[2025] 4 S.C.R. 1950 : 2025 INSC 597

Visa Coke Limited
v.
M/s Mesco Kalinga Steel Limited

(Civil Appeal No. 357 of 2025)

29 April 2025

[J.B. Pardiwala and R. Mahadevan,* JJ.]

Issue for Consideration

Issue arose whether the notice served by the appellant-Operational Creditor upon the Key Managerial Personnel-KMP of the respondent-Corporate Debtor at their registered office constitutes valid service of the statutory demand notice u/s.8 of the Insolvency and Bankruptcy Code, 2016, so as to maintain a petition u/s.9 for initiation of CIRP against the respondent-Corporate Debtor.

Headnotes†

Insolvency and Bankruptcy Code, 2016 – ss.8 and 9 – Insolvency resolution by operational creditor – Demand notice to corporate debtor – Valid service of statutory demand notice – Compliance – Petition u/s.9 by the appellant-Operational Creditor to initiate CIRP against the respondent-Corporate Debtor – Application rejected by the NCLT on the ground that the alleged demand notice was addressed/sent to the Key Managerial Personnel-KMP and no demand notice as required u/s.8(1) sent to the Corporate Debtor and thus, whether service is valid or not, does not arise at all – NCLAT upheld the same – Interference with:

Held: s.9 petition can be filed only against the corporate debtor after giving prior notice u/s.8 to the corporate debtor – s.8(1) requires the operational creditor to deliver the notice of demand of unpaid operational debt or a copy of the invoice demanding payment to the corporate debtor at their registered office and the demand notice is required to be in the form and manner as prescribed – Appellant complied with the statutory requirement of sending demand notice in Form 3 to the respondent as provided u/s.8 before filing the s.9 petition – Notice sent by the appellant to the Key Managerial Personnel-KMP of the corporate debtor at the registered office

* Author

address in the capacity of their official position, demonstrates that the same was issued to the corporate debtor demanding the operational debt due and payable by them – Not the case of the respondent that no notice was sent by the appellant calling upon the respondent to pay the operational debt – Also during the pendency of s.9 petition, the respondent approached the appellant for settlement, which was not fructified – Substantive right should not be allowed to be defeated merely on technicality – Respondent unable to show any substantial prejudice being caused to them on account of procedural irregularity – Notice issued by the appellant to KMP of the corporate debtor and delivered at their registered office can be construed as a deemed service of demand notice u/s.8 – Approach of the NCLT and the NCLAT rejecting s.9 petition on the technical ground that no notice was sent to the corporate debtor and the notice sent by the appellant to the KMP of the corporate debtor cannot be taken to be a notice issued u/s.8, incorrect and unsustainable in law – Furthermore, the appellant to establish as to what is the actual date of default, failing which, the application filed u/s.9 is incomplete – Issue relating to the date of default by the Corporate Debtor and novation of contract, if any, being a mixed question of law and fact, to be decided by NCLT at the time of final disposal of s.9 petition on merits – Orders passed by the NCLT and NCLAT set aside – Matter remanded to NCLT. [Paras 8.1, 10, 10.1, 14-17]

Case Law Cited

Union of India v. Ibrahim Uddin & Another **[2012] 8 SCR 35 : (2012) 8 SCC 148;** *GLAS Trust Co. LLC v. Byju Raveendran & Others* **[2024] 10 SCR 1802 : 2024 SCC OnLine SC 3032;** *State Bank of India & Ors. v. The Consortium of Murari Lal Jalan & Florian Fritsch & Another,* **C.A. No(s). 5023-5024/2024;** *Rajneesh Aggarwal v. Amit J. Bhalla* **[2001] 1 SCR 54 : (2001) 1 SCC 631;** *Sardar Amarjit Singh Kalra (Dead) by LRs & Others v. Pramod Gupta (Dead) by LRs & Others* **[2002] Supp. 5 SCR 350 : (2003) 3 SCC 272;** *Ramnath Exports (P) Ltd. v. Vinita Mehta* **(2022) 7 SCC 678 : (2022) 4 SCC (Civ) 150 : 2022 SCC OnLine SC 788 – referred to.**

K.B. Polychem (India) Ltd. v. Kaygee Shoetech Pvt. Ltd. **(2020) ibcla.in 193 NCLAT : Company Appeal (AT) (Insolvency) No. 1010 of 2019;** *Shubham Jain v. Gagan Ferrotech Ltd. and Another* **(2021) ibclaw.in 40 : Company Appeal (AT) (Insolvency) No. 1008 of 2019 – referred to.**

List of Acts

Insolvency and Bankruptcy Code, 2016; Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016; Companies Act, 2013.

List of Keywords

Corporate debtor; Operational creditor; Corporate Insolvency Resolution Process; Demand of unpaid operational debt; Demand notice; Low Ash Metallurgical Coke; Key Managerial Personnel; Statutory notice; Registered office of corporate debtor; Copy of invoice demanding payment; Official capacities; Purpose of sending demand notice; Plea of novation of contract; Date of default by the Corporate Debtor; Procedural irregularity; Deemed service of demand notice.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 357 of 2025

From the Judgment and Order dated 03.10.2024 of the National Company Law Appellate Tribunal in CAAT (I) No. 247 of 2023

Appearances for Parties

Advs. for the Appellant:
Rajiv Shakdher, Sr. Adv., Diwakar Maheshwari, Ms. Pratiksha Mishra, Karan Bhootra, Karan Khetani, Jonathan Ivan Rajan.

Advs. for the Respondent:
Ramji Srinivasan, Sr. Adv., Saswat Kumar Acharya, Dhananjay Bhaskar Ray, Arjun Bhatia.

Judgment / Order of the Supreme Court

Judgment

R. Mahadevan, J.

1. This appeal has been filed against the judgment and final order dated 03.10.2024 passed by the National Company Law Appellate Tribunal, Principal Bench, New Delhi[1] in Comp. Appeal (AT)(Ins.)

1 For short, "the NCLAT"

No. 247 of 2023 filed by the appellant herein. By the impugned order, the NCLAT dismissed the company appeal filed under Section 61 of the Insolvency and Bankruptcy Code, 2016[2] against the order dated 24.01.2023 passed by the Adjudicating Authority *viz.*, National Company Law Tribunal, Cuttack Bench,[3] which dismissed the petition bearing CP(IB) No. 45/CB/2021 filed by the appellant under Section 9 of the IBC seeking to initiate Corporate Insolvency Resolution Process[4] against the respondent herein.

2. The facts of the case as presented by the appellant, are summarized as under:

2.1. The appellant is the Operational Creditor, engaged in the business of manufacture and sale of Low Ash Metallurgical Coke[5] at its plant at Kalinganagar Industrial Complex, Jaipur Road, Odisha. The respondent is the Corporate Debtor, engaged in the business of minerals and metals.

2.2. On 11.10.2019, the appellant – Operational Creditor (seller) and the respondent – Corporate Debtor (buyer) entered into a contract for sale and purchase of LAM Coke for 12,000 MT +/- 10% at seller's option subject to the terms *viz.*, (a) the respondent agreed to purchase the LAM Coke at the price of INR 18,800 per metric tonne + GST from the appellant; (b) the delivery period was up to 10.11.2019; and (c) 100% advance payment was to be paid by the respondent through RTGS/NEFT or by opening a Letter of Credit[6] prior to dispatch of the material.

2.3. Subsequently, the said contract was amended on many occasions with respect to delivery period and date of lifting under clause 3 of the contract. In terms of the last amendment dated 18.12.2019, the date of lifting was extended upto 10.01.2020. Accordingly, the appellant supplied LAM Coke to the respondent and payment was made.

2.4. While so, the respondent sent emails dated 12.11.2019 and 16.11.2019 to the appellant, requesting delivery of 1700 MT

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2 For short, "the IBC"

3 For short, "the NCLT"

4 For short, "the CIRP"

5 For short, "the LAM Coke"

6 For short, "the LoC"

of LAM Coke, with an assurance that LoC would be opened shortly. Based on the same, the appellant issued delivery orders for 1700 MT of LAM Coke on credit basis, but payment was not made, and the same remained due and payable by the respondent.

2.5. In this regard, the respondent – Corporate Debtor sent an email on 25.11.2019, admitting their default and assured that the outstanding payment for 1700 MT of LAM Coke will be made at the earliest. However, no payment was made, which compelled the Operational Creditor to issue a legal notice dated 23.11.2020 to the Corporate Debtor through its Director, Sameer Singh, demanding the outstanding payment for supply of 1700 MT of LAM Coke amounting to INR 3,34,16,661.60 along with penal interest at 15% per annum.

2.6. Since no response was received from the Corporate Debtor, the Operational Creditor issued a demand notice in Form 3 on 31.03.2021 in compliance with section 8 of the IBC, to the Corporate Debtor at its registered address through its Key Managerial Personnel *viz.*, Director, Chief Financial Officer and Manager, Commercial, demanding payment of INR 4,19,77,245.17 (which included principal amount of INR 3,34,16,661.60 and penal interest calculated till 31.03.2021) due and payable as on 30.09.2020.

2.7. Though the Corporate Debtor received the demand notice, they did not send any reply. Hence, the Operational Creditor filed an application bearing CP(IB) No. 45/CB/2021 before the NCLT under Section 9 of the IBC, to which, the respondent filed their reply on 24.09.2022 *inter alia* stating that they were unable to pay the outstanding amount due to circumstances beyond their control.

2.8. However, by order dated 24.01.2023, the NCLT dismissed the application observing that notice dated 31.03.2021 was sent to three managerial persons i.e., Sameer Singh, Bibhuti Bhushan Rath, and S. Subudhi and no notice was sent/addressed to the Corporate Debtor and hence, the question whether service is valid or not, does not arise at all.

2.9. Challenging the aforesaid order of the NCLT, the appellant preferred an appeal bearing Comp. App (AT)(Ins) No. 247 of

2023 before the NCLAT under Section 61 of the IBC. Pursuant to the issuance of notice, the respondent entered appearance and filed their reply on 28.05.2023. The appellant also filed their rejoinder on 05.08.2023.

2.10. However, the NCLAT by order dated 03.10.2024, which is impugned herein, dismissed the appeal, observing that no notice has been addressed to the Corporate Debtor through its managing director etc., and therefore, it cannot be termed to have been delivered to the Corporate Debtor and cannot be taken to be a notice issued under section 8 of the IBC.

2.11. Aggrieved by the aforesaid order of the NCLAT, the appellant – Operational Creditor is before us with the present appeal.

3. The primary contention of the learned counsel for the appellant is that Section 8(1) of the IBC requires the operational creditor, i.e., appellant herein, on occurrence of a default, to deliver a demand notice of unpaid operational debt or a copy of the invoice demanding payment. The demand notice is required to be in the form and manner as prescribed, and it is clear that the demand notice is to be delivered on the corporate debtor. The learned counsel also submitted that instead of a demand notice, the operational creditor can also deliver on the corporate debtor, a copy of an invoice, demanding payment of the defaulted amount. Therefore, once the demand notice, in the prescribed form, is delivered at the registered office of the corporate debtor, via any of the modes referred to in Rule 5(2)(a) or (b), the condition precedent for instituting a section 9 action stands completed. In the present case, the demand notice was duly delivered to the registered address of the respondent through its Director, Chief Financial Officer, and Manager, Commercial and accordingly, the condition precedent for initiation of CIRP against the respondent, has been complied with by the appellant.

3.1. It is further submitted that Rule 5(2)(a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016[7] provides that a demand notice under Section 8 of the IBC can be served upon the corporate debtor through its Key

7 For short, "the Adjudicating Authority Rules, 2016"

Managerial Personnel.[8] If the statute and its accompanying regulations allow for service of a demand notice upon the KMP of an entity, it follows that the corporate debtor may lawfully be addressed through its KMP. Moreover, Section 20(1) of the Companies Act, 2013 also states that a company can be served through its officer at the registered address. In the present case, even the 'subject' and paragraph 1 of the demand notice sent by the appellant stated that the notice was indeed addressed to the Corporate Debtor. However, the NCLT and NCLAT without properly appreciating that the demand notice had been addressed to the KMP of the Corporate Debtor in the capacity of the positions they were holding in the respondent company – corporate debtor and not in their personal capacity, dismissed the section 9 petition filed by the appellant merely on the basis of an alleged procedural irregularity that no notice was addressed to the corporate debtor through its KMP.

3.2. It is further submitted that Section 9(1) of the IBC confers a right on the operational creditor to file an application for initiating CIRP, if, after expiry of ten (10) days of the date of delivery of the demand notice issued under Section 8(1), either no payment is received or there is failure to serve the notice of demand, as adverted to in Section 8(2), is not served on the corporate debtor by the operational creditor. The plain language, object and purpose of the above-referred provision is to bring to the notice (and thus, to make the corporate debtor aware) that an operational debt is due from it which remains unpaid. As long as notice in that behalf is delivered at the registered office of the corporate debtor, the condition precedent would stand fulfilled enabling the operational creditor to trigger a section 9 petition. In this case, the appellant - Operational Creditor has done exactly this. The demand notice would clearly show that it is the Corporate Debtor who has been called upon to pay the amount and not its "KMP". Though both the NCLT and the NCLAT found that the demand notice was delivered at the registered office of the Corporate Debtor seeking payment of unpaid operational debt, they erroneously dismissed the section 9 petition.

8 For short, "KMP"

3.3. The learned counsel also submitted that no ground was raised by the respondent at the initial stage that they had not received the demand notice under Section 8 of the IBC. During the pendency of the section 9 petition, the respondent approached the appellant to settle the matter, as could be seen from the orders dated 20.04.2022, 02.05.2022, 10.06.2022, 05.07.2022, 22.07.2022, 01.08.2022, 30.08.2022 and 06.12.2022 of the NCLT. However, no settlement was arrived at before the NCLT. Thereafter, final arguments were heard on 03.01.2023 and 10.01.2023, in which the respondent had raised certain arguments for the first time, which were not borne out of pleadings. The appellant vehemently objected to such arguments. However, the NCLT erred in dismissing the section 9 petition by order dated 24.01.2023, based on the contentions which were not pleaded in their reply. Regarding the principles of the necessity of pleadings, reliance was placed on the decision of this Court in *Union of India v. Ibrahim Uddin & Another.*[9] Therefore, the learned counsel prayed to allow this appeal by setting aside the order impugned herein.

4. On the contrary, the learned counsel for the respondent submitted that as per the accounts of the respondent, the appellant's Group of Companies owes a sum of Rs. 75,44,461.52 to Mid-East Integrated Steel Ltd (MISL), the parent company of the respondent, therefore requiring a reconciliation of accounts between the parties. Without waiting for a reconciliation of accounts, the appellant issued an alleged statutory demand notice dated 31.03.2021 purportedly under section 8 of the IBC, in the names of the KMP of the respondent *viz.*, (1) Mr. Sameer Singh, Director, (2) Mr. Bibhuti Bhushan Rath, CFO and (3) Mr. S. Subudhi, Manager, Commercial. Whereas, Section 8(1) of the IBC states that notice has to be issued to the corporate debtor. Thus, it is clear that the alleged demand notice has been addressed to the KMP of the Corporate Debtor and not to the Corporate Debtor and the same was not in consonance with Section 8 of the IBC r/w Rule 5(2) of the Adjudicating Authority Rules, 2016 r/w the statutorily prescribed Form 3 and Form 5 of the Adjudicating Authority Rules, 2016. Hence, the alleged demand notice having not been issued to the respondent being the Corporate Debtor, was not valid in the eyes of law.

9 (2012) 8 SCC 148

4.1. According to the learned counsel, section 9 petition filed by the appellant - Operational Creditor seeking initiation of CIRP against the respondent herein for the alleged default of operational debt to the tune of Rs. 4,19,77,245.17 (including interest), is wholly untenable.

4.2. It is submitted that the issue as to the tenability of the subject demand notice has been raised by the respondent before the NCLT, which is the court of first instance, both in oral and written arguments. This has also been traversed by the appellant both in its oral and written arguments. In any case, the question of what constitutes valid service of statutory notice on the Corporate Debtor being a pure question of law, could have been raised at any stage of the proceedings.

4.3. It is further submitted that Rule 5(2)(a) of the Adjudicating Authority Rules, 2016 provides that notice has to be sent to the registered office for which various modes have been provided, namely, by hand, registered post, or speed post with acknowledgement, but the notice has to be sent to the corporate debtor at its registered office. Rule 5(2)(b) provides for delivery of notice by electronic mail to the KMP of the corporate debtor, but it does not apply to the present case because admittedly no electronic mail has been sent.

4.4. It is also submitted that the principles of constructive notice and deemed service are inapplicable to the present case, since the statute itself is clear enough that a demand notice sent through registered post or speed post has to be served upon the corporate debtor which is a separate juristic entity as against the individuals on whom it has been served.

4.5. It is submitted that the NCLT has rightly not ventured into the merits of the case, and has dismissed the Section 9 petition at the very threshold on the ground that the demand notice was not validly served on the respondent. Apart from the above aspect relating to demand notice, the appellant failed to make out a case of default which is a mandatory precondition to admit a petition u/s. 9 of the IBC.

4.6. It is submitted that Clause 7 of the IBC Bill stated that admission of CIRP should not be made as a matter of regular practice.

The requirement to provide proof of valid service of demand notice to the corporate debtor ensures that creditors do not file frivolous applications which prematurely put the corporate debtor into CIRP for extraneous considerations. Whereas, the present case pertains to an application which itself is totally incomplete and non-maintainable, and thus deservedly came to be dismissed. It is also submitted that the repercussions of admission of insolvency are far-reaching and irreversibly damaging. It can paralyze a perfectly solvent company. Hence, the onus was heavily on the appellant to show, beyond any shadow of doubt, that there existed the required criteria for admission of the application. On the other hand, non-admission does not *ipso facto* foreclose the rights of the appellant as it can still approach several other forums to recover their alleged dues by proving it.

4.7. Referring to the recent decisions of this court in *GLAS Trust Co. LLC v. Byju Raveendran & Others*[10] *and State Bank of India & Ors. v. The Consortium of Murari Lal Jalan & Florian Fritsch & Another (Jet Airways case),*[11] it is submitted that the IBC is a complete code in itself and the procedure prescribed by it has to be mandatorily followed.

4.8. Stating so, the learned counsel submitted that the orders passed by the NCLT and NCLAT rejecting the section 9 petition are perfectly correct and the same do not call for any interference by this court.

5. We have heard the learned counsel on either side and perused the materials available on record carefully and meticulously.

6. Admittedly, the appellant – Operational Creditor moved the NCLT by filing a petition under section 9 of the IBC to initiate CIRP against the respondent – Corporate Debtor. However, the said application was rejected by the NCLT on the ground that the alleged demand notice was addressed/ sent to the KMP and no demand notice as required under section 8(1) of the IBC was sent to the Corporate Debtor and therefore, the question of whether service is valid or not,

10 2024 SCC OnLine SC 3032

11 C.A. Nos. 5023-5024/2024

does not arise at all. The said decision was also affirmed by the NCLAT by the order impugned herein. Aggrieved, this civil appeal by the appellant - Operational Creditor before us.

7. The short question that arises for our consideration is, whether the notice dated 31.03.2021 served by the appellant – Operational Creditor upon the KMP of the respondent – Corporate Debtor at their registered office constitutes valid service of the statutory demand notice under Section 8 of the IBC, so as to maintain a section 9 petition for initiation of CIRP against the respondent – Corporate Debtor.

8. It is well settled law that an operational creditor must send a demand notice of unpaid operational debt to the corporate debtor as mandated under section 8 of the IBC, before initiating the proceedings under section 9 for CIRP and the failure to issue a proper demand notice can render the section 9 petition invalid. For the sake of specificity, Sections 8 and 9 of the IBC and Rule 5 of the Adjudicating Authority Rules, 2016 are reproduced below:

> *"Section 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.*
>
> *(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor*
>
> *(a) existence of a dispute, [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;*
>
> *(b) the payment of unpaid operational debt*
>
> *(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or*
>
> *(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.*

Explanation.- For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred."

"Section 9: Application for initiation of corporate insolvency resolution process by operational creditor.

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish-

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt [by the corporate debtor; if available;]

[(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order

(i) admit the application and communicate such decision to the operational creditor

and the corporate debtor if,-

(a) the application made under sub-section (2) is complete;

(b) there is no payment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any;

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if-

(a) the application made under sub-section (2) is incomplete;

(b) there has been payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a

notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

"5. Demand notice by operational creditor.—(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.

(2) 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,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any."

8.1. Thus, it is manifest that a section 9 petition can be filed only against the corporate debtor after giving prior notice under section 8 of the IBC to the corporate debtor; and the key requirements for filing the same are (i) demand notice under section 8 must be served on the corporate debtor; (ii) after 10 days, if the payment is not made or if there is no valid dispute, the application can be filed; (iii) application must be filed in Form 5 as prescribed by the Adjudicating Authority Rules, 2016; and (iv) supporting evidence such as invoices, bank statements, or written contracts must be attached. Further, a conjoint reading of section 8 of the IBC r/w Rule 5(2)(a) and (b) of the Adjudicating Authority Rules, 2016 would reveal that a demand notice under section 8 can be addressed and delivered to the corporate debtor through its KMP.

9. Additionally, it is to be noted that the operational creditor is required to send the demand notice in Form 3, which is the prescribed format used to comply with Section 8(1) of the IBC. For better appreciation, the same reads as under:

FORM 3
(See clause (a) of sub-rule (1) of rule 5)

FORM OF DEMAND NOTICE / INVOICE DEMANDING PAYMENT
UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016
(Under rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

[Date]

To,

[Name and address of the registered office of the corporate debtor]

From,

[Name and address of the registered office of the operational creditor]

Subject: Demand notice/invoice demanding payment in respect of unpaid operational debt due from [corporate debtor] under the Code.

Madam/Sir,

1. This letter is a demand notice/invoice demanding payment of an unpaid operational debt due from [name of corporate debtor].

2. Please find particulars of the unpaid operational debt below:

PARTICULARS OF OPERATIONAL DEBT		
1.	TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE	

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF DEFAULT IN TABULAR FORM)	
3.	PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)	
4.	DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS	
5.	RECORD OF DEFAULT WITH THE INFORMATION UTILITY (IF ANY)	
6.	PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH DEBT HAS BECOME DUE	
7.	LIST OF DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT	

3. If you dispute the existence or amount of unpaid operational debt (in default) please provide the undersigned, within ten days of the receipt of this letter, of the pendency of the suit or arbitration proceedings in relation to such dispute filed before the receipt of this letter/notice.

4. If you believe that the debt has been repaid before the receipt of this letter, please demonstrate such repayment by sending to us, within ten days of receipt of this letter, the following:

a. an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

b. an attested copy of any record that [name of the operational creditor] has received the payment.

5. The undersigned, hereby, attaches a certificate from an information utility confirming that no record of a dispute raised in relation to the relevant operational debt has been filed by any person at any information utility. (if applicable)

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 authorized to act on behalf of the operational creditor
Name in block letters
Position with or in relation to the operational creditor
Address of person signing

Instructions

1. Please serve a copy of this form on the corporate debtor, ten days in advance of filing an application under section 9 of the Code.

2. Please append a copy of such served notice to the application made by the operational creditor to the Adjudicating Authority.

9.1. Thus, it is abundantly clear that the statutory Form 3 itself mentions "Name and address of the registered office of the corporate debtor" and "Madam/Sir". It requires the operational creditor to state the name and address of the registered office. Further, in the 'subject' heading, the operational creditor is required to state clearly the demand notice/ invoice demanding payment of money against unpaid operational debt from the corporate debtor.

10. As already stated above, Section 8(1) required the operational creditor to deliver the notice of demand of unpaid operational debt or a copy of the invoice demanding payment to the corporate debtor at their registered office; and the demand notice is required to be in the form and manner as prescribed. According to the appellant, the notice dated 31.03.2021 sent to the KMP of the respondent - Corporate Debtor at their registered office, is in compliance with the provisions of the IBC *viz.*, Section 8 of the IBC r/w Form 3 of the Adjudicating Authority Rules, 2016, and hence, the NCLT as well as the NCLAT cannot reject the section 9 petition filed by the appellant – Operational

Creditor at the threshold. For better appreciation, Form 3 sent by the appellant reads as follows:

"FORM 3
[See clause (a) of sub rule (1) of Rule 5]

FORM OF DEMAND NOTICE/INVOICE DEMANDING PAYMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016
(Under Rule 5 of the Insolvency and Bankruptcy (Adjudicating Authority) Rules, 2016

31 March 2021

To

1. Mr. Sameer Singh
Director
MESCO Kalinga Steel Limited
3915, Lewis Road, MESCO Tower,
Kedar Gouri Square,
Bhubaneshwar- 751002

2. Bibhuti Bhushan Rath
Chief Financial Officer
MESCO Kalinga Steel Limited
3915, Lewis Road, MESCO Tower,
Kedar Gouri Square,
Bhubaneshwar- 751002

3. Mr. S. Subudhi
Manager-Commercial
MESCO Kalinga Steel Limited
3915, Lewis Road, MESCO Tower,
Kedar Gouri Square,
Bhubaneshwar - 751002

From:
Ms. Radhika Agarwal
Company Secretary
VISA Coke Limited
VISA HOUSE, 8/10Alipore Road, Kolkata-700 027

Subject: Demand Notice/invoice demanding payment in respect of unpaid operational debt due from MESCO Kalinga Steel Limited (Mesco) under the Insolvency and Bankruptcy Code, 2016 (Code)

Dear Sirs,

1. This letter is a Demand Notice/invoice demanding payment in respect of unpaid operational debt due from MESCO Kalinga Steel Limited under the Code.

2. Please find the particulars of the unpaid operational debt below:

……"

10.1. On a perusal of Form 3 notice dated 31.03.2021 issued by the appellant, it is revealed that the same was addressed to the names of the KMP and delivered to the registered office of the respondent - Corporate Debtor *viz*., MESCO Kalinga Steel Limited. Even the 'subject' and paragraph 1 of the notice clearly demonstrate that as per the IBC, demand notice / invoice demanding payment in respect of unpaid operational debt due from the corporate debtor was issued and thereby, the appellant called upon the Corporate Debtor to pay the operational debt within a period of ten days from the date of receipt of the notice, failing which, CIRP be initiated in respect of the Corporate Debtor. Notably, the said notice dated 31.03.2021 was served on the KMP in their official capacities at the registered office address of the corporate debtor. The contents of the notice clearly establish that the same was issued to the Corporate Debtor in respect of the operational debt due and payable by them. As such, it cannot be said that the appellant did not comply with the statutory requirement of sending demand notice in Form 3 to the respondent - Corporate Debtor as provided under section 8 of the IBC, before filing the section 9 petition seeking initiation of CIRP against the respondent in respect of the unpaid operational debt.

11. In this context, we may take aid of the decision in *Rajneesh Aggarwal v. Amit J. Bhalla,*[12] wherein, this Court while dealing with

12 (2001) 1 SCC 631

requirement of notice under Section 138 of the Negotiable Instruments Act, 1881, held that a notice issued upon the Director of the Company amounts to notice to the Company. It was further held that the object of issuance of notice must be kept in mind and that the same cannot be construed in a narrow and technical manner without examining its substance. The relevant paragraphs are extracted below:

> *"…it is no doubt true that all the three requirements under clauses (a), (b) and (c) must be complied with before the offence under Section 138 of the Negotiable Instruments Act, can be said to have been committed and Section 141 indicates as to who would be the persons, liable in the event the offence is committed by a company. The High Court itself on facts, has recorded the findings that conditions (a) and (b) under Section 138 having been duly complied with and, therefore, the only question is whether the conclusion of the High Court that condition (c) has not been complied with, can be said to be in accordance with law. Mere dishonour of a cheque would not raise to a cause of action unless the payee makes a demand in writing to the drawer of the cheque for the payment and the drawer fails to make the payment of the said amount of money to the payee. The cheques had been issued by M/s Bhalla Techtran Industries Limited, through its Director Shri Amit Bhalla. The appellant had issued notice to said Shri Amti J. Bhalla, Director of M/s Bhalla Techtran Industries Limited. Notwithstanding the service of the notice, the amount in question was not paid. The object of issuing notice indicating the factum of dishonour of the cheques is to give an opportunity to the drawer to make payment within 15 days, so that it will not be necessary for the payee to proceed against in any criminal action, even though the bank dishonoured the cheques. It is Amit Bhalla, who had signed the cheques as the Director of M/s Bhalla Techtran Industries Ltd. When the notice was issued to said Shri Amit Bhalla, Director of M/s Bhalla Techtran Industries Ltd., it was incumbent upon Shri Bhalla to see that the payments are made within the stipulated period of 15 days. It is not disputed that Shri Bhalla has not signed the cheques, nor is it disputed that Shri Bhalla*

was not the Director of the company. Bearing in mind the object of issuance of such notice, it must be held that the notices cannot be construed in a narrow technical way without examining the substance of the matter. We really fail to understand as to why the judgment of this court in Bilakchand Gyanchand Co.,1999(5) SCC 693, will have no application. In that case also criminal proceedings had been initiated against A. Chinnaswami, who was the Managing Director of the company and the cheques in question had been signed by him. In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court committed error in recording a finding that there was no notice to the drawer of the cheque, as required under Section 138 of the Negotiable Instruments Act. In our opinion, after the cheques were dishonoured by the bank the payee had served due notice and yet there was failure on the part of the accused to pay the money, who had signed the cheques, as the Director of the company. The impugned order of the High Court, therefore, is liable to be quashed."

12. During the course of hearing, it has been brought to our attention that in the decision in *K.B. Polychem (India) Ltd. v. Kaygee Shoetech Pvt. Ltd.*,[13] wherein, the issue that arose for consideration was 'whether deemed service of demand notice under Section 8 of the IBC is sufficient, to trigger the process under section 9 of the IBC', the NCLAT, Principal Bench, New Delhi, after examining the relevant provisions of the IBC and the Adjudicating Authority Rules, 2016 and Rule 38 of the National Company Law Tribunal Rules, 2016, held that the Adjudicating Authority erred in rejecting the application filed under section 9 of the IBC. The relevant paragraphs of the same are extracted below:

"The brief facts as stated in the Appeal is that Appellant/ Applicant had filed an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 after serving the demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016. The Appellant contends that

13 (2020) ibcla.in 193 NCLAT [Company Appeal (AT) (Insolvency) No. 1010 of 2019, decided on 11.02.2020]

the demand notice dated 30.07.2018/01.08.2018 under Section 8 of the Insolvency and Bankruptcy Code, 2016 was sent by Speed Post, but it was returned with the remark of the Postal Authorities as "not available". The Adjudicating Authority rejected the petition on the ground that service of the demand notice of the Corporate Debtor is not established. The contention of the Operational Creditor that demand notice sent to the Director of the Company is not returned. Hence, demand notice shall be deemed served, given the General Clauses Act, 1987 and Section 114 of the Indian Evidence Act, 1872. The Adjudicating Authority further holds that I & B Code, 2016 is a complete Code in itself and provisions of Indian Evidence Act, 1872 and General Clauses Act, 1987 is not applicable unless specifically covered in I & B Code, 2016, and based on these, the petition has been dismissed.

……..

On perusal of the record, it is apparent that the Application filed under Section 9 of I & B Code, 2016 has been rejected by the Adjudicating Authority on the ground that the service of demand notice under Section 8 of I & B Code, 2016 is not established. The contention of the Operational Creditor, that the demand notice sent to the Director of the Company at his residence, is not returned. Thus it should be deemed to be served/delivered, given the General Clauses Act, 1897 and Section 114 of Indian Evidence Act, 1872.

…….

The Appellant has given sufficient evidence to show the delivery of demand notice. There is no specific denial of service of demand notice. The corporate debtor has itself stated that in reply to the demand notice, he had raised the dispute of unpaid operational debt. But no document is placed before us to show the existence of dispute before issuance of demand notice. Copy of invoices, demand notice, bank statement all other documents are placed before us which clearly shows that the corporate debtor

failed to pay off the operational debt of more than Rs One Lac, despite service of demand notice."

13. Following the above decision, the NCLAT, Principal Bench, New Delhi, in *Shubham Jain v. Gagan Ferrotech Ltd. and Another,*[14] wherein, the issue that fell for consideration was 'whether service of Demand Notice u/s 8 of the Code on a Director of the Corporate Debtor can be construed as deemed delivery or not for Initiation of Corporate Insolvency Resolution Process under Section 9 of the IBC', held that service of notice on the Director must be held to be good service. The relevant paragraphs of the same are reproduced below:

"7. Admittedly, the Demand Notices sent u/s 8 of the Code to the registered address, and functional address of the Corporate Debtor met with the remarks' addressee moved' and 'unclaimed' respectively. Unclaimed, will also have to be treated as Service of Notice. Again one set of Demand Notice was duly served upon one of the Directors of the Corporate Debtor. 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 gets right to apply under Section 9 and not before such date. Upon perusal of the record, it is apparent that the Demand Notice was duly served on the functional address as well as Director of the Corporate Debtor. Under Section 2(59) of the Companies Act, 2013 Director is included in to definition of Officer. Under Section 20 of the Act a document served on a Company or on Officer thereof is service recognized. Going from Principles of Natural Justice, in terms of Section 424 of Companies Act read with above provision of Service of Notice on Director must be held to be good service. Therefore, in our opinion, the mandate u/s 8 of the Code was fulfilled, and the Adjudicating Authority has rightly admitted the application u/s 9 filed by the Operational Creditor for initiating Corporate Insolvency Resolution Process against the Corporate Debtor."

14 (2021) ibclaw.in 40 [Company Appeal (AT) (Insolvency) No. 1008 of 2019 decided on 29.01.2021]

14. Undoubtedly, the purpose of sending a demand notice is to give the corporate debtor an opportunity to either repay the outstanding debt, or dispute the debt if there are genuine reasons. In the present case, the notice dated 31.03.2021 sent by the appellant to the KMP of the corporate debtor at the registered office address in the capacity of their official position, explicitly demonstrates that the same was issued to the corporate debtor demanding the operational debt due and payable by them. However, it is not the case of the respondent that no notice was sent by the appellant calling upon the respondent - Corporate Debtor to pay the operational debt. Further, it is pertinent to point out that during the pendency of the section 9 petition, the Corporate Debtor approached the Operational Creditor for settlement, which was not fructified.

    14.1. This Court in *Sardar Amarjit Singh Kalra (Dead) by LRs & Others v. Pramod Gupta (Dead) by LRs & Others,*[15] categorically observed that 'laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice'. It is also a trite law that 'the procedural defect may fall within the purview of irregularity, but it should not be allowed to defeat the substantive right accrued to the litigant without affording reasonable opportunity'.[16] In other words, a substantive right should not be allowed to be defeated merely on technicality. In the instant case, the respondent was unable to show any substantial prejudice being caused to them on account of such procedural irregularity. Therefore, in our opinion, the notice dated 31.03.2021 issued by the appellant to the KMP of the Corporate Debtor and delivered at the registered office of the Corporate Debtor, can be construed as a deemed service of demand notice as required under section 8 of the IBC. In such view of the matter, the approach of the NCLT and the NCLAT

15 (2003) 3 SCC 272, a five Judge bench, SCC pp. 300-01, para 26

16 Ramnath Exports (P) Ltd. v. Vinita Mehta, (2022) 7 SCC 678 : (2022) 4 SCC (Civ) 150 : 2022 SCC OnLine SC 788 at page 684

rejecting the section 9 petition on the technical ground that no notice was sent to the corporate debtor and the notice sent by the appellant to the KMP of the corporate debtor cannot be taken to be a notice issued under section 8 of the IBC, is incorrect and is unsustainable in law.

15. Yet another mandatory requirement to admit the section 9 petition is the occurrence of a 'default'. It cannot be disputed that the trigger to initiate CIRP under section 9 of the IBC is occurrence of a "default" and not "mere existence of debt". In other words, the appellant has to establish as to what is the actual date of default, failing which, the application filed under section 9 of the IBC is incomplete. In this case, the appellant mentioned the date of default as 19.11.2019, in terms of the contract dated 11.10.2019. As per the contract, in respect of supply of LAM Coke by the appellant, the respondent had to pay 100% in advance through RTGS / NEFT fund transfer or alternatively by opening of LoC prior to dispatch. Subsequently, the contract was amended on various occasions, relating to lifting and delivery of LAM Coke. Further, at the request of the respondent, by emails dated 12.11.2019 and 16.11.2019, the appellant permitted the respondent to lift the coals without making payment in advance / opening LoC prior to despatch. On this basis, the respondent contended that the contract dated 11.10.2019 is novated and the default date mentioned in the petition is incorrect.

    15.1. However, the NCLT declined to decide this question as the respondent raised the plea of novation of contract to nullify the occurrence of default without pleading the same, and that, the question of novation of contract is a mixed question of law and fact. The NCLAT also, did not delve into this aspect, as the same was not a subject matter of the appeal before it.

    15.2. In the given factual matrix, we are of the view that the issue relating to the date of default by the Corporate Debtor and novation of contract, if any, being a mixed question of law and fact, requiring detailed analysis based on the materials adduced by the parties, is to be decided by the NCLT at the time of final disposal of the section 9 petition, on merits.

16. In the ultimate analysis, we find that the orders passed by the NCLT and NCLAT rejecting the section 9 petition filed by the appellant, deserve to be interfered with by us.

17. Accordingly, this appeal stands allowed by setting aside the orders impugned herein and the matter is remanded to the NCLT, which shall entertain the section 9 petition and decide the same afresh, on merits, after providing reasonable opportunity to the parties by letting in oral and documentary evidence. Needless to state that the NCLT shall pass orders without being influenced by any observations made in its earlier order. No order as to costs.

18. Connected miscellaneous application(s), if any, shall stand disposed of.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Nidhi Jain