgment delivered on 15th December 2017 in a matter between **Macquaire Bank Limited (Singapore) and Shilpi Cable Technologies Ltd.**, reported as 2017 SCC Online SC 1493, Supreme Court of India reversed the Judgment of National Company Law appellate tribunal (NCLAT) and settled the law relating to the following issues arising out of Insolvency and Bankruptcy Code, 2016:

1. Whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor?
2. Whether, in relation to an operational debt, the provision contained in Section 9(3)(C) of the Insolvency and Bankruptcy Code, 2016 is mandatory?

Back Ground of the case: Insolvency and Bankruptcy code, 2016 Hamera International Private Limited executed an agreement with the Appellant Macquaire Bank limited, Singapore on 27.07.2015 by which the appellant purchased the original supplier's right, title and interest in a supply agreement in favour of the Respondent. The Respondent entered into an agreement dated 02.12. 2015 for supply of goods worth USD 6,321,337.11 in accordance with the terms and conditions contained in the Sales Contract. The supplier issued two invoices dated 21.12.2015 and 31.12.2015. Payments terms under the said invoices were 150 days from the date of Bill of Ladings dated 17.12.2015/19.12.2015. Since amounts under the said bills were due for payment, the appellant sent an email dated 03.05.2016 to the contesting respondent for payments of the outstanding amounts. Ultimately, the appellant issued a statutory notice under Sections 433 and 434 of the Companies Act,1956 and the respondent denied that there was any outstanding amount. After enactment of the code, the appellant issued a demand notice under Section 8 of the Code on 14.02.2017, the contesting Respondent stated that there was no amount payable by them.

Insolvency Proceedings: On 07.03.2017, the appellant initiated insolvency proceedings by filing an application under Section 9 of the Code. On 01.06.2017, the NCLT rejected the petition holding that Section 9(3)(C) of the Code was not complied with, inasmuch as no certificate, as required by the provision, accompanied the application filed under Section.9. More over, the NCLAT also went into the question as to whether a dispute has been raised by the reply to the statutory notice sent under Sections 433 and 434 of the Companies Act, 1956 and hence under Section 9(5)(ii)(d), the application would have to be dismissed.

By the impugned Judgment dated 17.07.2017, te NCLAT agreed with the NCLT holding that the application would have to be dismissed for non compliance of the mandatory provision contained in Section 9(3)(c) of the Code. It further went on to hold that an Advocate/Lawyer cannot issue a notice under Section 8 on behalf of the operational creditor in the following terms:

“ In the present case, as the notice has been given by an advocate/lawyer and there is nothing on record to suggest the lawyer was authorized by the appellant, and as there is nothing on



record to suggest that the lawyer was authorized by the appellant, and as there is nothing on record to suggest that the said lawyer hold any position with or in relation to the appellant company, we hold that the notice issued by the lawyer on behalf of the appellant cannot be treated as notice under Section 8 of the I&B Code. And for the said reason also the petition under Section 9 at the instance of the appellant against the respondent was not maintainable”.

The above said Judgment literally stalled hundreds of insolvency proceedings and created a major confusion in the minds of stake holders. An appeal was filed by the Bank and Supreme court reversed the said judgment and has given a big relief.

Conclusion by Supreme Court: The Supreme Court of India held that the traditional role of a lawyer is well recognized in Indian law and even Supreme Court in the matter of Byram Pestonji Gariwala Vs Union Bank of India (1992) 1 SCC 31 upheld the same. In the said case, Supreme Court of India considered Order XXIII Rule 3 of the amended Code of Civil Procedure, which mandated the compromise deed be “signed by the parties” and held that the compromise deed signed by the counsel on behalf the parties also is valid in law. The Supreme Court also held that S.30 of the Advocates Act should be harmoniously read with the Code and held that the notice issued under S.8 of the Insolvency and Bankruptcy code by a lawyer on behalf of the client is valid in law and serve the purpose stated in the Code. Supreme Court also held that S.9(3)(c) is not mandatory and hence production of the Bank statement (which is impossible in case of Foreign Petitioners since they may not have an account in a scheduled bank recognized by Indian Law) is Directory in nature. The main reason for the Supreme Court taking such a decision is “serious general inconvenience caused to innocent persons without in any way furthering the object of the Act”.