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## Authority & Competency of Professionals to issue Demand Notice under Section 8 (1) of Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016<sup>[i]</sup> classify two kinds of creditors for the purpose of initiating Corporate Insolvency Resolution Process (CIRP in short), **(1)** “Financial Creditor” as defined in Section (5) Clause 7 and **(2)** “Operational Creditor” as defined in Section (5) Clause 20. A careful reading of Chapter II, which deals with “Corporate and Insolvency Process”, explain the procedure to be adopted w.r.t different class of creditor. While Section (7) deals with provisions for initiation of CIRP by financial Creditor, the Section (8) & (9) deals the same w.r.t. Operational Creditor. The provisions under both sections, prescribing respective procedure for initiations of claims/CIRP by both class of creditors are very different, particularly the requirement to “Deliver a Demand Notice” or “Copy of an Invoice” caste upon Operational Creditor under Section (8) Clause (1). A comparison of each section exhibits that whereas a Financial Creditor isn’t required to send a “Demand Notice” and can maintain his or their petition straight away, the Operational Creditor has been burdened with duty to “Deliver a Notice” or “Copy of Invoice”. There were numerous precedents (Old View) wherein adjudicating authority (NCLT) dismissed applications preferred by Operational Creditors on the ground that legal demand notice was not issued by Operational Creditor but by engaged respective Advocate/Law Firm/CA/CS etc. The author, hereinafter shall deal with history of issue, final adjudication by Supreme Court and subsequent views of NCLAT.

### History of Issue

#### **Negative Views by NCLAT: (Old Views)**

The National Company Law Appellate Tribunal (NCLAT in short) was asked to decide the question in Company Appeal (AT) (Insolvency) No- 132 of 2017, titled as **Macquarie Bank Limited Vs. Uttam Galva Metallilcs Limited, III (2017) BC 10 (NCLT)**. Vide order dated- 17.07.2017 the NCLAT decided the question in negative by observing following:

*"17. In view of such provision we hold that an Advocate/lawyer or Chartered Accountant or a Company Secretary or any other person in absence of any authority by the 'Operational Creditor', and if such person do not hold any position with or in relation to the 'Operational Creditor', cannot issue notice under Section 8 of 'I&B Code', which otherwise can be treated as a lawyer's notice/pleader's notice, as distinct from notice under Section 8 of 'I&B Code'.*

*19. In the present case, as the notice has been given by an Advocate/lawyer and there is nothing on the record to suggest that the lawyer was authorized by the appellant, and as there is nothing on the record to suggest that the said lawyer/ Advocate hold any position with or in relation to the appellant company, we hold that the notice issued by the Advocate/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."*

What transpire from the above-mentioned verdict (Old View) was that there was no absolute prohibition for an Advocate or C.A. or C.S. etc to issue a Demand Notice under section (8) (1) of the Code, but it has to fulfil following conditions:

1. There has to be some authority vested in him like some "Board Resolution" or "Authority Letter" issued by Board of Director or Competent Person, and
2. Such authorized person or advocate should hold any position with or in relation to Operational Creditor.

The NCLAT again answered the question in negative in Company Appeal (AT) (Insolvency) No- 158 of 2017, titled as ***Uttam Galva Steels Limited Vs. DF Deutsche Forfait AG & Ors, 2018 (1) BC 1 (NCLAT)***. The NCLAT held that:

*"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. 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.*

*33. In the present case as an advocate/lawyer has given notice and there is nothing on record to suggest that the lawyer has been authorised by 'Board of Directors' of the respondent-'DF Deutsche Forfait AG' and there is nothing on record to suggest that the lawyer hold any position with or in relation with the respondents, we hold that the notice issued by the lawyer on behalf of the respondents cannot be treated as a notice under Section 8 of the I&B Code and for that the petition under Section 9 at the instance of the respondents against the appellant was not maintainable."*

In another Company Appeal (AT) (Insolvency) No- 158 of 2017, titled as ***Jord Engineers India Limited Vs. Valia & Company, II (2018) BC 77 (NCLT)***, vide order dated- 13.10.2017 the NCLAT came up with issue wherein legal notice under section 8 (1) was issued by an advocate on his letter head, and not

in Form 3 or 4, under the authority of “Retainership Agreement” wherein his services were hired to initiate civil, criminal and other proceedings under I & B Code. The NCLAT again answered the question in negative by following judgement of **Uttam Galva Steels Limited**. The NCLAT held that:

*"6. In the present case as the demand notice has been given by an Advocate and there is nothing on record to suggest that the Advocate in question holds any position with or in relation to the respondent – Valia & Company 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, the initiation of resolution process 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."*

Apart from above instances, the NCLT in Company Appeal (AT) (Insolvency) No- 141 and 146 of 2017, titled as **Ravi Mahajan Vs. Sunrise 14 A/S, Denmark, II (2018) BC 126 (NCLT)**, vide order dated- 06.12.2017 while deciding application under section (7) of the Code filed by “Financial Creditor”, dismissed application on the ground that same has been filed by Advocate and not by Financial Creditor. It held that:

*"12. This apart, as we find that the application under Section 7 of the 'I&B Code' in Form-1 has not been filed by the respondent- 'Operational Creditor', but an Advocate, Mr. RohitKhanna, who is neither Authorised Representative nor holds any position with or in relation to the 'Financial Creditor', as required to be stated as Form-1 of the Adjudicating Authority Rules, 2016, we hold that application under Section 7 of the 'I&B Code' was not maintainable at the instance of the respondent."*

Reader may also see **J.P. Engineers Pvt. Ltd Vs Indo Alusys Industries Ltd, II (2018) BC 99 (NCLAT)**, wherein it was that

*"7. In the present case, admittedly notice has been issued by an Advocate and there is nothing on the record to suggest that the said Lawyer has been authorised by Board of Directors of the appellant or holding any position with or in relation with the appellant. In this background, we hold that the Adjudicating Authority rightly held 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'"*

### Hon'ble Supreme Court of India: Final Verdict

Finally, the Honble Supreme Court of India in the matter of **Macquarie Bank Limited Vs. Shilpi Cable Technologies Limited 2018 [iii]**, settle down the entire controversy by interpreting impact and wording of Section 8 (1) of Code. The Honble Apex Court held that:

1. Section (8) of Code speaks of an operational creditor delivering a demand notice. It is clear that had the legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been “issued” and not “delivered”. Delivery, therefore, would postulate that such notice could be made by an authorized agent
2. It is clear, therefore, that both the expression “authorized to act” and “position in relation to the operational creditor” go to show that an “Authorized Agent” or a “Lawyer” acting on behalf of his client is included within the aforesaid expression.
3. The non-obstante clause contained in Section 238 of the Code will not override the Advocates

Act as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act.

4. Since there is no clear disharmony between the two Parliamentary statutes in the present case which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also, we must not forget that Section 30 of the Advocates Act deals with the fundamental right under Article 19(1)(g) of the Constitution to practice one's profession. Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

### Positive View of NCLAT after Supreme Court's Verdict: (New View)

Since, legal position was clear on issue as settled by Honble Supreme Court in **Macquarie Bank Case**, the NCLAT in the matter of **J.B. Tiwari Vs. Biostadt India Ltd., 2018 SCC OnLine NCLAT 563[iii]**, decided on 30-11-2018, was of view that Corporate Debtor and appellant had knowledge of the legal proceedings and also of the notice. It observed, "When advocate sends the notice, it is on instructions from the client and the same cannot be ignored by saying that the advocate should also forward authority and Resolution of the Company."

Similar view was taken by NCLAT in **Shaw Traders Vs. Balaji Paper & Newsprint Pvt. Ltd**, Company Appeal (AT) (Insolvency) No. 314 of 2017, decided on 18<sup>th</sup> September, 2018[iv] and held that "*In so far as issuance of demand notice by advocate is concerned, the case being covered by decision of the Hon'ble Supreme Court in 'Macquarie Bank Limited' Vs 'Shilpi Cable Technologies Ltd.' in Civil Appeals No. 15135, 15481 and 15447 of 2017 on 15th December, 2017, cannot be a ground to reject the application.*"

### Connected Issue:

#### **Whether "Power of Attorney Holder" is an "Authorised Person" and can file application for CIRP on behalf of Financial Creditor, Operational Creditor or Corporate Creditor?**

The NCLAT dealt with the issue in Company Appeal (AT) (Insolvency) No- 30, 37, 54 of 2017, titled as **Palogix Infrastructure Pvt Limited Vs. ICICI Bank Ltd.**, the case was heard by a Division Bench of the Adjudicating Authority which having noticed that the 'Financial Creditor' preferred the application under Section (7) through Power of Attorney Holder, passed two separate orders, one holding the application through Power of Attorney is not maintainable (Member Judicial) and the other (Member Technical) held that the application was maintainable as the Power of Attorney was given in favour of the Legal Manager to initiate proceedings before the National Company Law Tribunal which is the Adjudicating Authority under 'I&B Code'. The case was referred to the Hon'ble President, National Company Law Tribunal exercising power under Sub-section (5) of Section 419 of the Companies Act, 2013 for constituting a Larger Bench for decision on the questions that "Whether the constituted Attorney authorised on 20.10.2014 to file suits and/or proceedings against the company for recovery of the amount and also to affirms plaints cum affidavits and other pleadings in any Court of India including NCLT can file application for initiation of corporate insolvency process under Section 7 of the Insolvency and Bankruptcy Code, 2016 without having specifically authorized to lodge Application/Petition under IBC 2016?". By majority judgment, the Adjudicating Authority held that for initiation of 'Corporate Insolvency Resolution Process', there should be specific authorization to the Power of Attorney Holder to initiate the 'Corporate Insolvency Resolution Process'. The 'Financial

Creditor'-ICICI Bank having not filed specific authorization to initiate 'Corporate Insolvency Resolution Process', was directed by the order dated 12th April, 2017 to rectify the defects. The said order was challenged by the 'Corporate Debtor' in Company Appeal (AT) (Insolvency) No. 30 of 2017. The 'Financial Creditor' also challenged the said order dated 12th April, 2017 in Company Appeal (AT) (Insolvency) No. 37 of 2017 on the ground that no specific authorisation required for initiation of 'Corporate Insolvency Resolution Process'. ***Now the question arose before the NCLAT was whether the 'Power of Attorney Holder' given power of attorney prior to enactment of 'I&B Code', is entitled to file an application under Sections 7 or 9 or 10 of the 'I&B Code'?*** While answering the issue the NCLAT differentiate between the "Authorized Person" and "Power of Attorney Holder". It held that the 'I&B Code' is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder. It further held that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' but an authorised person has power to do so.

## Conclusion

The author is of view that earlier, NCLAT was negative in approach to decide the issue in its older judgments. It not only ignored the true spirit of Section (30) of the Advocates Act, 1961 but also shut its eyes on Article 19(1) (g) of Constitution of India. Though the NCLT & NCLAT are required to follow the principle of natural justice, without following stringent and technical provisions of CPC or Evidence Act while deciding matter before it so that they remain out of legal complexity while deciding issue under IBC, they chose to enter into complex legal issues that too with negative answers. The professional like Advocates, Chartered Accountants, and Company Secretaries have been specifically allowed to participate in proceedings of IBC by Code itself, in different capacity, hence any interpretation should be such which empower them to assist the Tribunal more effectively to achieve aims and objects of Code.

Reference:

[i] <http://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>

[ii] Civil Appeal no- 15135, 15481 & 15447 of 2017.

[iii]

<https://www.sconline.com/blog/post/2018/12/03/advocates-and-solicitors-send-notice-on-instructions-of-client-which-cannot-be-ignored-for-want-of-resolution-of-company-nclat/>

[iv]

<https://ibclaw.in/issuance-of-demand-notice-by-advocate-cannot-be-a-ground-to-reject-the-application-on-shaw-traders-vs-balaji-paper-newsprint-pvt-ltd-nclat/>

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