I. Case Reference

Case Citation	: [2017] ibclaw.in 14 SC
Case Name	: Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd.
Appeal No.	: Civil Appeal No. 15135 of 2017
Appeal Ref.	: With Civil Appeal No. 15481 of 2017 & Civil Appeal No. 15447 of 2017
Appellant(s)	: Macquarie Bank Limited
Respondent(s)	: Shilpi Cable Technologies Ltd.
Date of Judgment	: 15-Dec-17
Tribunal/Court	: Supreme Court of India
Impugned Orders	: SC set aside NCLAT order **[2017] ibclaw.in 35 NCLAT** and restored NCLT order **[2017] ibclaw.in 12 NCLT**
Original Judgment	: **Download**

II. Brief about decision

The first question is whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory?

It is true that the expression "initiation" contained in the marginal note to Section 9 does indicate the drift of the provision, but from such drift, to build an argument that the expression "initiation" would lead to the conclusion that Section 9(3) contains mandatory conditions precedent before which the Code can be triggered is a long shot. Equally, the expression "shall" in Section 9(3) does not take us much further when it is clear that Section 9(3)(c) becomes impossible of compliance in cases like the present. It would amount to a situation wherein serious general inconvenience would be caused to innocent persons, such as the appellant, without very much furthering the object of the Act, therefore, Section 9(3)(c) would have to be construed as being directory in nature.

Whether a demand notice of an unpaid operational debt under section 8 can be issued by a lawyer on behalf of the operational creditor?

Sections 8, 9 and 238 of the Insolvency and Bankruptcy Code, 2016 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 30 of the Advocates Act - A fair construction of Section 9(3)(c), in consonance with the object ought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent - 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 -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****.*

Facts of the case:

As per the terms, payment was to be received by Macquarie Bank Limited ('Appellant') within a period of 150 days from the date of bill of lading. Several emails by way of reminders were sent by the Appellant to Shilpi Cable Technologies Ltd. ('Respondent') but the Appellant failed to receive any payment. Subsequently, a statutory notice under Section 433 and 434 of the Companies Act, 1956 was issued by the Appellant; however, the Respondent vide its reply dated October 5, 2016 denied the fact that there was any outstanding amount.

NCLAT Verdict:

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 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."*

The Supreme Court verdict:

1. The first question is whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory?

Under Section 9(3), what is clear is that, along with the application, certain other information is also to be furnished. Obviously, under Section 9(3)(a), a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor is to be furnished. We may only indicate that under Rules 5 and 6 of the Adjudicating Authority Rules, read with Forms 3 and 5, it is clear that, as Annexure I thereto, the application in any case must have a copy of the invoice/demand notice attached to the application. That this is a mandatory condition precedent to the filing of an application is clear from a conjoint reading of sections 8 and 9(1) of the Code.

When we come to Section 9(3)(b), it is obvious that an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt can only be in a situation where the corporate debtor has not, within the period of 10 days, sent the requisite notice by way of reply to the operational creditor. In a case where such notice has, in fact, been sent in reply by the corporate debtor, obviously an affidavit to that effect cannot be given.

When we come to sub-clause (c) of Section 9(3), it is equally clear that a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is certainly not a condition precedent to triggering the insolvency process under the Code. The expression "confirming" makes it clear that this is only a piece of evidence, albeit a very important piece of evidence, which only "confirms" that there is no payment of

an unpaid operational debt. This becomes clearer when we go to sub-clause (d) of Section 9(3) which requires such other information as may be specified has also to be furnished along with the application.

When Form 5 under Rule 6 is perused, it becomes clear that Part V thereof speaks of particulars of the operational debt. There are 8 entries in Part V dealing with documents, records and evidence of default. Item 7 of Part V is only one of such documents and has to be read along with Item 8, which speaks of other documents in order to prove the existence of an operational debt and the amount in default. Further, annexure III in the Form also speaks of copies of relevant accounts kept by banks/financial institutions maintaining accounts of the operational creditor, confirming that there is no payment of the unpaid operational debt, only "if available". This would show that such accounts are not a pre-condition to trigger the Code, and that if such accounts are not available, a certificate based on such accounts cannot be given, if Section 9 is to be read the Adjudicating Authority Rules and the Forms therein, all of which set out the statutory conditions necessary to invoke the Code.

In the present case, the rules merely flesh out what is already contained in the statute and must, therefore, be construed along with the statute. Read with the Code, they form a self-contained code being contemporanea expositio by the Executive which is charged with carrying out the provisions of the Code. The true construction of Section 9(3)(c) is that it is a procedural provision, which is directory in nature, as the Adjudicatory Authority Rules read with the Code clearly demonstrate.

There may be situations of operational creditors who may have dealings with a financial institution as defined in Section 3(14) of the Code. There may also be situations where an operational creditor may have as his banker a non-scheduled bank, for example, in which case, it would be impossible for him to fulfill the aforesaid condition. A foreign supplier or assignee of such supplier may have a foreign banker who is not within Section 3(14) of the Code. The fact that such foreign supplier is an operational creditor is established from a reading of the definition of "person" contained in section 3(23), as including persons resident outside India, together with the definition of "operational creditor" contained in Section 5(20), which in turn is defined as "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred".

The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code. It is no answer to state that such person can approach the Central Government to include its foreign banker under Section 3(14) of the Code, for the Central Government may never do so.

The true construction of Section 9(3)(c) is that it is a procedural provision, which is directory innature, as the Adjudicatory Authority Rules read with the Code clearly demonstrate. The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code. It is no answer to state that such person can approach the Central Government to include its foreign banker under Section 3(14) of the Code, for the Central Government may never do so.

Argument that such persons ought to be left out of the triggering of the Code against their corporate debtor, despite being operational creditors as defined, would not sound well with Article 14 of the Constitution, which applies to all persons including foreigners. Therefore, as the facts of these cases show, a so called condition precedent impossible of compliance cannot be put as a threshold bar to the processing of an application under Section 9 of the Code.

It is true that the expression "initiation" contained in the marginal note to Section 9 does indicate the drift of the provision, but from such drift, to build an argument that the expression "initiation" would lead to the conclusion that Section 9(3) contains mandatory conditions precedent before which the Code can be triggered is a long shot. Equally, the expression "shall" in Section 9(3) does not take us much further when it is clear that Section 9(3)(c) becomes impossible of compliance in cases like the present. It would amount to a situation wherein serious general inconvenience would be caused to innocent persons, such as the appellant, without very much furthering the object of the Act, therefore, Section 9(3)(c) would have to be construed as being directory in nature.

A fair construction of penal statutes based on purposive as well as literal interpretation is the correct modern day approach. Any arbitrary interpretation, as opposed to fair interpretation, of a statute, keeping the object of the legislature in mind, would be outside the judicial ken. The task of a Judge, when he looks at the literal language of the statute as well as the object and purpose of the statute, is not to interpret the provision as he likes but is to interpret the provision keeping in mind Parliament's language and the object that Parliament had in mind. With this caveat, it is clear that judges are not knight-errants free to roam around in the interpretative world doing as each Judge likes. They are bound by the text of the statute, together with the context in which the statute is enacted; and both text and context are Parliaments', and not what the Judge thinks the statute has been enacted for. *Also, it is clear that for the reasons stated by us above, a fair construction of Section 9(3)(c), in consonance with the object ought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent.*

2. Whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor?

Section 8 of the 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. In fact, in Forms 3 and 5 of the Adjudicating Authority Rules, it is clear that this is the understanding of the draftsman of the Adjudicatory Authority Rules, because the signature of the person "authorized to act" on behalf of the operational creditor must be appended to both the demand notice as well as the application under Section 9 of the Code.

The position further becomes clear that both forms require such authorized agent to state his position with or in relation to the operational creditor. A position with the operational creditor would perhaps be a position in the company or firm of the operational creditor, but the expression "in relation to" is

significant. It is a very wide expression, as has been held in Renusagar Power Co. Ltd. v. General Electric Co., (1984) 4 SCC 679 at 704 and State of Karnataka v. Azad Coach Builders (P) Ltd. (2010) 9 SCC 524 at 535, which specifically includes a position which is outside or indirectly related to the operational creditor. 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.

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.

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.

The expression "an operational creditor may on the occurrence of a default deliver a demand notice….." under Section 8 of the Code must be read as including an operational creditor's authorized agent and lawyer, as has been fleshed out in Forms 3 and 5 appended to the Adjudicatory Authority Rules.

III. Full text of the judgment

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