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INSOLVENCY & BANKRUPTCY

# Certificate from Financial Institutions, Demand Notice by Lawyers…year-end brings clarity to IBC Code

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The decision of the Supreme Court Bench consisting of J. F Nariman and J N Sinha in *Macquarie Bank Limited Vs. Shilpi Cable Technologies Limited*[1] brought clarity to two crucial issues pertaining to Insolvency and Bankruptcy Code 2016 ("Code").

The first question was whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory. Section 9 (3) (c) requires that while initiating the insolvency proceeding under the Code, the operational creditor shall submit a certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of the unpaid operational debt by the corporate debtor. The second question was whether a demand notice of an unpaid operational debt could be issued by a lawyer on behalf of the operational creditor.

Both these procedural matters resulted into dismissal of many matters despite the existence of valid grounds for initiation of insolvency proceedings. Regarding the first issue, financial institutions are often hesitant to issue such a certificate especially in matters where there exist multiple transactions between operational creditor and operational debtor. Under such situations, it would be difficult for financial institutions to determine whether payment had been received on a particular invoice. Further, this requirement also resulted into a major obstacle for foreign creditors to invoke the Code against their debtors in India in spite of the fact that the Code expressly allows for the same. The is due to the reason that generally foreign creditors don't have bank accounts in India and only Indian banks and financial institutions fall under the definition of 'financial institution' under the Code. A certificate from foreign bank will not satisfy the criteria under the Code. Similarly, the second issue that lawyers can't issue demand notice on behalf of their client also resulted dismissal of otherwise genuine matters only due to this ground.

Regarding the first issue, the Supreme Court held that the requirement under Section 9 (3) (c) regarding the certificate from the financial institution is not a condition precedent to trigger the insolvency process under the Code but can only be considered as a piece of evidence. The Court went on to add that the important condition precedent to trigger the Code is occurrence of a default, which can be proved by means of other documentary evidence also and not necessary only through certificate from financial institution.

Since the matter was related to a foreign operational creditor, the Court categorically stated that the Code allows foreign operational creditor to invoke the Code despite the fact that such operational creditor may or may not have a bank account in India. Imposing a condition precedent that such foreign creditor, who does not have bank account in India, shall bring a certificate from Indian financial institutions would amount to imposing impossible compliance. Such condition precedent with impossible compliance cannot be a threshold to invoke the process of the Code.

The Court interpreted provisions of Section 8, Form 3 and Form 5 of the Code, while answering the second issue, and concluded that lawyer is entitled to issue demand notice on behalf of his client. The Court observed that Section 8 of the Code speaks of the language that the operational creditor 'delivering' a demand notice, instead of 'issuing' demand notice. The word 'delivery' signifies that the Code envisages authorized agent of the operational creditor to issue demand notice on behalf of the creditor. If the intention of the lawmaker were that operational creditor himself should issue demand notice, then they would have used the word 'issued' instead of 'delivery'. After concluding that that authorized agent can issue demand notice, the Honorable Court analyzed the wordings of Form 3 and Form 4; both are Forms under the Code, which need to be signed by the operational creditor himself or person acting on behalf of the operation creditor. Both the Forms require that the person signing on behalf of the operation creditor has to specify '*his position with or in relation to the operational creditor'.* The Court observed, *"a 'position with' the operational creditor would perhaps be a position in the company or firm of the operational creditor, but the expression 'in relation to' is significant.*" The word 'in relation to' is very wide and it includes position outside or indirectly related to operation creditor. Hence, both authorized agent and lawyer can issue demand notice on behalf of client.

The judgment lays rest to some procedural obstacles, which have impeded the practical implementation of the Code. As rightly quoted in the judgment, '*it is well settled that procedure is the handmaid of justice and a procedural provision cannot be stretched and considered as mandatory, when it causes serious general inconvenience*."

[1] Civil Appeal No.15135 OF 2017