

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH- III**

CP-IB-658/ND/2018

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rule, 2016

MEMO OF PARTIES

**TIRUPATI BALAJI OVERSEAS,
Through Mr. Hemant Gera (Proprietor),
Harchand Mill Road, Motia Khan,
Mandi Gobindgarh, Fatehgarh Sahib,
Punjab - 147301.**

...Applicant

Versus

**OLIVER ENGINEERING PVT. LTD.,
Registered Office:
D-2, 2nd Floor, Southern Park,
Saket, New Delhi – 110017.**

...Respondent

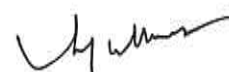
Coram:

**R,VARADHARAJAN,
Hon'ble Member (JUDICIAL)**

**Dr. V.K.Subburaj,
Hon'ble Member (TECHNICAL)**



Counsel for the Petitioner : Mr. Ajay Garg, Mr. Manish Sharma, Advocates
Counsel for the Respondent : None



ORDER

Date: 04 .09.2018

1. This is an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“the Code”) filed by Tirupati Balaji Overseas, a proprietorship firm, (“Applicant”) through its proprietor Hemant Gera against Oliver Engineering Pvt. Ltd. (“Respondent”) for initiation of Corporate Insolvency Resolution Process (“CIRP”) of the Respondent.

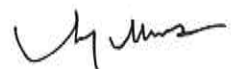
2. The Applicant has averred as follows in relation to the transaction leading to the filing of the present application:
 - a. The Applicant is engaged in the business of trading of iron and steel scrap. The Respondent approached the Applicant and enquired about the materials and after negotiations the Respondent regularly started business dealings with the Applicant.

 - b. The Applicant started supplying the goods under various invoices issued time to time as per the purchase orders in accordance with the terms as agreed between the parties, and the same were accepted by the Respondent without demur.



- c. The Respondent released part payment periodically and assured the Applicant that the final payment will be released immediately after release of goods. However, the Respondent did not make any payment after 22.09.2017 and is thus, liable to pay an outstanding debt of Rs. 60,61,157.26 to the Applicant.
- d. The Applicant claims that it served a demand notice in Form 4 dated 11.12.2017 to the Respondent at its registered office but this notice was returned back with a note "item delivery attempted addressee moved".
- e. The Applicant served another demand notice in Form 3 dated 17.01.2018 to the Respondent at the registered office address but again the notice was returned with the note "item delivery attempted unclaimed".
- f. Thereafter, the Applicant has filed the present application.

3. When the application came before this Tribunal, on the first hearing the Applicant represented that the notice has been served by the Applicant as well as the Information Utility company National E-governance Services Limited



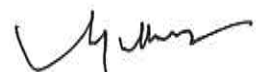
("NeSL") and an advance copy of the application was also sent to the Respondent. The Tribunal directed the Applicant to serve one more notice to the Respondent through registered post in relation to next date of hearing.

4. The Applicant filed an affidavit of service showing service of notice to the Respondent at its registered office in pursuance to this Tribunal's order dated 08.06.2018. the tracking report shows "item delivery attempted unclaimed". The notice was delivered to the Respondent's factory address as well, which is in Punjab. The tracking report shows that the item was delivered. The notice was also sent to the e-mail address of the officers of the Respondent company.
5. None appeared on the Respondent's behalf even on the next hearing. The Ld. counsel for the Applicant argued at length that the service attempted by the Applicant should be treated as deemed service to the Respondent. Thus, order was reserved by this Tribunal on maintainability of the application.
6. This Tribunal was recently faced with similar facts regarding unsuccessful delivery attempts of the demand notice at the registered office address of the Respondent by the Applicant as well as the information utility in *V. Chiranjiv & Co. vs. Wiltan Telmag (India) Pvt. Ltd.* In that order this Tribunal held that



return of demand notice to the Applicant will not constitute as sufficient delivery of the demand notice in view of the language used in Section 9(3)(a) of the Code and Rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which emphasizes on the “delivery” of the notice. Thus, the application in that order was dismissed in the following words:

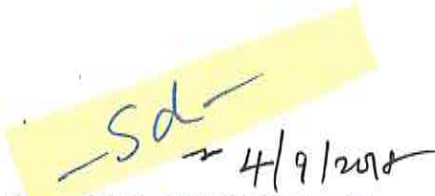
“...Thus, taking into consideration the reasoning as provided in the above order passed by this Tribunal, we do not find any merit in the submissions of the OC in relation to the deemed service as sought to be projected by the OC to sustain the plea that notice under Section 8 of IBC, 2018 should be deemed to have been served as all the points put forth in relation to the same have been dealt with in detail in the above cited order passed by this Tribunal and also in the paragraphs referred to above and in the circumstances this petition on the issue of maintainability arising out of notice of demand having not been delivered upon the Corporate Debtor in accordance with the provisions of Section 8 of IBC, 2016 read with Rule 5 of AAA Rules 2016 stands rejected in exercise of Section 9(5)(ii)(c) of IBC, 2016 but without cost.”

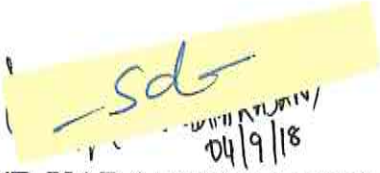


7. In the present application the only difference is that service through e-mail has also been attempted. Rule 5 of the AAA Rules specifies that electronic mail to whole time director or designated partner or key managerial personnel of the corporate debtor. Thus, Rule 5 specifies to whom the notice via e-mail is to be served. However, in the present case, the affidavit of service only states that the e-mail was sent to the “director/authorized representative”. It has failed to show whether the two addressees “ds.sodhi@oilverengg.com” and pramod.yadav@amtek.com qualify as any of the three people specified in Rule 5 of AAA Rules. Thus, this Tribunal is unable to ascertain if the service was made according to the specified mode.
8. Further, it is also noted that the e-mail was not sent to the e-mail id specified in the master data of the Respondent cs.secretarial2013@gmail.com even when it appears to be the e-mail id for reaching the company secretary of the Respondent, who can be categorized as key managerial personnel of the Respondent company, according to the definition of key managerial personnel in Section 2(51) of the Companies Act, 2013.



9. In view of the decision of this Tribunal in *V. Chiranjiv* and the grounds set forth it is held that there is no deemed service of the demand notice on Respondent. Thus, the application stands dismissed with no costs.


(Lr. V.K. SUBBURAJ)
MEMBER (TECHNICAL)


(R.VARADHARAJAN)
MEMBER (JUDICIAL)

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