

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENCH III  
NEW DELHI**

**CP -IB-312/ND/2018**

**IN THE MATTER OF SECTION 9 OF THE INSOLVENCY AND  
BANKRUPTCY CODE, 2016**

**In the matter of:**

**V.Chiranjiv & Co.  
H/O 11, Oza Market,  
B.P.T. Rly Siding,  
Darukhana,  
Mumbai-400010**

**... Operational Creditor**

**Wiltan Telmag(India) Pvt.Ltd.  
Flat No.305, Sahyog Building,  
58, Nehru Place,  
New Delhi-110 019.**

**....Corporate Debtor**

**Coram:**

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

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



**Counsel for the Petitioners : Mr. Arunav Patnaik, Ms. Kanika Singh,  
Ms.Mahima Sinha, Mr. Shikhar Saha,  
Mr. Karun Pahwa, Advocates**

**Counsel for the Respondents :-**

**Order delivered On: 28.08.2018**

## **ORDER**

1. This petition has been filed by an Operational Creditor (OC) namely V Chiranjiv & Company against the Corporate Debtor (CD) namely Wiltan Telmag (India)Pvt. Ltd under the provisions of Insolvency and Bankruptcy Code, 2016 (IBC,2016) claiming an amount of Rs.68,43,509.25/- due against supply of Cold Rolled Grain Oriented (CRGO) and such like products and other materials supplied to the CD and payable under several invoices. The details of the said invoices have been given in Part IV of the application as filed by the OC in the form prescribed under Rule 6 of the Insolvency and Bankruptcy(Application to Adjudicating Authority) Rules, 2016 for brevity hereinafter called as



'AAA' Rules,2016. Despite several reminders which have been sent to the CD through email as well as under the erstwhile provisions of Indian Companies Act, 1956 relating to winding up calling on to discharge the liability along with interest, but the same has not been responded to by the CD. It is stated that on 29.2.2016 the OC filed a winding up petition against the CD before the Hon'ble High Court of Delhi and that notice was also issued by the Hon'ble High Court of Delhi. However in the meanwhile, the petition stood withdrawn in order to file an application before this Tribunal under the provisions of IBC,2016 which was also granted by the Hon'ble High Court of Delhi allowing OC to withdraw with liberty.

2. Consequent to the withdrawal, notice under the provisions of Section 8 being the notice of demand in Form 3 under 'AAA' Rules, 2016 was attempted to be delivered to the CD but the same was not received by any one and the demand notice was received back by the counsel of the OC.



It is also stated that OC has not received payment in relation to the amount claimed as default from the CD. It is further stated that the notice of default registered with the Information Utility, namely, National E-governance Services Limited (NESL) by the OC and that communication in this regard was also addressed by NESL to the CD as provided under the relevant provisions of IBC, 2016. From the records it is also seen that NESL has not been successful in serving the notice of claim of the OC to the CD as evidenced from the report dated 6.1.2018. Though the OC has not been successful in serving the notice of demand as contemplated under Section 8 of IBC, 2016 read with Rule 5 of AAA Rules however, this petition has come to be filed by OC seeking to unfold the Corporate Insolvency Resolution Process (CIRP) against the CD by the OC and the matter was listed before this Tribunal on 28.3.2018 and the matter got adjourned in view of non-service of notice of demand under Section 8 of

IBC,2016 and as contemplated under 'AAA' Rules, 2016, all of which are extracted hereunder for ready reference :

8. (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(3)(a) of IBC, 2016 also specifies the filing of copy of the invoice demanding payment or demand notice **delivered** by the OC to CD along with the application of an OC before this Tribunal.

2. Rule 5 of the AAA Rules, 2016 prescribes the manner of service of notice of demand as contemplated under Section 8 of IBC, 2016 which is to the following effect:-



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 electric mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

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

3. It is to be seen that both Section 9(3)(a) as well Rule 5 of AAA Rules has specifically used the term '**delivered**' or '**shall deliver**' respectively laying particular emphasis on

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delivery of notice upon the Corporate Debtor and not mere sending or dispatch of notice to the registered office address of the Corporate Debtor. It is also required to be seen from Rule 5 of AAA Rules extracted above that different and alternative modes of delivery of demand notice has also been provided as compared to the earlier regime of service of statutory notice prior to filing of winding up petition prescribed under the relevant provisions of Companies Act, 1956, even though this Tribunal is well aware that both the insolvency proceeding contemplated under the provisions of IBC, 2016 and that of winding up proceeding under the provisions of Companies Act, 1956 cannot be equated. However in order to interpret the provisions of IBC, 2016 as was done by the Hon'ble Supreme Court in interpreting the word or term 'dispute' as found in IBC, 2016 as well as in the earlier dispensation namely, Companies Act, 1956 in Mobilox Innovations Pvt. Ltd. vs. Kirusa Software (P) Limited- 2017 SCC OnLine SC1154 in order to bring out draw



a distinction and what was left behind, similarly it will not be out of place to construe the term 'deliver' or 'shall deliver' in terms of IBC, 2016 being a complete code by itself and without carrying the baggage of interpretation by different High Courts of the erstwhile provisions of Companies Act, 1956 differently in relation to service of statutory notice upon the debtor company. It is also required to be noted that the rules as framed by the Central Government, namely AAA Rules specifically provide for the modes and manner of delivery of notice upon the Corporate Debtor and not by the Central Act or Regulations.

4. Going further under the provisions of IBC, 2016 it is also required of the OC to state specifically by way of an affidavit under Section 9(3)(b) of IBC, 2016 as to the receipt of notice of dispute from the CD and the Hon'ble Supreme Court in Mobilox Innovations Pvt. Ltd. case as cited above has held that even a plausible contention raised by way of dispute will entail the dismissal of the petition of OC.

However, it is evident from the Scheme of IBC, 2016 that a window of ten days has been provided under IBC, 2016 to the CD to send the notice of dispute from the date of delivery of the notice of demand by the OC upon CD as contemplated under the provisions of IBC, 2016 read with the AAA Rules, 2016.

5. The petitioner/OC has filed an affidavit under Section 9(3)(b) of IBC,2016 vide Dy. No.2142 dated 16.4.2018 wherein it has been specifically stated that notice as well as advance copy of the application sent to the CD to its registered office has been returned indicating that notice as well as notice of application has not been delivered upon the CD as required to be done under the provisions of IBC,2016 read with 'AAA' Rules, 2016. It is also stated that subsequent demand made on the part of OC by way of notice has also met with failure to be served including that of notice to the whole time Directors or key managerial personnel of the CD. In the circumstances when the ten days period expire giving raise to

the cause of action to the Operational Creditor in the absence of any specific date of delivery itself becomes a moot point. In the matter of M/s Eastern Travels Private Limited vs. M/s Swash Convergence Technologies Limited in CP No.IB-231/ND/2018 this Tribunal vide order dated 19.07.2018 after detailed consideration has held in paragraph 14 as follows:

"This Tribunal is hence of the view that Operational Creditor has not been able to discharge, despite repeated time being granted in this regard and in the circumstances as held in the case of "Mobilox Innovations Pvt. Ltd. vs. Kirusa Software (P) Limited-2017 SCC OnLine SC1154", where the issuance and delivery of Section 8 notice under the provisions of IBC, 2016 has been held to be mandatory in order to prefer the Petition by an Operational Creditor has not been done giving rise to the cause of action for the Operational Creditor to approach this tribunal. The emphasis of Section 8 notice of default under IBC, 2016 have also been dealt with by the Hon'ble NCLAT in a plethora of judgements including the one recently passed in Company Appeal (AT)(Insolvency) Nos.285 & 286 of 2017 pronounced on 20.02.2018 in the matter of Mr. M.Nandagopal vs. Virtuous Urja Limited."

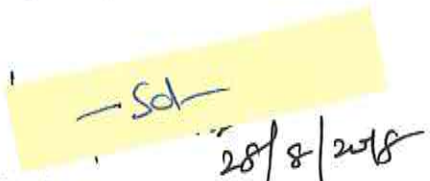
6. Further we are also fortified in our view that failure of delivery of notice upon the CD by the OC is liable to be rejected as held by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.272 of 2018 in the matter of Sharad

Kesarwani vs M/s. Planetcast Media Services Limited &Anr. dated 07.08.2018 in relation to the order in original passed by this Tribunal. 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.

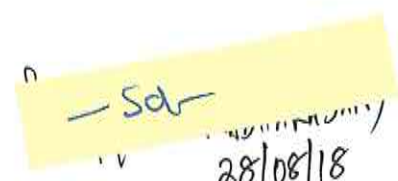
7. However, the order of rejection of this petition will not preclude the OC from approaching other forums in relation to



claim, if so advised. Let a copy of this order be duly communicated to the Operational Creditor forthwith by the Registry.

  
**(Dr.V.K.SUBBURAJ)**  
**MEMBER (TECHNICAL)**

U.D.Mehta  
28 /08/2018

  
**(R.VARADHARAJAN)**  
**MEMBER (JUDICIAL)**