

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1008 of 2019

[Arising out of Order dated 02nd September 2019 passed by the Adjudicating Authority/National Company Law Tribunal, New Delhi in Company Petition (IB.) No. 1058/ND/2018]

IN THE MATTER OF:

**Shubham Jain
S/o Shri Virendra Jain
R/o C-10, Ramprastha
Ghaziabad (UP)**

...Appellant

Versus

**1. Gagan Ferrotech Limited
having its registered office at:
113/1B, Chittaranjan Avenue
7th Floor, Room No. 7C
Kolkata – 700073**

...Respondent No.1

**2. Manju J Homes India Limited
having its registered office at:
C-294, Vivek Vihar
Delhi – 110095
Through Interim Resolution Professional
Shri Harish Goyal
431, Kanungo Apartments
Plot No.71, I.P. Extension
Patparganj, New Delhi**

...Respondent No.2

Present:

For Appellant : Shri Sanchit Garg, Advocate

**For Respondent : Ms Soumya Dutta, Advocate (R-1)
Shri Abhishek Anand, Shri Viren Sharma and
Shri Kunal Godhwani, Advocates (for RP – R2)**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

1. The present Appeal has been filed against the impugned order dated 02nd September 2019 in CP (IB) No. 1058/ND/2018 passed by Adjudicating Authority (National Company Law Tribunal), New Delhi (Court IV) admitting

Application u/s 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'the Code') against the Corporate Debtor – Manju J Homes India Limited, by Shubham Jain, one of the directors of the Corporate Debtor.

2. The Appellant has challenged the impugned order of admission primarily on two grounds – (a) Demand Notice u/s 8 of the Code was not served on the Corporate Debtor; (b) Claim of the Applicant Operational Creditor was seriously disputed.

3. The Appellant submits that the I&B Code is a complete Code in itself, overriding all the other Acts. The concept of deemed delivery cannot be applied by necessary implication to Demand Notice u/s Section 8 of the Code read with Section 9 and Rules framed thereunder. The Appellant further submits that the service of notice on the Director of the Corporate Debtor is no service in the eyes of the law given the provisions of the Code. Furthermore, it is submitted that the claim of the Operational Creditor is seriously disputed. Still, the opportunity to dispute the same was neither provided to the Corporate Debtor at the stage of notice nor the stage of filing of the reply to the petition.

4. The main issue that arises for consideration in the present Appeal is whether service of Demand Notice u/s 8 of the Code on a Director of the Corporate Debtor can be construed as deemed delivery or not for Initiation of Corporate Insolvency Resolution Process under Section 9 of the Code.

5. In the impugned order the Adjudicating Authority has observed and held:

"8. As per the delivery status report, an attempt was made on 27.06.2018 to deliver the said notice to the Respondent at its registered address, but it remained unserved as the 'addressee moved'. Again, on the very date, an attempt was made to serve on the Respondent at its another address but the same remained 'unclaimed'. A demand notice demanding payment in respect of unpaid operational debt as required under Section 8 of IBC Code is duly served on the Respondent on 27.06.2018 as evident from the service affidavit containing receipt of speed post and the tracking report, however, despite the same, the Corporate Debtor has failed to pay the amount demanded nor has replied to the demand notice raising any dispute, hence this application, seeking to unfold the process of CIRP.

9. As per Part IV of Form 5, the applicant has stated that total debt due and payable is Rs. 84,47,147/- (Rupees Eighty-Four Lakhs Forty- Seven Thousand One Hundred and Forty- Seven only) which includes Principal amount of Rs. 66,03,856.78/-and interest of Rs. 18,43,290.22/- @18% p.a. till 20.06.2018.

The applicant has mentioned that default occurred on 02.12.2016.

10. The Respondent did not appear though Section 8 notice and the present application were duly served on the Respondent and proof of service filed by the applicant. This Tribunal is constrained to proceed with the matter exparte against the Respondent as per order dated 18.07.2019."

(verbatim copy)

6. A similar issue fell for consideration of this Appellate Tribunal in **K. B. Polychem (India) Ltd. Vs. Kaygee Shoetech Private Limited MANU/NL/0096/2020** decided on 11th February 2020. In that case, the Demand Notice sent at the corporate Debtor's registered office had returned

with the postal remark of "not available", but the notice sent to the Director of the Company was at their residential address not returned. This Appellate Tribunal held that Adjudicating Authority had erred in rejecting the application u/s 9 of the Code.

7. Admittedly, the Demand Notices sent u/s 8 of the Code to the registered address, and functional address of the Corporate Debtor met with the remarks 'addressee moved' and 'unclaimed' respectively. Unclaimed, will also have to be treated as Service of Notice. Again one set of Demand Notice was duly served upon one of the Directors of the Corporate Debtor. The legislative intent of issuance of Demand Notice under Section 8(1) is not a mere formality but a mandatory provision. Only after service of notice under Section 8(1) and on completion of 10 days, if payment towards the demand is not made, an Operational Creditor gets right to apply under Section 9 and not before such date. Upon perusal of the record, it is apparent that the Demand Notice was duly served on the functional address as well as Director of the Corporate Debtor. Under Section 2(59) of the Companies Act, 2013 Director is included in to definition of Officer. Under Section 20 of the Act a document served on a Company or on Officer thereof is service recognized. Going from Principles of Natural Justice, in terms of Section 424 of Companies Act read with above provision of Service of Notice on Director must be held to be good service. Therefore, in our opinion, the mandate u/s 8 of the Code was fulfilled, and the Adjudicating Authority has rightly admitted the application u/s 9 filed by the Operational Creditor for initiating Corporate Insolvency Resolution Process against the Corporate Debtor.

8. As is evident from paragraph 10 of the Impugned Order, despite service of Demand Notice u/s 8 of the Code and service of the application u/s 9 of the Code, the Corporate Debtor did not appear before the Adjudicating Authority. Hence, we are of the considered opinion that the Adjudicating authority had not erred in proceeding *ex parte* in the matter.

9. The Appellant though has alleged that the Operational Creditor's claim is seriously disputed, has failed to adduce any evidence in support of alleged dispute before this Appellate Tribunal. Hence, in the absence of any evidence/document before us showing the existence of dispute before issuance of Demand Notice, we cannot hold in favour of the existence of a dispute merely based on a single averment.

10. Having regard to the preceding discussion, we do not find any merit in the Appeal. The Appellant has failed to demonstrate that the impugned order suffers from any legal infirmity. Therefore, the Appeal is dismissed. No order as to Cost.

[Justice A.I.S. Cheema]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
29TH JANUARY, 2021

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