

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, (ADJUDICATING  
AUTHORITY UNDER THE INSOLVENCY & BANKRUPTCY CODE, 2016)  
CHANDIGARH BENCH, CHANDIGARH.**

**CP (IB) No.22/Chd/Hry/2017  
Date of Order: 01.06.2017**

**Coram: HON'BLE MR. JUSTICE R.P.NAGRATH, MEMBER (JUDICIAL).**

**In the matter of:**

Macquarie Bank Limited, Singapore Branch, a company incorporated under the laws of Singapore, having its Office at 10, Marina Boulevard, # 17-01, Tower-2, Marina Bay Financial Centre, Singapore-018983.

...Petitioner/Operational Creditor.

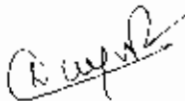
Versus.

Uttam Galva Metalics Limited, a company incorporated under the Companies Act, 1956 having its registered Office at 502, Global Foyer Building, Sector 43, Golf Course Road, Gurgaon-122002, Haryana, India.

.. Respondent/Corporate Debtor.

**Application to initiate corporate insolvency resolution process by Operational Creditor under Section 9 of Insolvency and Bankruptcy Code, 2016 in respect of Uttam Galva Metalics Limited, respondent-corporate debtor.**

**Present:** Mr.Ashish Aggarwal, Senior Advocate with Mr.Kanwalvir Singh Kang, Advocate for Applicant/Operational Creditor.  
Mr.Anand Chibbar, Senior Advocate with Mr.Tarun Lehal, Advocate for Corporate Debtor.



**ORDER.**

The Operational Creditor has filed the instant application seeking to set in motion the Corporate Insolvency Resolution Process as contemplated under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred here-in-after as the 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 (for brevity the 'Rules') in relation to Uttam Galva Metallics Limited (for short the (Corporate Debtor')). The registered office of the Corporate Debtor is situated at Gurgaon in Haryana State and therefore, the matter falls within the jurisdiction of this Tribunal. The application has been filed in terms of Form No.5 prescribed under the Rules.

2. The application was filed after the operational creditor sent a notice alongwith the invoices demanding the payment of the defaulted amount to the Corporate Debtor statedly in Form No.3, as prescribed in Rule 5(1) of the Rules by a registered post AD and through courier. The demand notice dated 14.02.2017 for both the sales contracts is at Annexure-11. Two invoices are dated 21.12.2015 and the third invoice dated 31.12.2015, which are at Annexure-4. The other documents relied upon by applicant are three bills of exchange; one dated 05.01.2016; second dated 06.01.2016 and third Bill of Exchange dated 18.01.2016 at Annexure-6. The demand notice was sent through Mr. Kanwalvir Singh Kang, Advocate.

3. The Corporate Debtor sent reply dated 22.02.2017 Annexure A-12 to the demand notice statedly raising the dispute.

4. In terms of sub-rule 2 of Rule 6, the applicant was required to despatch forthwith a copy of the application filed with the Adjudicating Authority

*Original*

by registered post or speed post to the registered office of the company. Though the appearance on behalf of the respondent-corporate debtor was made by Mr. Anand Chibbar, Senior Advocate with Mr. Tarun Lehal, Advocate on 08.05.2017, the first date, when the matter was listed, yet the petitioner was directed to file an affidavit along with the postal receipt regarding despatch of the application along with the paper book to the respondent-corporate debtor and the track report of the postal department. The matter was adjourned to 17.05.2017. The said compliance was made.

5. The learned Senior Counsel for the Corporate-Debtor, sought time to file objections and the matter was adjourned to 22.05.2017. The objections were filed on 22.05.2017 with copy to the counsel for the petitioner. On 22.05.2017 learned senior counsel for the respondent submitted that there is no certificate from the Financial institution maintaining the account of the operational creditor, in terms of clause (c) of sub-section (3) of Section 9 of the Code, for which, learned counsel for the petitioner sought time to file the affidavit and the document, if available and the matter was adjourned to 24.05.2017. The certificate of the Applicant-Bank dated 15.05.2017 Annexure A-13 was filed along with the supporting Affidavit of Mr. Kanwalvir Singh, Advocate. The filing of this document was objected to by the senior counsel for the corporate debtor on the ground that the same could not be filed at that stage of the case. This objection was, however, kept open.

6. It may be observed that this matter was listed before the Adjudicating Authority for the first time on 08.05.2017 and by counting the actual working days, the period of 14 days was expiring on 26.05.2017 within which the application was supposed to be decided. The request was submitted to the

*Amr*

Hon'ble President of NCLT, New Delhi seeking extension of 10 days more time in disposal of the case in terms of Section 64 of the Code. The Hon'ble President has been pleased to grant the extension of 10 days time as conveyed to this Bench vide letter No.25/2/2017-NCLT, dated 31.05.2017.

**FACTS.**

7. The Corporate Debtor approached the original supplier Hamera International Pte Ltd., having its office in Singapore, for supply of Hot Rolled Steel Sheet in Coils and pursuant thereto, two sales contracts nos; (i) HIPL(S)-UGML/2015/004 and (ii) HIPL(S)-UGML/2015/005 Annexure A-3 (Colly) both dated 02.12.2015 were executed between them.

8. The original supplier issued three invoices Annexure A-4 (Colly) for the said deal. One invoice is dated 21.12.2015 describing the goods with total price for a sum of USD 1,407,622.07 relating to contract No.HIPL (S)-UGML/2015/004, dated 02.12.2015. The payment terms as per the invoices is 150 days from the Bill of Lading Date and this term was also there in the sales contract. The others are the invoices dated 21.12.2015 and 31.12.2015 at pages 43 and 44 of the paper book respectively, mentioning therein the amount of the goods being supplied with the same terms of payment within 150 days from the date of Bill of Lading.

9. It is further stated that on 27.07.2015 receivables purchase agreement was executed between the original supplier and the applicant-operational creditor. By virtue of this Agreement, the applicant-operational creditor purchased the original supplier's rights, title and interest against the respondent-corporate debtor. To support this contention, the applicant has also relied upon the Bills of Exchange, which are negotiable instruments in respect

*As per*

of three supplies and these are Annexure 6 signed by the authorised signatory of the operational creditor and the respondent-corporate debtor. In first such document, the date of Bill of Lading (BIL) is dated 19.12.2015; the second dated 17.12.2015 and the third Bill of Exchange refers to the Bill of Lading dated 31.12.2015. The copies of the Bills of Lading aforesaid are at Annexure 7 (Colly). The maturity date of one bill of exchange, therefore, is 19.05.2016, the other 17.05.2016 and the third is 29.05.2016 respectively i.e. the expiry of 150 days of the date of Bills of Lading. Accordingly, the debt fell due w.e.f. 19.05.2016, 17.05.2016 and 29.05.2016 respectively. The total amount of default is USD 6,321,337.11, equivalent to ₹43,11,15,190.90 calculated at the rate of ₹68.20 per dollar along with interest at the rate of 18% per annum. It may be seen that in the sale contracts, there is the term of interest. It is provided that if any payment is not made on or before the due date for payment, the interest shall be payable at default interest rate of 1.5% per month. This clause further says that a dispute shall be deemed to exist, which shall be settled by Arbitration in accordance with the agreement.

10. It is further the version of applicant that there was exchange of emails between the original supplier and the respondent-corporate debtor with regard to the outstanding payments relied upon by the operational creditor. These reminder emails are dated 03.05.2016 and 03.06.2016 to which the operational creditor sent responses vide emails dated 23.05.2016 and 06.06.2016. There is also a reference to the meeting between the applicant and respondent with regard to the payments due, as reflected in the mail dated 10.06.2016. Copies of all these documents are attached with the application.

*Original*

11. According to the applicant, even before coming into force of the Code, the operational creditor sent a statutory notice dated 15.09.2016 Annexure 9 in terms of Section 433 and 434 of the Companies Act, 1956 through Mr.Kang, Advocate and the respondent sent reply thereto dated 05.10.2016 Annexure 10.

12. The applicant has come up to file this application on the basis of the assignment of debt in its favour by the original supplier by relying upon the receivables and purchase agreement dated 27.07.2015 as also the bills of exchange and the bills of lading.

13. The instant application has been filed by the 'operational creditor' through Pankaj Sachdeva, the Attorney Holder on the basis of the power of attorney executed by the applicant Bank in favour of three persons mentioned in the first schedule to the power of attorney Annexure 2. Out of the three persons, in whose favour the power of attorney was executed, is Pankaj Sachdeva, the authorised representative of the operational creditor in the instant application. This power of attorney is dated 14.12.2016 issued under the signatures of the Executive Director and Secretary of the applicant Bank under its Common Seal.

14. The respondent-corporate debtor filed objections to this application by way of affidavit of Mr.Mukesh Jaisani, the authorised signatory of the respondent-corporate debtor. However, the documents like the sales contracts, invoices, bills of exchange, the statutory notice issued under Section 433 and 434 of the Companies Act, 1956, the demand notice under the Code and reply thereto are all admitted facts because even with the objections copies of these documents have been attached by the respondent.

*Ameyan*

15. According to the respondent, various complaints as regards the goods supplied were received, but not limited to the quality thereof by the end user. In view of the said complaints, various meetings were held with the officers of the supplier and subsequently raising the dispute. Reliance mainly is placed upon a letter dated 11.04.2016 received from Uttam Galva Steel Ltd., the end user of the goods, which was forwarded by the respondent to the original supplier on 16.05.2016. The documents in respect of the aforesaid plea relied upon by the respondent are Annexure R-9 and R-10 respectively.

16. It was for the first time that the respondent became aware of assignment of the debt in favour of the applicant, on receiving statutory notice dated 15.09.2016 sent under Sections 433 and 434 of the Companies Act, 1956 to which reply dated 05.10.2016 was sent stating therein that there was already a quality claim dispute with the supplier causing huge loss to the respondent. The issue relating to quality of the goods was not to the knowledge of the respondent at the time, when the bills of exchange were drawn.

17. Allegation of the applicant that the debt was assigned to it by the original supplier vide agreement dated 27.07.2015, is also challenged, the said agreement being prior in time to the sales contracts in question and therefore, there is no valid assignment.

18. It is further stated that immediately after sending reply to the demand notice, the respondent filed a civil suit in the High Court of Bombay against Hamera International Pte. Ltd, the original supplier and also the applicant-operational creditor for declaration that the receivable purchase agreement dated 27.07.2015 is not binding on the debtor, there being no privity of contract between the parties to this petition. Copy of the civil suit is Annexure

*(Handwritten signature)*

R-15. It is stated that Hon'ble Bombay High Court granted leave to file the suit vide order dated 14.03.2017, copy of which is at Annexure R-16.

19. The respondent has referred to the sales contract dated 02.12.2015, where there is a specific clause of assignment, which is reproduced as under:-

"Neither this Agreement nor the Rights and Obligations arising out of it may be assigned, delegated or otherwise transferred by either the buyer or the seller to any third party without the other party's prior written consent, which consent shall not be unreasonably withheld despite the foregoing, either party is allowed in principle to assign its rights and obligations to an affiliated company, provided the credit worthiness of the affiliated company is acceptable to the other party. **Also, seller is allowed to transfer the receivable(s) arising under this agreement to a financial institution.**"

It is thus contended that in view of the above specific clause, the rights and obligations arising out of the sales contracts cannot be transferred by either of the parties without consent of the other.

20. Another contention raised in the objection filed by the respondent is that the purported claim of the applicant was insured with the insurance company Euler Hermes and pursuant thereto the petitioner has received the entire amount claimed under this petition from the insurer. In view of the aforesaid fact, the petitioner would not have the locus-standi to file this petition. Therefore, it can be said that the petitioner has not come before the Adjudicating Authority with clean hands.

21. It is further stated that the copy of the application along with the paper book was received in the registered office of the respondent-corporate

*RWA*



debtor, almost about 1 ½ month after the filing of the case in the Registry. The said registered envelop was received on 11.05.2017 and there being non-compliance to the mandatory requirement of clause 2 of sub-rule 1 of Rule 6 of the Rules, the instant petition should be rejected. The aforesaid objection should not detain the Adjudicating Authority for proceeding to dispose of the matter on merits, as the petition was listed before the bench after the application was despatched by registered post as per acknowledgement due on 01.05.2017 to the registered office of the respondent-company.

22. Another issue raised is about the authority of Mr. Sachdeva to file this petition on behalf of the alleged operational creditor because the power of attorney does not give specific authority to initiate the corporate insolvency resolution process under the Code. It is further stated that the claim of interest is not tenable. The respondent has further pleaded that the non-compliance of Section 9 (3) (c) of the Code, which is mandatory requirement is fatal to the present petition. The prayer was thus made to reject this petition.

23. I have heard the learned Senior Counsel for both the parties and perused the record with their able assistance.

24. The following issues arise for determination in the instant petition:-

1. Whether the instant petition has been filed on the basis of a valid power of attorney?
2. Whether the petitioner is entitled to file this petition as an assignee of the original supplier?
3. Whether there is non-compliance of clause (c) of Section 9 (3) of the Code? If so, its effect?
4. Whether the petitioner had the notice of the existence of the dispute, as defined in the Code?

*Chugh*

5. Whether the petitioner does not have the locus-standi to file the instant petition, having already been reimbursed by the insurer of the goods?

### **ISSUE NO.1**

**Whether the instant petition has been filed on the basis of a valid power of attorney?**

25. The power of attorney Annexure 2 dated 14.12.2016 executed by the petitioner in favour of three persons including Mr.Pankaj Sachdeva through whom the instant petition has been filed, authorising them inter-alia:-

- (a) To ask or demand the outstanding amount from Uttam Galva Metallics Limited (the 'Debtor') having its registered office at 502, Global Foyer Building, Sector 43, Golf Course Road, Gurgaon-122002, Haryana, India and having its Cl.No. as U27200HR2007 PLC 037927, alongwith the overdue interest thereon and costs, owed to the company.
- (b) to file and/or defend suits in respect of the Debtor, to sign and verify all the plaints including winding up petitions, pleadings, written statements, affidavits, petitions, objections, to file execution applications, to undertake proceedings, appeals, review, revisions, writ petitions and to furnish evidence and to make statements and to file all sorts of applications and to prosecute all legal proceedings, memorandums of appeal, petitions, and to do all other legal matters in all the Courts/Tribunals including the Board for Industrial and Financial Reconstruction (BIFR) and the Appellate Authority for Industrial and Financial Reconstruction (AAIFR), from the lowest to the highest, concerning any matter in respect of the said outstanding amount and the said petitions/appeals in respect of the Debtors;
- (c) to engage advocate(s) and technical counsels for the conduct of the proceedings for recovery against the debtor;

*(Signature)*

- (d) To settle, compromise, compound or withdraw the said petition, suits, appeals, reviews, revisions, petitions with respect to the Debtor, upon obtaining a written consent from the Company; and"

26. Learned senior counsel for the respondent vehemently contended that this power of attorney does not give any specific authority to the named attorney holders to file the petition under the Code. Learned senior counsel refers to the judgment of the Full Bench of the Adjudicating Authority Kolkata in case "**ICICI Bank Ltd. Vs. Palogix Infrastructure Pvt. Ltd. & Ors. SB Case No.01/IBC/GB/2017 (C.P.No.37 of 2017)**", decided on 30.03.2017. The issue was referred to the Special Bench of NCLT Guwahati in view of the divergent opinion expressed by the two members Bench of NCLT, Kolkata. The power of attorney in the said case was executed on 20.10.2014 i.e. more than two years before coming into force of the Code. The general power of attorney in the said case authorised the attorney holder to commence and institute any proceedings before any Court of law including NCLT. In the said case, the power of attorney authorised the attorney holder to appoint pleaders, advocates and solicitors to appear and act on behalf of ICICI Bank in any Court of justice or Tribunal or Recovery Officer or before any revenue and/or Income-tax officer etc. including NCLT to sign and verify and execute the vakalatnama, plaint, recovery applications written statements etc. It was held by the Special Bench that the author of the power of attorney bestowed various powers on the attorney appointed therein, which included the power to initiate winding proceedings as well. The Special Bench held that the power so given to the attorney under the instrument above, cannot be stretched to embrace the power

to initiate a corporate insolvency resolution proceeding under Section 7 of the Code.

27. That judgment cannot provide much support to the respondent because it was held by the Special Bench that when the financial creditor executed the power of attorney on 20.10.2014, he could not have visualized even remotely that the donee would be required, one day, to initiate a corporate insolvency resolution proceeding under the Code, which came into force only w.e.f. 01.12.2016 vide notification dated 30.11.2016. The present is a case, where the power of attorney was given on 14.12.2016 and by that time the provisions of the Code had already come into force.

28. It is pertinent to mention that under Sections 271 and 272 of the Companies Act, 2013 as originally enacted, any creditor or creditors could file a petition for winding up of the company for its inability to pay the debts. These provisions had not been enforced till the time, the Code, became effective. The clause pertaining to the inability of the company to pay the debt entitling the creditor to file a petition for winding up, has been omitted as per the amendment to these sections incorporated in the 11<sup>th</sup> Schedule of the Code. So, the only remedy to a creditor against a company is to take steps for winding up of the company, for which the appropriate recourse is provided under Sections 7 and 9 of the Code exclusively in respect of the financial and operational creditors respectively. So, the authority in favour of Pankaj Sachdeva, which is recent in time, authorising him to file the winding up petition etc. would fully cover the authority to file the insolvency resolution process under the Code.

29. In **"M/s DF Deutsche Forfait AG and Anr. Vs. M/s Uttam Galva Steel Ltd. CP No.45/I&BP/NCLT/MAH/2017"**, decided on 10.04.2017, it has

similarly been observed that nature of insolvency proceedings under the IB Code cannot be seen as something different from the winding up proceedings and the petition thus was found to be instituted through a duly constituted attorney. In view of the above, the issue is held in favour of the petitioner and against the respondent.

**ISSUE NO.2.**

**Whether the petitioner is entitled to file this petition as an assignee of the original supplier?**

30. Learned senior counsel for the petitioner relies upon the non-recourse receivables purchase agreement dated 27.07.2015 Annexure-5 between the original supplier Hamera International Pte Ltd. and the petitioner-operational creditor, as well as on the terms of the sales contracts entered into between the original supplier and the respondent dated 02.12.2015 Annexure 3 (Colly).

31. Learned senior counsel for the respondent, however, relies upon a similar assignment clause in both the agreements. It is contended that this clause prohibits the assignment of Rights and Obligations under the contract to any third party without the other party's prior written consent, which has not admittedly been obtained. I am unable to agree with this contention because the seller has been specifically allowed to transfer the receivables arising under the agreement to a financial institution and the petitioner undoubtedly is a financial institution. The sole purpose of this permission seems to be to save the original supplier from the botheration of having recourse to the process of law for making the recovery in case of default.

32. The non-recourse receivable purchase agreement dated 27.07.2015 Annexure-5 entered into between the petitioner and the original

Accepted

supplier M/s Hamera International Pte. Ltd. (for short 'Hamera'), shows that Hamera had requested the petitioner Bank to consider non-recourse purchase of certain receivables and the Petitioner-Bank expressed its willingness to purchase such receivables owing to Hamera and subject to the terms and conditions of this agreement. Annexure-5 deals with the specific contract No.003, dated 08.05.2015, but it also relates to any other contract between a debtor and Hamera approved in writing by the Bank.

33. Learned senior counsel for the respondent, however, contended that agreement No.003, dated 08.05.2015 stood closed because payment under the said contract was made in October, 2016 and therefore, this document cannot be applicable to the subsequent transaction entered into on the basis of Sales contracts of 02.12.2015. The learned senior counsel for the respondent laid emphasis on the clause of the sales contracts dated 02.12.2015, whereby it supersedes any and all previous discussions, contracts and understandings between the parties. This contention of the learned senior counsel cannot be sustained as the sales contracts are inter se the original supplier and the respondent and the above term pertains to the past transactions between them only which cannot have any effect or bearing on the receivables purchase agreement between the Bank and the original supplier.

34. The receivables purchase agreement dated 27.07.2015 not only pertains to the specific contract dated 08.05.2015 between the original supplier and the respondent, but also to any other contract between a 'Debtor' and the original supplier, which is approved by the Bank in writing. The term 'Debtor' has been defined in the document dated 27.07.2015 as three different customers including the respondent.

*A. K. Singh*

35. Import of this term in the receivable purchase agreement dated 27.07.2015 is very wide so that the parties thereto are not required to enter into fresh agreements for including any subsequent contracts. It is apparently for this reason that clause (b) was added as a general term in the document Annexure-5 to include other transactions also, which the Bank agrees to adopt.

36. To support the petitioner's contention, learned senior counsel also refers to the bills of exchange, copies of which have been filed by both the parties on record. All the bills of exchange are admittedly signed by the original supplier and the respondent-corporate debtor and the petitioner is 'payee' in these documents. The Bill of Exchange is a negotiable instrument which makes both the maker and drawee equally liable under the Negotiable Instrument Act. The bills of lading in respect of the disputed supplies are at Annexure 7. In all these documents, the name of consignee is the petitioner Bank with notified party as the respondent.

37. In view of the above admitted documents, the petitioner would definitely come within the definition of the term 'operational creditor', as defined under Section 5(20) of the Code, as meaning a person to whom an operational debt is owed and includes the person to whom such debt has been legally assigned or transferred. The learned senior counsel for the respondent submitted that the documents relied upon by the petitioner would not be the illegal assignment, but perusal of the definition shows that it has wide connotation to include the petitioner without an iota of doubt. The respondent's version is not that it has paid the amount of these supplies to the original supplier or to the petitioner. The issue is accordingly held in favour of the petitioner.

*Q. Anand*

**ISSUE NO.3.**

**Whether there is non-compliance of clause (c) of Section 9 (3) of the Code? If so, its effect?**

38. Sub section (3) of Section 9 of the Code lays down certain requirements to be furnished by an operational creditor along with the application. Clause (a) requires furnishing of copy of invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor; in terms of clause (b) an affidavit is required to be filed with the application that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and; as per clause (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor has to be furnished.

39. The crucial issue in this case is the non-compliance of clause (c) sub-section 3 of Section 9 of the Code. No such certificate was filed along with the petition. The above non-compliance was pointed out on behalf of the respondent, when the matter was listed on 22.05.2017. The petitioner filed the certificate on 24.05.2017, but the learned senior counsel for the respondent objected to the filing of the said document at that stage being the requirement to be furnished along with the application itself and thus cannot be considered a defect, which could be rectified by taking recourse to the proviso to sub-section 5 of Section 9 of the Code.

40. It is pertinent to mention that the Bank Certificate Annexure A-13 filed with CA No.66 of 2017 is dated 15.05.2017 issued by the petitioner, which is stated to be a Bank. It is stated in the certificate that the payment under all

*(P. Singh)*



these three transactions has not been deposited and the amount owing to Macquarie by respondent to the tune of USD 6,321,337.11 along with interest is outstanding and no payments have been received from the respondent. It was contended by learned counsel for the petitioner that this certificate was received by email. The certificate has been filed on record with the affidavit of Mr. Kanwalvir Singh Kang, Advocate for the petitioner. I am of the considered view that no authenticity can be attached to this document in the absence of any provision of law or rules permitting such an unauthentic document to be relied upon. Mr. Sachdeva, the authorised representative of the petitioner has not even filed his own affidavit in support of the correctness of this certificate.

41. The learned senior counsel for the respondent contended further that such a certificate cannot be said to be issued by a **financial institution**, as required by clause (c) of Section 9 (3) of the Code. The term 'financial institution' is defined in Section 3 (14) of the Code as meaning:-

- (a) a scheduled bank;
- (b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);
- (c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013 (18 of 2013); and
- (d) such other institution as the Central Government may by notification specify as a financial institution."

The learned counsel for the petitioner fairly conceded that the petitioner, which is a foreign based Bank is not covered within any of the clauses of definition of the term 'financial institution'.

42. Learned senior counsel for the respondent placed strong reliance upon the judgment of Hon'ble National Company Law Appellate Tribunal

*Disputed*

reported in "**Smart Timing Steel Ltd. Vs. National Steel and Agro Industries Ltd. Company Appeal (AT) (Insolvency) No.28 of 2017**", decided on 19.05.2017. The question for determination before the Hon'ble Appellate Tribunal was, whether filing of a "copy of certificate from the "Financial Institution" maintaining the accounts of operational creditor confirming that there is no payment of unpaid operational debt by the corporate debtor as prescribed under clause (c) of sub-section (3) of Section 9 of the Code, is mandatory or directory. In the said case before the Hon'ble Appellate Tribunal, the operational creditor was given an opportunity to complete the record by enclosing the certificate of financial institution and remove the defect within 7 days, but it failed to do so. The Hon'ble Appellate Tribunal categorically held that on perusal of the entire section, it is crystal clear that the entire provision of sub-section (3) of Section 9 of the Code are required to be mandatorily followed and it is not empty statutory formality.

43. An argument was also raised before the Hon'ble Appellate Tribunal that the foreign companies and multiple national companies having no office or having no account in India with any of the "Financial Institutions" will suffer to recover the debt as due from the "Corporate Debtor" of India. It was also contended that the appellant being a foreign based "Operational Creditor", the 'Adjudicating Authority' was required to interpret the provisions of the Code in such a manner that Section 9 would have taken in its fold all the 'Operational Creditors', who are entitled to recover the debt defaulted by the 'Corporate Debtors' of India. The Hon'ble Appellate Tribunal held that the above argument that foreign companies having no office in India or no account in India with any "Financial Institutions" will suffer in recovering the debt from the Corporate

(R) 11/12/17

Debtor, cannot be accepted as apart from the Code, there are other provisions of recovery like suit, which can be preferred by any person.

44. However, the learned senior counsel for petitioner would refer to the instructions appended to Form No.5 of the Rules under which the application by the operational creditor is filed. The requirement as per Annexure III of the instructions is that the applicant has to attach copy of the relevant accounts from the **banks**/financial institutions maintaining the accounts of the operational creditor confirming that there is no payment of the relevant unpaid operational debt by the corporate debtor, if **available**. It was thus contended by the learned senior counsel that Section 9 (3) (c) of the Code has to be interpreted in such a way as not to render the statutory rules nugatory.

45. The learned senior counsel for the petitioner vehemently contended that there was no discussion or issue raised before the Hon'ble Appellate Tribunal in **Smart Timing Steel (supra)** with regard to instructions appended to Form No.5, which is part of the statutory rules and permits the certificate even by the **Banks** and that too, if the same is **available**. Since the aforesaid instruction of Form No.5 was not brought to the notice of the Hon'ble Appellate Tribunal, the view taken in **Smart Timing Steel (Supra)** can be termed as per incuriam and the principle of sub-silentio would be applicable. To support this contention, it is submitted that respondent has not stated that the payment of the amount of claim has been made, rather it has tried to raise the issue of default in quality of goods.

46. In support of this contention, the learned senior counsel relied upon **ARNIT DAS Vs. STATE OF BIHAR (2000) 5 Supreme Court Cases,**

*Duspat*  
488. The Hon'ble Supreme Court held as under:

*"A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined."*

47. The question before the Hon'ble Supreme Court in that case was the relevant date for determining the age of the accused, who claims himself to be a juvenile and reference was made to the case law on the subject before the Hon'ble Supreme Court. The Hon'ble Supreme Court observed that in all the referred cases, the counsel for the contesting parties before the Court made their submissions by assuming that the date of the offence was the relevant date for determining the age of the juvenile and in none of those cases, there was a specific issue by reference to which date (the date of the offence or the date of the production of the person before the competent authority), the Court shall determine whether the person was a juvenile or not, the same having neither been raised nor decided.

48. To further support this contention, the learned senior counsel also relied upon **"State of UP & Another Vs. Synthetics And Chemicals Ltd. And Another"** 1991 (4) SCC 139. It was observed in that case that a decision passes sub silentio, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. By referring to another decision in **"Municipal Corporation of Delhi Vs. Gurnam Kaur"** (1989) 1 SCC 101, it was held that the precedents sub-silentio and without argument are of no moment. A decision, which is not expressed and is not founded on

*Pragna*

reasons nor it proceeds on consideration of issue, cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141 of the Constitution of India.

49. In the present case, however, there was a specific issue raised before the Hon'ble Appellate Tribunal with regard to the compliance of various clauses of sub-section (3) of Section 9 of the Code and the same was held to be mandatory. Therefore, the principle of law laid down on the mandatory nature of Section 9 (3) cannot be said to be per incuriam or sub-silentio on the ground that instructions appended to Form No.5 of Rule 6 of the Rules, was not brought to the notice of the Hon'ble Appellate Tribunal. In any case, the rules cannot override the statutory provisions of the Code.

50. The contention that the respondent is not prejudiced, having admittedly not made the payment, cannot be accepted, there being non-compliance of the mandatory requirement of Section 9 (3) (c) of the Code. The intent of the legislature for laying down the mandatory compliances is keeping in view the time line within which an application is required to be decided i.e. 14 days and that too even in the absence of the respondent despite being served or without calling upon the evidence. Therefore, there has to be uniformity in ensuring the mandatory compliances as aforesaid. In the instant case, there being non-compliance of the mandatory requirement of Section 9 (3) (c) of the Code, the issue is held against the petitioner accordingly.

#### **ISSUE NO.4.**

**Whether the petitioner had the notice of the existence of the dispute, as defined in the Code?**

51. Under clause (ii) (d) of sub-section (5) of Section 9 of the Code, the application of the operational creditor can be rejected, if it has received a

*(P. V. Rao)*

notice of dispute or there is a record of dispute in the 'information utility'. It is informed that 'information utility' has not been established so far. So, the existence of the dispute has to be determined on the basis of available record. The term 'dispute' is defined in Section 5 (6) of the Code, which reads as under:

- " 'dispute' includes a suit or arbitration proceedings relating to-
- (a) the existence of the amount of debt;
  - (b) the quality of goods or service; or
  - (c) the breach of a representation or warranty,"

The learned senior counsel for the respondent contended that the respondent had raised a dispute even before the enforcement of the Code and therefore, it is a clear case of existence of the dispute for which this application deserves to be rejected.

52. The first document relied upon by the respondent is a letter Annexure R-9, dated 11.04.2016 written by Uttam Galva Steels Limited (UGSL) to the respondent about the quality complaint of the disputed goods. It is stated in Annexure R-9, that as conveyed on earlier occasion as well, UGSL received the quality related complaints from its customers and due to these quality problems, UGSL suffered heavy monetary losses apart from having significant negative impact on the company's brand name and market positioning. In addition, UGSL has not been able to process the material in time and supply the same to its customers, which is accentuating their further losses apart from unsold inventory piling up at their end, thereby constraining their working capital, which could have been utilised for their profitable operations.

53. The learned senior counsel for the respondent further submits that the aforesaid complaint was forwarded to Hamera International, the original supplier, vide letter dated 16.05.2016 Annexure R-10 Further in the reply to

*Original*

the legal notice dated 15.09.2016 sent by the petitioner under Sections 433 and 434 of the Companies Act, 1956, the respondent reiterated that the client of the respondent received various complaints from buyers and end users. It was further stated in the reply dated 05.10.2016, that this fact has already been communicated by the client of the respondent to the original supplier on various occasions **telephonically and in the meeting** held between them. This was also the stand of the respondent in reply dated 22.02.2017 Annexure 12 to the demand notice sent under Section 8 of the Code.

54. To rebut this contention, learned senior counsel for the petitioner contended that the entire defence lacks material particulars and the plea deserves to be rejected outrightly. It was submitted that the documents, which prima-facie cannot withstand the test of scrutiny should be totally ignored. The learned senior counsel referred to letter Annexure R-9 attached with the objection petition purportedly sent by Uttam Galva Steels Ltd. to the Respondent-Uttam Galva Metalics. It is pointed out that the address of both these Uttam companies is same i.e. Uttam House, 69, P D' Mello Road, Mumbai and there is no diary number of the letter Annexure R-9. Further there is no documentary evidence like postal receipt of despatch of the letter Annexure R-10 dated 16.05.2016 by registered post, speed post or by courier service or by even email to attach any authenticity to the said document.

55. Learned senior counsel would refer to four emails exchanged between the petitioner and the respondent, which are Annexure 8 (Colly). The first email is dated 03.05.2016 from the petitioner to Uttam team. This is a reminder to the respondent that the payment of the upcoming bills is falling due in May and to make the timely arrangement for the same. The corporate debtor

*Uttam Galva*

Uttam Galva sent the response dated 23.05.2016 addressed to Uma, a representative of Macquarie. It is stated in this email that Mr. Handa had briefed the Bank about delay in some payments. Mr. Rajinder Miglani from Uttam Galva assured that he would be visiting Singapore and to instruct Mr. Handa to fix appointment with the representative of the petitioner. In this email, there is no reference to letters Annexure R-9 and R-10, which are prior in time to this email, raising the issue of quality of the goods. Further the petitioner sent another email dated 03.06.2016 to Mr. Miglani that they have not heard about any planned trip of Mr. Miglani to Singapore nor they have received any communication as to how and when the outstanding dues would be settled. The response from Mr. Miglani is by email dated 06.06.2016. Mr. Miglani assured to inform the petitioner about his visit to Singapore in advance. It was further assured that the respondent would sort out the pending matters during his visit to Singapore.

56. Thereafter the petitioner Bank again sent email dated 10.06.2016 addressed to Mr. Handa and Mr. Dipak, who visited the Bank to discuss the issue. It is indicated in this email that the representatives of the respondent explained the current business environment in Steel Industry in India in general and Uttam in particular. Copy of this mail is also addressed to Mr. Miglani. So, till then, there was no dispute about the defect in quality. It is not the version of the respondent that it sent any further response to the email of the petitioner dated 10.06.2016. It is the pertinent to mention that the allegation of the exchange of these emails has not been disputed or challenged in the objection petition of the respondent.

*(Signature)*



57. The learned senior counsel for the petitioner would further submit that in the reply dated 05.10.2016 Annexure -10 sent by the respondent, there was no indication that the quality related issue was earlier raised in **writing**. In the said letter, it was only said that the matter was discussed telephonically as well as in the meeting held between them. But now for the first time in reply to the demand notice, the respondent has alleged that the quality related issue on the complaints from the buyers and end users was communicated to the petitioner and to the original supplier on various occasions telephonically and in the meetings as well as in **writing**.

58. The learned senior counsel strongly relied upon the judgment of Hon'ble National Company Law Appellate Tribunal in case "**Kirusa Software Private Ltd. Vs. Mobilox Innovations Private Ltd. Company Appeal (AT) (Insolvency) 6 of 2017**", decided on 24.05.2017 in support of his contention. The Hon'ble Appellate Tribunal held as under:

*"Though the words 'prima-facie' are missing in Sections 8 and 9 of the Code, yet the Adjudicating Authority would examine whether notice of dispute in fact raises the dispute and that too within the parameters of two definitions – 'debt' and 'default' and then it has to reject the application, if it apparently finds that the notice of dispute does really raise a dispute and no other factual ascertainment is required. On the other hand, if the Adjudicating Authority finds that the **notice of dispute lacks in particulars** or does not raise a dispute, it may admit the application, but in either case, there is neither an ascertainment of the dispute, nor satisfaction of the Adjudicating Authority."* (emphasis supplied).

*(N) as per* It was further held that the definition of dispute is inclusive and not exhaustive. The same has to be given wide meaning provided it is relatable to the existence

of the amount of the debt, quality of goods or service or breach of a representation or warranty.

59. It was further held by the Hon'ble Appellate Tribunal that the true meaning of sub-section (2) (a) of Section 8 read with sub-section (6) of Section 5 of the IB Code clearly brings out the intent of the Code, namely; the Corporate Debtor must raise a dispute with **sufficient particulars**. And in case a dispute is being raised by simply showing a record of dispute in a pending arbitration or suit, the dispute must also be relatable to the three conditions provided under sub-section (6) of Section 5 (a)-(c) only. The Hon'ble Appellate Tribunal further held that mere raising a dispute for the sake of dispute, unrelated or related to clause (a) or (b) or (c) of sub-section (6) of Section 5, if not raised prior to application and not pending before any competent Court of law or authority cannot be relied upon to hold that there is a dispute raised by the corporate debtor. Further by merely giving a dispute a colour of genuine dispute or illusory, raised for the first time while replying to the notice under Section 8 cannot be a tool to reject an application under Section 9 of the Code, if the operational creditor otherwise satisfies the Adjudicating Authority that there is a debt and there is a default on the part of the corporate debtor. It was further held that the onus to prove that there is no default or debt or that there is a dispute pending consideration before a Court of law or Adjudicating Authority, shifts from the creditor to debtor and operational creditor to corporate debtor.

60. The learned senior counsel for respondent, however, contended that the dispute about the quality having already been raised, the instant petition may be rejected. The learned senior counsel for the respondent further submitted that the respondent has even filed a civil suit in the High Court of

*Duspan*

Bombay, impleading the original supplier as well as the petitioner as the defendants, raising the dispute about quality of the goods. Copy of the plaint in the said civil suit is Annexure R-15. The plaint in the said civil suit is dated 10.03.2017 which is much after service of the demand notice. The learned senior counsel would, however, refer to the order passed by the High Court in the said civil suit granting leave to file the suit and that order is Annexure R-16.

61. Having given my thoughtful consideration to the rival contentions of the learned counsel for the parties and appraisal of the documents on record, I would decline to attach much weight to the letters Annexures R-9 and R-10 in preference to the exchange of emails and contradictions referred to by learned senior counsel for the petitioner. For the same reason, the institution of civil suit in the Bombay High Court after the receipt of demand notice under Section 8 of the Code, is also not considered as of much help to the respondent.

62. However, the respondent having raised the dispute of quality of the goods in the reply dated 05.10.2016 to the statutory notice sent in terms of Section 433 and 434 of the Companies Act, 1956 i.e. much before the coming into force of the Code, would be sufficient to attract the provision of clause (d) of sub-section 5 (ii) of Section 9 of the Code.

63. In **"M/s MCL Global Steel Pvt. Ltd. & Anr. Vs. M/s Essar Projects India Ltd. & Anr."** Company Appeal (AT) (Insolvency) No.29 of 2017", decided on 31.05.2017, the notice was issued by the operational creditor under Section 433 (e) and 434 of the Companies Act, 1956 on 28.10.2016, which was disputed by the corporate debtor objecting to the quality of service and non-completion of the work within the time, and was much prior to enactment of the Code and notice under Section 8 of the said Code. It was

*Due to*

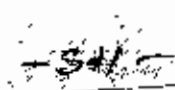
thus, held that there was existence of dispute for which, the petition under Section 9 preferred by the operational creditor, was not maintainable and as such, this issue is also held against the petitioner.

**ISSUE NO.5.**

**Whether the petitioner does not have the locus-standi to file the instant petition, having already been reimbursed by the insurer of the goods?**

64. Another objection taken in the reply was that the petitioner Bank has got itself reimbursed from the insurer with regard to this transaction. It was submitted by learned senior counsel for the respondent that the petitioner has not responded to the above allegation. I do not think that the right of the petitioner, if otherwise maintainable, could be defeated solely on that ground, as the corporate debtor cannot escape from its liability under the contract, in case it has made a default in payment of debt. The issue is accordingly held against the respondent.

65. In view of my findings on the issues No.3 and 4, the instant petition is rejected. Let the copy of the order be supplied to both the parties.

  
(Justice R.P. Nagrath)  
Member (Judicial)

Pronounced.  
June 1, 2017.

ABHINAV