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MACQUARIE BANK LTD. v. SHILPI CABLE TECHNOLOGIES LTD. – SUPREME COURT OF INDIA (CIVIL APPEAL NO.15135 OF 2017)

Ratio 1 - A lawyer on behalf of the operational creditor can issue a demand notice of an unpaid operational debt under Section 8 of the Code.

Ratio 2 - Requirement of Bank Certificate under Section 9(3)(c) of the Code is not mandatory but only a directive in relation to an operational debt.

FACTS:

Appellant entered into a contract of sale and purchase of copper rods with respondent.

The transaction resulted in an outstanding amount at the end of the Respondent.

This led the appellant to issue a statutory notice under Sections 433 and 434 of the Companies Act, 1956. The respondent replied to the notice and denied the fact that there was any outstanding amount.

After the enactment of the Code, the appellant issued a demand notice through their advocate under Section 8 of the Code. The respondent again denied to such an outstanding.

Finally, the appellant initiated the insolvency proceedings by filing a petition under Section 9 of the Code.

The NCLT rejected the petition holding that Section 9(3)(c) of the Code was not complied with as no Bank Certificate accompanied the application filed under Section 9 of the Code.

ISSUES:

1. Whether a demand notice, under Section 8 of the code, of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor?
2. Whether, in relation to an operational debt, the provision under Section 9(3) (c) of the Code is mandatory?



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In NCLT:

The NCLT rejected the matter on the ground that a Certificate from the

financial institution is mandatory under Section 9(3)(c) of the Code.

In NCLAT:

The NCLAT upheld the decision of the NCLT for rejecting the petition on the ground of lack of Certificate under Section 9(3)(c) of the Code.

It further held that an advocate/lawyer or chartered accountant or a company secretary or any other person in the absence of any authority by the 'operational creditor', **and if such a person does not hold any position with or in relation to the 'operational creditor', cannot issue notice under Section 8 of the Code, which otherwise can be treated only as a lawyer's notice/ pleader's notice as distinct from notice under Section 8 of the Code.**

Aggrieved by the order of the NCLAT the appellant appealed to the Supreme Court of India.

In SUPREME COURT:

The Supreme Court overruled the NCLAT's order and held that a lawyer on

behalf of the operational creditor can issue a demand notice of an unpaid operational debt.

When section 30 of the Advocate Act and Section 8 and 9 of the Code are read along with Adjudicatory authority rules and forms, it would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

The court held that "*the expression 'an operational creditor may on the occurrence of a default deliver a demand notice...' under Section 8 of the code must be read as including an operational creditor's authorized agent and lawyer, as has been fleshed out in Forms 3 and 5 appended to the Adjudicatory Authority Rules.*"

The Supreme Court also held that the provision contained in Section 9(3)(c) of the Code is not mandatory for initiating insolvency proceedings. The court looked into the expression '**shall**' given in Section 9(3). As per the court, this would amount to a situation wherein serious general inconvenience would be caused



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to innocent persons and therefore they concluded **that Section 9(3)(c) would have to be construed as being directory in nature.**

The expression “confirming” makes it clear that this is only a piece of evidence, albeit a very important piece of evidence, which only “confirms” that there is no payment of an unpaid operational debt. This becomes clearer when we go to sub-clause (d) of Section 9(3) which requires such other information as may be specified has also to be furnished along with the application.

The Court finding also dealt with the following minute details under Form 5:

When Form 5 is perused, it becomes clear that Part V thereof speaks of particulars of the operational debt. There are 8 entries in Part V dealing with documents, records and evidence of default.

Item 7 of Part V is only one of such documents and has to be read along with Item 8, which speaks of other documents in order to prove the existence of an operational debt and the amount in default.

Further, annexure III in the Form V also speaks of copies of relevant accounts kept by banks/financial institutions maintaining accounts of the operational creditor, confirming that there is no payment of the unpaid operational debt, only “if available”.

This would show that such accounts are not a pre-condition to trigger the Code. Further, if such accounts are not available, a certificate based on such accounts cannot be given.

The important condition is an occurrence of a default which can be proved by means of other documentary evidence. This piece of evidence would be sufficient to demonstrate that such debt is due and that default has taken place, as may have been admitted by the corporate debtor.

Conclusion

The Apex Court held that:

- i. A demand notice of an unpaid operational debt under Section 8 of the Code can be issued by a lawyer on behalf of the operational creditor.**
- ii. The Requirement of Bank Certificate under Section 9(3) (c) of the code is only directive rather than compulsory in relation to an operational debt.**