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**BEFORE THE AJUDICATING AUTHORITY  
(NATIONAL COMPANY LAW TRIBUNAL)  
AHMEDABAD BENCH  
AHMEDABAD**

**C.P. (I.B) No. 131/9/NCLT/AHM/2017**

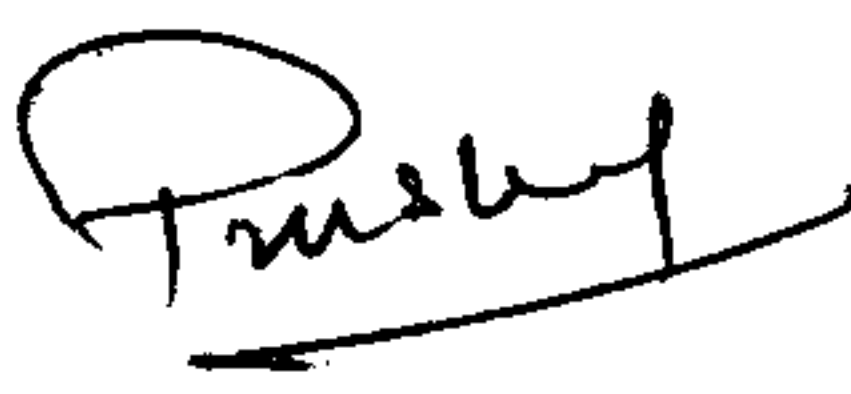
Coram:

**Present: Hon'ble Mr. BIKKI RAVEENDRA BABU  
MEMBER JUDICIAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD  
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 21.11.2017**

Name of the Company: VRV Asia Pacific Pvt. Ltd  
V/s.  
Cryogaas Equipment Pvt. Ltd.

Section of the Companies Act: Section 9 of the Insolvency and Bankruptcy  
Code

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.	Priyam Shah	i/b Wadia Ghandy & Co. Ahmedabad)	for Petitioner	
2.				

**ORDER**

Learned Advocate Mr. Priyam Shah i/b Wadia Ghandy & Co. present for Operational creditor/ petitioner. None present for Respondent.

Order pronounced in open Court. Vide separate sheets.

  
**BIKKI RAVEENDRA BABU  
MEMBER JUDICIAL**

Dated this the 21st day of November, 2017.

**BEFORE ADJUDICATING AUTHORITY  
(NATIONAL COMPANY LAW TRIBUNAL)  
AHMEDABAD BENCH**

**C.P. No.(IB) 131/9/NCLT/AHM/2017**

**In the matter of:**

VRV Asia Pacific Private Limited  
Sri City DTA, Saddamma Agraham  
Village, Varaiahpalem Taluk,  
Chittoor District-517541  
Andhra Pradesh

: Petitioner.  
[Operational Creditor]

**Versus**

M/s. Cryogas Equipment Private  
Limited,  
A-36, Ghanshyam Nagar,  
Society No.2, G.I.D.C. Road,  
Manjalpur,  
Vadodara-390011  
Gujarat.

: Respondent.  
[Corporate Debtor]

Order delivered on 21<sup>st</sup> November, 2017.

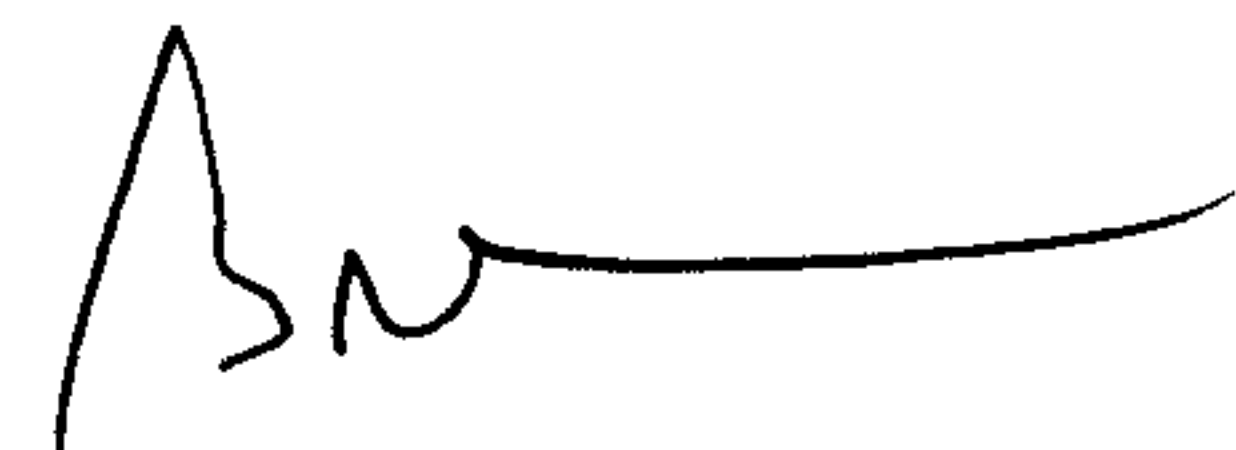
**Coram: Hon'ble Sri Bikki Raveendra Babu, Member (J).**

**Appearance:**

Mr. Priyam Shah, learned Advocate on behalf of Wadia Ghandy &  
Co., for the Petitioner.

Mr. Rushabh Shah, learned Advocate for the Respondent.

**ORDER**



1. M/s. VRV Asia Pacific Private Limited (hereinafter called as "Petitioner") filed this Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ["IB Code" for short] read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("IB Rules" for short) with a request to initiate Corporate Insolvency Resolution Process in respect of M/s. Cryogas Equipment Private Limited (hereinafter called as "Respondent").

2. The Respondent on 14.4.2016 placed a purchase order for 3 (three) numbers of LNG Tanks with the Petitioner. The price agreed was Rs. 32,50,000/- + ED+CST for purchase of three Tanks. The price of 1<sup>st</sup> Tank was Rs.35,00,000/- plus Taxes which was billed; the price of 2<sup>nd</sup> Tank was Rs. 35,00,000/- plus Taxes which was billed; and the price of 3<sup>rd</sup> Tank was Rs. 27,50,000/- plus Taxes which was billed. The terms of payment are 10% in advance and balance by 45 days credit. The freight had to be arranged by the Respondent. The delivery of the 1<sup>st</sup> Tank was to be made by 3<sup>rd</sup> of May. The balance two Tanks were to be lifted as and when required by Respondent before 31<sup>st</sup> December, 2016 with 3.5 to 4 months' advance intimation from Petitioner to make the Respondent ready with 10% advance for respective Tank. With the above said stipulations, LOI dated 14.4.2016 and Purchase Order dated 14.4.2016 were executed by the Respondent and placed with the Petitioner.

3. The Petitioner by E.Mail dated 27<sup>th</sup> May, 2016 informed the Respondent that the 1<sup>st</sup> Tank will be completed on 31<sup>st</sup> may, 2016 and requested the Respondent to inspect the Tank and provide draft LC for balance payment as per the terms. Thereafter, Petitioner issued several reminders on 30<sup>th</sup> May, 2016 and 2<sup>nd</sup> June, 2016. Petitioner had also telephonic discussion with the Respondent on 7<sup>th</sup> June, 2016. Respondent stated that the Tank will be lifted by 14<sup>th</sup> June, 2016. On 29<sup>th</sup> August, 2016, Petitioner informed the

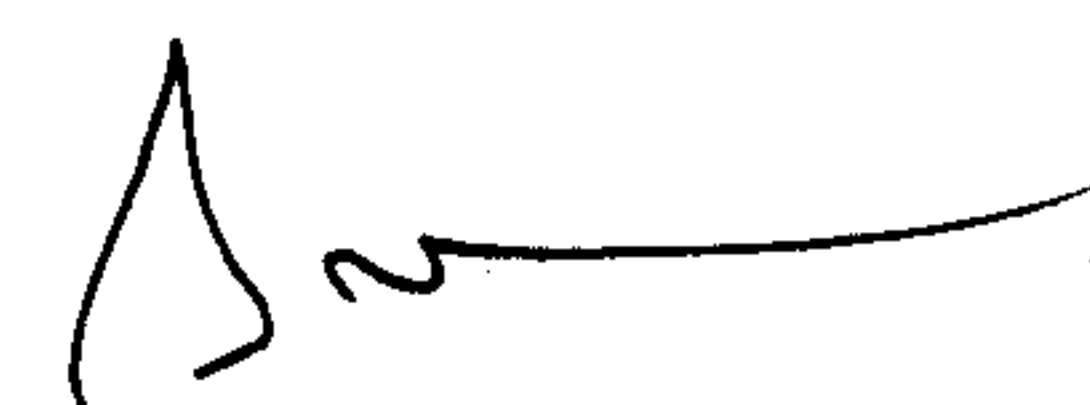


Respondent that storage charges and interest for delayed payment will be made applicable from 16<sup>th</sup> June, 2016 onwards due to delay in payment. On 27<sup>th</sup> October, 2016 Respondent sent an e-Mail stating that its receivables is getting delayed and payment will be delayed and promised to pay by 19<sup>th</sup> November, 2016 but Respondent did not keep up its promise. The Petitioner got issued a Legal Notice dated 16.2.2017 under Section 272 of the Companies Act, 2013 to the Respondent claiming an amount of Rs. 41,59,903/-.

4. Petitioner got issued Demand Notice under Section 8 of the Code on 28.6.2017 claiming an amount of Rs. 41,59,903/- due as on 31.1.2017. Petitioner also issued another Demand Notice on 13.7.2017 claiming the said amount due as on 31.1.2017.

5. Petitioner in the Petition claimed the amount in default as Rs. 47,42,148/- as on 30<sup>th</sup> June, 2-017. The particulars of the amount claimed in default and the working for computation of such default as furnished in Annexure 'II-F' of the Petition, which read as follows;

Sr. No	Particulars	Amount Rs.
1	Balance Tank Price	31,50,000/-
2	Interest charges for delayed payment @12% p.a. from 22 <sup>nd</sup> May, 2016 to 30 <sup>th</sup> June, 2017	4,18,389/-
3	Storage charge from 22 <sup>nd</sup> May, 2016 to 30 <sup>th</sup> June, 2017 @ Rs.20,000/- p.m.	2,69,064/-
4	Interest charges for inventory carrying cost for the raw materials for 2 tanks to be made for the period from 14 <sup>th</sup> April, 2016 to 30 <sup>th</sup> June, 2017 @ 12% p.a.	6,10,323/-
5	Inventory storage cost for the raw materials and Tanks to be made for the period from 14 <sup>th</sup> May, 2016 to 30 <sup>th</sup> June, 2017 @ 12% p.a.	2,94,372/-
	Total claim till 30 <sup>th</sup> June, 2017	47,42,148/-




6. Petitioner served a copy of the Application on the Respondent. This Adjudicating Authority also ordered Notice to the Respondent regarding the date of the hearing.

7. Respondent appeared through a Counsel and filed Objections. The first and foremost objection raised by the Respondent is, the amount claimed in the Demand Notice is Rs. 41,59,903/- and the Demand Notice gives rise to cause of action, but the amount claimed in the Petition is Rs. 47,42,148/- with interest at 12% p.a.

7.1. It is contended by the learned Counsel appearing for the Respondent that on that ground alone the Petition is liable to be dismissed. In support of his contention, he relied upon a decision of the *Hon'ble National Law Company Tribunal, Mumbai Bench* in the matter of **Bharat Steel Vs. Aarti Infra Projects Pvt. Ltd.**, in C.P. No. 850/I&BF/NCLT/MAH/2017. In that decision, in Para 4, it is held as follows;

*"4. This Adjudicating Authority noticed that the amount claimed in the statutory notice issued under section 8(2) is Rs.4,93,588/- and whereas the amount claimed in the Petition is Rs.5,93,588 with further interest @ 24% p.a. Since the cause of action for filing this petition arises from the demand notice issued under the code, the claim amount in the petition cannot vary from the amount mentioned in the demand notice. Hence, the Petition fails."*

7.2. In the case on hand also, there is a difference between the default amount claimed in the statutory notice and the demand amount claimed in the Petition, but it is clearly mentioned that the default amount claimed in the notice was up to 31.1.2017 whereas the default amount claimed in the Petition was up to 30<sup>th</sup> June, 2017. Therefore, on facts the variation in default amount does not

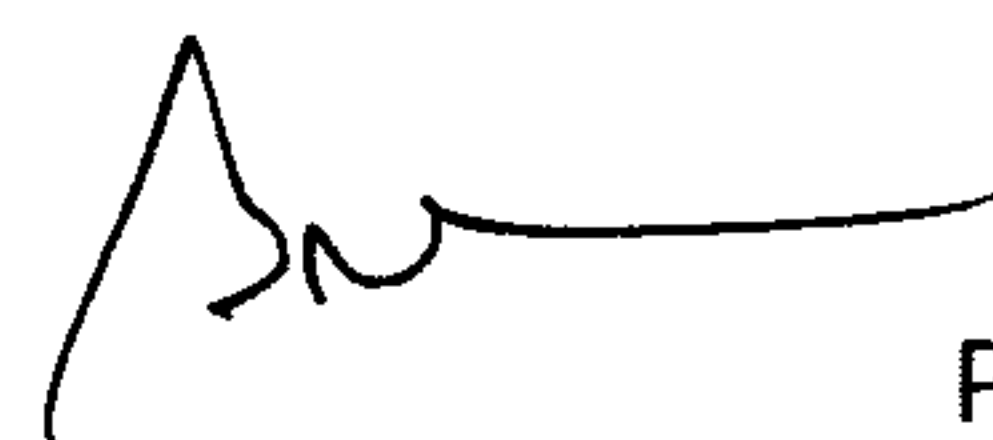


go against the Petitioner and its request for initiation of Corporate Insolvency Resolution Process.

8. The second objection raised by the Respondent is, without there being any reference, understanding or agreement, either in the Purchase Order or in the LOI regarding payment of incidental charges and interest on delayed payment Petitioner claimed incidental charges and as well as interest on the delayed payment. Respondent also pleaded that it is customary to take delivery of the Tanks only upon the request of the client to whom the Respondent has to supply the Tank and the Tank would be supplied and installed at the place of the customer of the Respondent since it is a static storage Tank. In support of the said contention, Respondent along with the Reply placed on record copies of Ledger accounts from 1<sup>st</sup> April 2009 to show that Tanks were delivered even after six years.

8.1. In this context, learned Counsel for the Respondent pointed out that in response to the Demand Notice on 25<sup>th</sup> July, 2017 Respondent gave a Mail to the Petitioner raising objections regarding the claim amount made by the Petitioner. In that Mail, it is stated that the Petitioner is claiming the amounts on imaginary basis although as if it was negotiated or committed by the Respondent. Respondent also requested the Petitioner to send detailed ledger account of it in order to reconcile with their books and to highlight the difference.

9. In the Judgement of the Hon'ble Supreme Court, reported in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited***, reported in ***2017 SCC OnLine SC 1154***. In Para 34, the Hon'ble Supreme Court laid down what are the points that have to be determined while examining an Application under Section 9 of the Code. The relevant Para No.34 is extracted hereunder;





*“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine :*

- (i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh ? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid ? and*
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?”*

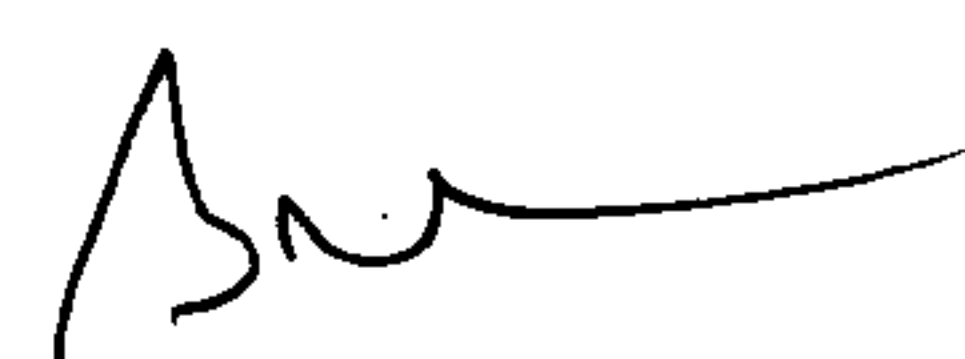
9.1. In the above said Judgment, in Para 54, it is held by the Hon’ble Apex Court as follows;

*“54. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”*



10. In the case on hand, a perusal of the LOI and the Purchase Order dated 14.4.2016 did not give any indication of incidental charges such as storage charges and interest on the unpaid amount after 45 days of credit. The Petitioner, in the Working for Computation of Claim, claimed Rs. 4,18,389/- towards interest and delayed payment from 22<sup>nd</sup> May, 2016 to 30<sup>th</sup> June, 2017. The Petitioner also claimed Rs. 2,69,064/- towards storage charge from 22<sup>nd</sup> May, 2016 to 30<sup>th</sup> June, 2017. Petitioner also claimed interest charges for inventory carrying cost for raw materials for the remaining two Tanks to be made ready at Rs.6,10,323/-. The Petitioner also claimed inventory storage cost of Rs. 2,94,372/-, but as per the Purchase Order vide bill for 1<sup>st</sup> Tank Petitioner was supposed to claim only Rs. 35,00,000/- plus Taxes.

10.1. It is this claim that has been disputed by the Respondent in the Reply Mail dated 25<sup>th</sup> July, 2017 which is filed by the Petitioner itself at Page No. 104 of the Petition, [Annexure "II-G"]. No doubt, the said Mail is beyond 10 days from the date of 1<sup>st</sup> Demand Notice dated 28.6.2017. However, there is a pre-existing dispute between the Petitioner and the Respondent regarding the claim amount made by the Petitioner. The question whether the Petitioner is entitled to the amount claimed by it or not is not within the scope of this Authority for determination. But a dispute which comes within the meaning of a dispute under Section 36(a) and within the guidelines given by the Hon'ble Supreme Court in the decision of the Hon'ble Apex Court in *Mobilox Innovations Private Limited* (supra) is there in this case. The dispute raised by the Respondent in this case cannot be termed as spurious, hypothetical or illusory. The customary practice in respect of the dispute raised by the Respondent in relation to storage charges and interest on unpaid amount can only be decided by the Civil Court having jurisdiction. Therefore, without going into the aspect whether the defence raised by the Respondent is likely to succeed or not for the purpose of Section 9 of the Code, it can only be said that there exists





a dispute as contemplated by the Code. When there is a pre-existing dispute, it cannot be said that Respondent committed default in payment of debt as contemplated under Section 3(12) of the Code.

11. The e-Mail correspondence between the parties clearly goes to show that the Petitioner has been requesting the Respondent to take delivery of the Tank and Respondent has been postponing to take delivery of the Tank on the ground that it has been awaiting confirmation from its client and the Tank has to be directly installed at the place of the client of the Respondent. In the case on hand, although Respondent placed a Purchase Order the Tank has not been delivered to the Respondent. No doubt, as per the Terms of the Purchase Order, Respondent has to arrange for the freight. The inability of the Respondent to lift the Tank and non-payment of the amount comes under the category of 'operational debt', but, in view of the dispute raised by the Respondent, the Petitioner cannot invoke the jurisdiction of this Adjudicating Authority and initiate Corporate Insolvency Resolution Process.

12. The Demand Notice dated 28.6.2017, in this case, was issued by Company Secretary, by name, Mr. R. Ajith Kumar. The signature portion in the Demand Notice is as follows;

*" For VRV ASIA PACIFIC PVT.LTD*

*Sd/-*

*R. Ajith Kumar,  
Company Secretary"*

According to the Petitioner, it has issued Demand Notice to the Respondent in Form-3. But the last column of Form-3 shall be as follows;

*"Signature of person authorised to act on behalf of the operational creditor*

*Name in block letter*

*Position with or in relation to the operational creditor*

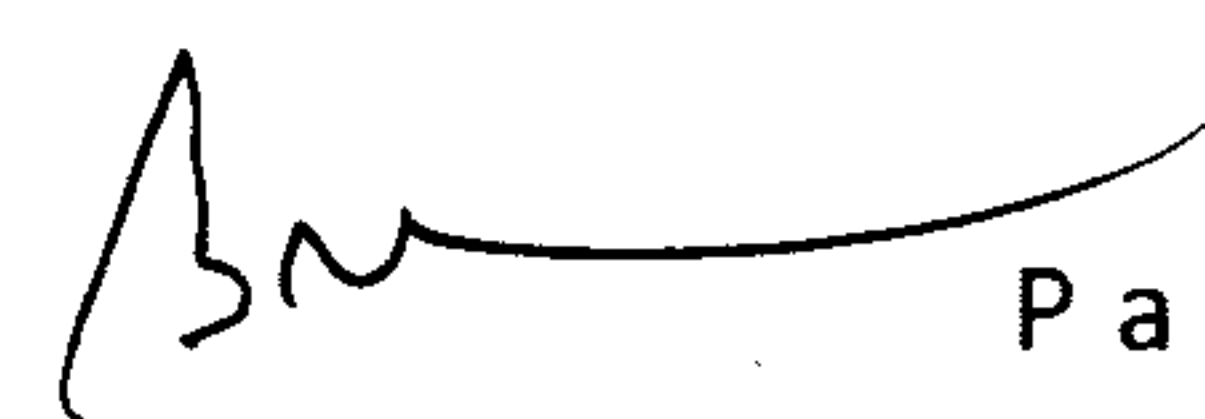
*Address of person signing."*



Petitioner filed Resolution of the Board of Directors of M/s. VRV Asia Pacific Private Ltd, authorising Mr. R. Ajith Kumar to file the Application. A perusal of the said Application which is at Page 75 of the Petition disclose that Mr. R. Ajith Kumar, Company Secretary is authorised to represent before various statutory authorities and the Court of Law and to sign the plaint/complaint/application/petition/rejoinder. In the said Resolution, it is nowhere mentioned that the Company Secretary or Mr. Ajith Kumar is the Authorised Person to issue Notice under Section 8 of the Code. Moreover, the said Resolution was passed on 6<sup>th</sup> July, 2016, whereas the 1<sup>st</sup> Demand Notice was issued on 28.06.2017, prior to the date of Resolution. Therefore, it cannot be said that Mr. R. Ajith Kumar, Company Secretary is the person authorised to issue Notice under Section 8 of the Code. On this aspect, the Hon'ble National Company Law Appellate Tribunal, New Delhi, vide order passed in the matter of **Macquarie Bank Limited Vs. Uttam Galva Metalics Limited** in Company Appeals (AT) (Insol) No. 96 of 2017, held as under;

*"16. 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 the 'Operational Creditor' can apply himself or through a person authorized to act on behalf 16 of the 'Operational Creditor', who hold same position with or in relation to the 'Operational Creditor'. Thereby such person(s) authorized by 'Operational Creditor', holding position with or in relation to the 'Operational. Creditor' can only apply.*

*17. In view of such provision we hold that an advocate/ lawyer or Chartered Account 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'.

18. The demand notice/ invoice Demanding Payment under the I& B Code required to be issued in Form-3 or Form - 4. By the said notice, the 'Corporate Debtor' is to be informed of particulars of 'Operational Debt', with a demand of payment, with clear understanding that the 'Operational Debt' (in default), as claimed, is to be paid, unconditionally within ten days from the date of receipt of letter failing which the 'Operational Creditor' will initiate a Corporate Insolvency Process in respect of 'Corporate Debtor', as apparent from last paragraph no. 6 of notice contained in form - 3, and quoted above. Only if such notice in Form - 3 or Form - 4 is served, the 'Corporate Debtor' will understand the serious consequences of non-payment of 'Operational Debt', otherwise like any normal pleader notice/ Advocate notice or like notice under Section 80 of C.P.C. or notice for initiation of proceeding under Section 433 of the Companies Act 1956, the 'Corporate Debtor' may 17 decide to contest the suit/case if filed, as distinct Corporate Resolution Process, where such claim otherwise cannot be contested, except where there is an existence of dispute, prior to issuance of notice under Section 8.

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."

13. On the same aspect, the Hon'ble Appellate Tribunal, New Delhi, in *Company Appeal (AT) (Insolvency) No. 113 of 2017*, in the



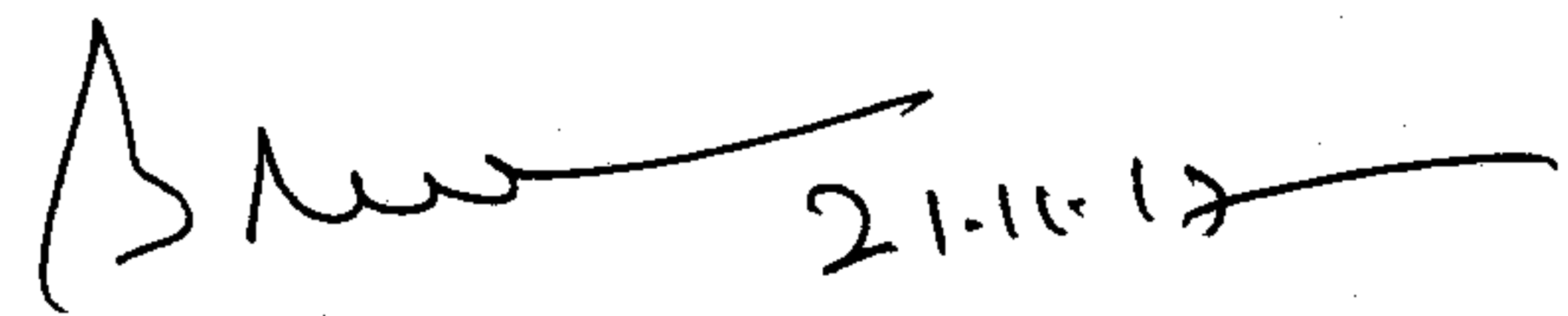
matter of **M/s. Bhagwan Motors Pvt.Ltd., Vs. Harshad V. Vora**, reiterated the same aspect. In Para No. 32, the Hon'ble Appellate Tribunal held as follows;

*"32. 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."*

Therefore, the Demand Notice issued by the Company Secretary, Shri R. Ajith Kumar, is not a valid notice.

14. In view of the above discussion, this Petition is dismissed. No order as to costs. The findings or observations, if any, made in this order may not come in the way of the Petitioner establishing its claim or for the Respondent to establish its defence in any other Forum.

Signature:

A handwritten signature in black ink, appearing to be 'Bikki Raveendra Babu', followed by the date '21.11.17'.

**Sri Bikki Raveendra Babu, Member (J).  
Adjudicating Authority.**