

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.301
C.P.(IB)/219(AHM)2024

Order under Section 9 IBC

IN THE MATTER OF:

M & B Engineering Limited
V/s
Mascot Suryapur LLP

.....Applicant

.....Respondent

Order delivered on: 28/06/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER
(Hybrid Mode)

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, AHMEDABAD**

CP/IB/219/AHM/2024

(An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the Matter of:

M/s M&B Engineering Limited

Through its Senior Manager and Authorized Signatory
Mr. Dharmendra Bagbai,

Registered Office:

MB House, 51 Chandroday Society,
Stadium Road,
Ahmedabad – 380014.

... Applicant/Operational Creditor

VERSUS

Mascot Suryapur LLP

Registered office:

Block No. 86B,
Resi: Puna Gam Village,
Makhinga, Taluka Palsana,
Surat, Gujarat – 394315.

...Respondent/Corporate Debtor

Order pronounced on: 28.06.2024

CORAM:

Mr. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)

Mr. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

APPERANCE:

For the applicant: Mrs. Tanya Shah, Advocate.

ORDER

1. The present application is filed on 03.06.2024 by M/s. M&B Engineering Limited (hereinafter referred to as “**Operational Creditor**”) against the Respondent M/s. Mascot Suryapur LLP (hereinafter referred to as ‘**Corporate Debtor**’) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “**IBC, 2016**”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as “**IB (AAA) Rules, 2016**”) for initiation of Corporate Insolvency Resolution Process (**CIRP**), to appoint Interim Resolution Professional (hereinafter referred to as “**IRP**”) and declare the moratorium for having defaulted in payment of the operational debt of **Rs.1,21,27,895/-** along with interest. The date of default is stated to be **07.03.2023**.
2. A perusal of Part-I of the Form-5 reveals that this application is on behalf of M/s. M&B Engineering Limited through its Senior Manager and Authorized signatory Mr.

Dharmendra Bagbai and to that effect the Certified True Copy of the Board Resolution is attached with the petition as **“Annexure – 2”**.

3. On perusal of Part-II of the Form-5, it reveals that the Corporate Debtor is one M/s. Mascot Suryapur LLP having LLPIN: AAX-7637. The Corporate Debtor was incorporated on 13.07.2021 and having registered office as mentioned in the cause title.
4. On perusal of Part-III of the Form-5 it reveals that Operational Creditor has not named any IRP under section 13 (1)(c) of the Code to act as Interim Resolution Professional (**IRP**).
5. On perusal of Part-IV of the Form-5 it reveals that total operational debt as claimed by the Operational Creditor is Rs. 92,29,776/- and an interest of Rs. 29,98,119/-.
6. The Operational Creditor is engaged in business of design, manufacture, supply and erection of pre-engineering building structures.

7. The Operational Creditor has a sister concern namely Phenix Building Solutions Pvt. Ltd. which is having common directors and common shareholders with the Operational Creditor.
8. The Corporate Debtor was desirous of setting up an industrial unit at Makhinga, Surat in Gujarat and approached the Operational Creditor vide email dated 28.04.2021 inquiring for the same project. A copy email dated 28.04.2021 is attached herewith as **“Annexure – 3”**.
9. In response to the said inquiry the Operational Creditor through Phenix Building Solutions Pvt. Ltd. Submitted a commercial offer to present Corporate Debtor design, manufacture, supply and erection of pre-engineering building/industrial unit vide email dated 06.05.2021. The copy of the email dated 06.05.2021 is attached herewith as **“Annexure – 4”**.
10. In furtherance of same and upon various changes and increased scope of work the Operational Creditor through its division Phenix Construction Technology submitted the

final financial quote vide email dated 29.06.2021 and in reply to that the Corporate Debtor issued Letter of Intent vide email dated 30.06.2021. The copy of email dated 06.05.2021 and 29.06.2021 is attached herewith as **“Annexure – 7 & 8”**.

11. The Corporate Debtor i.e. M/s. Mascot Suryapur LLP issued a purchase order dated 28.07.2021 in favour of the Operational Creditor and in furtherance of that the Corporate Debtor issued a revised the purchase order due to change in certain circumstances and hence issued a Final Purchase Order dated 06.01.2022 bearing purchase order No. MSLLP/2021-22/011(R2) which was priced at Rs. 9,72,96,539.00 and also a work order on 06.01.2022 bearing work order No. MSLLP/2021-22/012 for the total price of Rs. 93,21,410/-. The copy of Final Purchase Order and work order dated 06.01.2022 is attached hereto as **“Annexure – 9”**.

12. Pursuant to the allocation of the work, the Operational Creditor completed both the supply and erection of the pre-engineered building in the timely manner under the

supervision and up to the satisfaction of the Corporate Debtor. The Corporate Debtor has not disputed the said work done by the Operational Creditor in any aspect whether be quantity, quality, technical specifications, timely performance and erection of the prefabricated building.

13. The Operational Creditor has issued various invoices from time to time and the same were accepted by the Corporate Debtor without raising any dispute as to the invoice or the amount.

Sr. No.	Stage for which invoices were issued	No. of invoices	Amount
1.	Supply of pre-engineered building	53	9,73,90,511.00
2.	Erection of pre-engineered building	3	93,21,410

The copy of the three invoices dated 22.04.2022, 17.05.2022 and 07.03.2023 is attached hereto as **“Annexure -10”**.

14. The Operational Creditor operational creditor issued the Completion certificated on 15.03.2023 in favour of the

Corporate Debtor. The copy of the completion certificate dated 15.03.2023 is attached hereto as **“Annexure – 11”**.

15. The Corporate Debtor had decided to make the payment as and when the invoices are raised and accepted and following is the status of the outstanding payment in the lieu of the invoices so issued.

Sr. No.	Amount of Invoices	Payment Received	Outstanding's
1.	9,73,90,511.00	9,01,67,564.00	72,22,947.00
2.	93,21,410.00	Nil, Only 91,634.00 paid in lieu of TDS	92,29,776.00

16. The Operational Creditor operation creditor addressed various letter dated 20.06.2023 to the Corporate Debtor to clear the outstanding dues and pursuant upon non-payment the Operational Creditor issued various reminders dated 12.07.2023, 28.07.2023, 17.08.2023 and 09.11.2023 to which the Corporate Debtor didn't respond to. The copy of letters dated 20.06.2023, 12.07.2023, 28.08.2023, 17.08.2023 and 09.11.2023 are attached hereto as **“Annexure – 14”**.

17. The Operational Creditor states that they have issued a legal notice dated 30.11.2023 for demanding the payment of outstanding dues. And the same notice was delivered to the Operational Creditor at the registered office as per the record available with the Ministry of Corporate Affairs and the Corporate Office of the Corporate Debtor. The copy of the Legal Notice dated 30.11.2023 is attached hereto as **“Annexure – 15”**.

18. In pursuant of the issue of the legal notice no payment of the outstanding dues were made by the Corporate Debtors and hence the Operational Creditor had issued a Demand Notice dated 30.12.2023 in accordance with the provision of section 8 of the Insolvency and Bankruptcy Code 2016. The said demand notice was addressed in the following manner:

Sr. No.	Particulars
1.	Email address of Mascot Suryapur LLP as available in the records of the Ministry of the Corporate Affairs.
2.	The Registered Office of Mascot Suryapur LLP as available in the records of the Ministry of the Corporate Affairs.

3.	Head office of Mascot Suryapur LLP as recorded in the website of Mascot Suryapur LLP.
----	---

The said notice was delivered by e-mail and at the head office of Mascot Suryapur LLP.

19. The notice which was addressed to the Registered Office of Mascot Suryapur LLP, was returned stating the reason as **“such office is not in possession of Mascot Suryapur LLP anymore and it is occupied by some other company”**. The copy of the demand notice dated 30.12.2023 and the proof of email service and proof of service through speed post is attached hereto as **“Annexure – 17”**.
20. Thereafter, the Operational Creditor filed an application before the Hon’ble NCLT, Ahmedabad for initiating the insolvency proceeding against the Corporate Debtor Mascot Suryapur LLP which was numbered as CP(IB)/87/2024. The same application was withdrawn by the Operational Creditor on grounds of technical defects with a liberty to file the matter a fresh. The copy of the order dated 23.02.2024

passed in CP(IB)/87/2024 is attached here to as **“Annexure – 18”**.

21. The Operational Creditor resorted to issue a fresh Demand Notice dated 18.03.2024 under section 8 of the Insolvency and Bankruptcy Code 2016 for total operational unpaid debt of Rs. 1,21,27,895.00. The said demand notice was addressed in the following manner:-

Sr. No.	Particulars
1.	Email at corp@identize.com as available in the records of the Ministry of the Corporate Affairs.
2.	Email at dipak@mascotinfra.com as given to NeSL in for issuance of Form-D.
3.	The Registered Office of Mascot Suryapur LLP as available in the records of the Ministry of the Corporate Affairs.
4.	Head office of Mascot Suryapur LLP as recorded in the website of Mascot Suryapur LLP.

22. The Operational Creditor states that the Demand Notice was successfully served through Email and at the head office of the Mascot Suryapur LLP. But the demand notice which was addressed to the Registered Office of Mascot Suryapur LLP, was returned with an endorsement ‘that the company

has refused to accept service'. The copy of the demand notice dated 18.03.2024 and the proof of email service and proof of service through speed post is attached hereto as **“Annexure – 19”**.

23. Despite the above, the Corporate Debtor has neither repaid the amount of the unpaid operational debt so claimed, nor has given any notice of dispute as per section 8(2) of the Insolvency and Bankruptcy Code, 2016. And hence the Operational Creditor has resorted to file the present petition.

JUDGEMENTS RELIED ON BY THE OPERATIONAL CREDITOR:

24. The counsel of the Operational Creditor has relied on the judgement of Hon'ble NCLAT passed in the matter of ***Ashok Agarwal VS. Amitex Polymers Private limited*** in *Company Appeal (AT) (INS) No. 608 of 2020*. The relevant Para so relied by the counsel are quoted below:

“33. Be it noted that in the decision of Nasha Toys Pvt Ltd. Versus Harshad Corporation [2002] 110 CompCas 324 Gauhati, it is held that if notices under section 434(1)(a) of the Companies Act is received back with the unserved remarks “addressee left”, it amounts to sufficient service if the notice was sent to the registered office.

35. In view of the fact that service of notice under section 8 of the 'The Insolvency and Bankruptcy Code 2016', Respondent/Company at its official e-mail ID as available in the web site portal is a valid service, it is

held by this Tribunal to be a valid and proper Respondent/Corporate Debtor, in the eye of law service upon the.”

25. The counsel of the Operational Creditor has relied on the judgement of Hon’ble NCLAT, New Delhi passed in the matter of ***Bijay Pratap Singh VS. Unimax International*** in *Company Appeal (AT) (INS) No. 1273 of 2019*. The said judgement is referred to show the sufficiency of service under Rule 5 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) read with Section 27 of General Clauses act and Section 20 of the Companies Act 2013. The relevant Para so relied by the counsel are quoted below:

“35. The Learned Counsel for the Appellant forcefully submits that the application of the 1st Respondent/ ‘Operational Creditor’ claims that notice was returned as ‘unclaimed’ and if that be the case, then the Demand Notice was not delivered as per Rule 5(ii) of the Insolvency and Bankruptcy (application to Adjudicating Authority) Rules, 2016. Furthermore, it is the crystalline stand of the Appellant is that the Adjudicating Authority wrongly assumed that service was effected and further that it is an admitted fact that no notice through electronic mail’ was delivered and notice by hand was given and the notice claimed to have been given was returned as unclaimed. Therefore, the impugned order of the Adjudicating Authority was passed on wrong premises and the same is liable to be set aside, in the interest of justice.

...37. One of the essential features for consideration of an Application under section 9 of I & B Code is Service of notice. A mere perusal of the paragraph 11 of the Impugned Order passed by the Adjudicating

Authority patently indicates that a perusal of the pleadings showed that the proper 'service' was effected on the registered office of the 2nd Respondent/Corporate Debtor situated at D-410, Pocket 16, Sector VII, Rohini, New Delhi 110085. Also, it was observed by the Adjudicating Authority that there was no change in the address of the 'Corporate Debtor' in the 'Ministry of Corporate Affairs Record' which also shows the same address. Even the Resolution passed by the 'Corporate Debtor' on 27-3-2019 had shown the same 'Registered Office' address. Therefore, the Adjudicating Authority had very rightly adverted to Section 27 of the General Clauses Act and Section 20 of the Companies Act, 2013 read with Rule 35 of the Companies (Incorporation) Rules, 2014 in and by which the 'service' is to be effected on the 'Registered Office' address and that process was carried out. Therefore, this Tribunal holds that it was 'Sufficient service' of the 'Demand Notice'. As such, the plea taken on behalf of the Appellant that there was no service effected upon the 'Corporate Debtor' is not acceded to by this Tribunal. The other plea taken that there was no service by hand or electronic mail service to the 'Corporate Debtor' relegates to the background and it pales into insignificance because of the fact that failure/omission to effect service by hand or electronic mail service is not fatal to the instant case."

26. The Order of Hon'ble NCLT, Delhi in the matter of **Lion Services Limited. Vs. Aura Management Services Private limited** in CP(IB)/641/2018 The relevant Para so relied by the counsel are quoted below:

"15. Another argument raised is that the mandatory provisions of Section 9(5)(ii)(c) of the Code have not been complied with in as much as the invoice and the notice for payment under Section 8 of the Code has not been received. The aforesaid objection would not require any detailed consideration because a perusal of the pleadings shows that the service has been effected on the registered office situated at 8-C, Hansalaya Building, Barakhamba Road, New Delhi. The argument

raised is that the aforesaid address has undergone change and the petitioner was fully aware of the change of address which was disclosed in para 8 in reply filed by the Corporate Debtor before the Executing Court on 15.11.2017. Such an argument would pale into significance because there is no change in the address of the MCA record which continues to be 8-C, Hansalaya Building, Barakhamba Road, New Delhi. Moreover, the resolution passed by the Corporate Debtor on 30.08.2018 (page 28) shows the registered office address which is 8-C, Hansalaya Building, Barakhamba Road, New Delhi. According to Section 27 of the General Clauses Act and Section 20 of the Companies Act, 2013 read with Rule 35 of the Companies (Incorporation) Rules, 2014 the service has to be effected on the address of the registered office which has been done. The insistence of Mr. Gupta that the service of invoices and notice under Section 8 of the Code should have been effected on the change address as disclosed in the affidavit filed by Mr. Karunesh Manchanda (page 20) would not be acceptable in view of Section 27 of the General Clauses Act and Section 20 of the Companies Act, 2013 read with Rule 35 of the Companies (Incorporation) Rules, 2014 therefore, the argument lacks substance and the same is hereby rejected.”

27. The counsel of the Operational Creditor has relied on the judgement of Hon’ble NCLAT, New Delhi passed in the matter of ***Alloysmin Industries Vs. Raman Casting (P.) Ltd.*** in *Company Appeal (AT) (INS) No. 684 of 2018*. The said judgement is referred to show that the demand notice U/s 8 of the IBC on the Corporate Debtor either on its registered office or its corporate office (head office) is valid service of

notice and an application U/s 9 of the IBC is maintainable

The relevant Para so relied by the counsel are quoted below:

"1. The Appellant 'M/s Alloysmin Industries' filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for initiation of Corporate Insolvency Resolution Process against Respondent - 'M/s Raman Casting Private Limited. The Adjudicating Authority by impugned order dated 17th September, 2018 rejected the application under Section 9 on the ground that the demand notice under Section 8 of the Code was duly sent through courier to the registered office address but the same was returned to the Applicant with remark "S/A RTO".

2. Learned counsel appearing on behalf of the Appellant submits that the demand notice under Section 8 was issued to the Respondent in the Registered Office at House No. 275, Village Dera, South West Delhi, Delhi 110074, as also at its Industrial Area Office at Plot No. G1-267-68, 279-80, RIICO Industrial Area, Khuskhera, Bhiwadi, Rajasthan. Though the demand notice issued under Section 8 in the Registered Office address of 'M/s Raman Casting Private Limited' was returned with remark "S/A RTO", the demand notice under Section 8 issued at Industrial Area Office was duly served on the Corporate Debtor,

4. From the end of paragraph 3 of the impugned order dated 17th September, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Bench III, we find that the Adjudicating Authority noticed that the demand notice was sent by the Appellant to the Corporate Office of the Respondent, which was duly received by the Respondent. The corresponding dispatch proofs and tracking report was placed by the Appellant but inspite of the same the Adjudicating Authority rejected the application under Section 9 on the ground that notice was not served on the Registered Office of the Respondent.

6. In view of aforesaid facts we hold that the Adjudicating Authority erred in rejecting the application under Section 9 on wrong presumption that demand notice is to be served on the Registered

Office of the Corporate Debtor and not on Corporate Office (Industrial Area Office herein). If the demand notice under Section 8 (1) is served on Corporate Debtor either on its Registered Office or its Corporate Office, it should be treated to be valid service of notice under Section 8 and application under Section 9 on failure of payment, if filed after 10 days, is maintainable.”

28. The counsel of the Operational Creditor has relied on the judgement of Hon’ble High Court of Delhi passed in the matter of **Hotline Teletubes & Componenets Limited Vs. A.S.Impex Limited** in Company Petition No. 408 of 2001. The said judgement is In case there is a change in the registered office of the corporate debtor, after issuance of the demand notice on the previous registered office address as per Ministry of Corporate Affairs Record, service of Demand Notice is valid and legal. The relevant Para so relied by the counsel are quoted below:

“5. Statutory notices under Section 433 of the Companies Act were sent to the respondent on 30.10.2001. The said notice was received back from the post office with the remarks "addressee left". Another copy of the notice was dispatched to the respondent through registered A.D. post on 6.11.2001. Same also received back unserved with similar remarks. With the aforesaid statement and allegations, the present petition was filed in this Court. The respondent filed a reply to the company petition raising various defences to the aforesaid claims of the petitioner. One of the grounds that is raised is that the statutory notice under Section 433 is not served on the respondent in terms of the provisions of Section 433 and 434 of the

Companies Act and, therefore, the present proceeding is not maintainable. The respondent has also claimed that it has a counter claim against the petitioner on account of overcharging for which the respondent has already filed a compensation application under Section 12 B of the Monopolies and Restrictive Trade Practices Act before the MRTP Commission against four manufacturers of picture tubes including the petitioner alleging that these four manufacturers including the petitioner had formed a cartel and had caused wrongful loss to the respondent by selling the picture tubes at a higher price. Another defence that is raised is that the petitioner has also filed a summary suit for recovery of the amount claimed against the respondent in which the respondent has already filed an application praying for leave to defend and, therefore, there is a serious dispute regarding liability of the respondent and a bona fide dispute having been raised by the respondent, the winding up petition cannot be allowed.

6. *I have considered the rival submissions of the counsel appearing for the parties in support of the aforesaid contentions which are raised in their pleadings. The following facts, however, emerge and are proved from the pleadings of the parties and submissions of their counsel. It is not disputed that the petitioner made supplies for the aforesaid amount as stated in the petition. That the respondent issued a balance confirmation note dated 17.3.2000 and again on 24.10.2001 which is not disputed and cannot be so done in view of the fact that the said balance confirmation is duly signed and stamped by the respondent. The registered office of the respondent company was situated at B- 3/31, Azad Apartments, Aurobindo Marg, New Delhi 110 016. The registered notices were sent by the petitioner to the aforesaid address on 30.10.2001 and on 6.11.2001 as indicated from the records placed on record. The case of the respondent is, however, that the same is not the registered office of the respondent company as the respondent shifted its office to 57, Kalu Sarai, Hauz Khas, New Delhi with effect from 11.10.2001. The said fact of change of the address of the registered office of the respondent was, however, brought to the notice and filed with the*

Registrar of Companies by the respondent only on 7.11.2001 when it submitted the statutory form No. 18. It is also apparent on the face of the records that the cheques were issued by the respondent as against the outstanding balance which were dishonoured by the bank on their presentation.

7. *The first objection that is raised is with regard to the maintainability of the company petition on the ground that the statutory notice as required under the provisions of the Companies Act was not served on the respondent company. (The documents placed on record, however indicate that the petitioner sent the statutory notices to the respondent at the address at which the registered office of the respondent was located) But in the meantime the respondent changed the address of its registered office. Therefore, the statutory notices sent by the petitioner were not served on the respondent company. It is stated by the counsel appearing for the respondent that the respondent gets 30 days' time to take steps for intimating the change of address of its registered office to the Registrar of Companies. Section 146(2) of the Companies Act provides for 30 days' time to a company to inform the Registrar of the Companies to submit the statutory form intimating change of the address of the registered office of the company. The registered office of the respondent company was changed with effect from 11.10.2001 and on 7.11.2001, i.e. within 30 days, the respondent company filed form No. 18 with the Registrar of Companies. There is no doubt that the respondent company fully complied with the legal requirements having submitted form No. 18 within 30 days as prescribed by Section 146(2) of Act as permissible period for intimation from the date of the change of the address of the registered office of the registered company. However, it is also proved that the petitioner could not have known about the change of the address as the address of the respondent even after the change continued to be at Aurobindo Marg in the records maintained by the Registrar when the aforesaid two statutory notices were issued by the petitioner. The intimation about change of address by the respondent company was filed with the Registrar of Companies only on 7.11.2001 and*

before the said date the registered notices were sent by the petitioner. The petitioner could not, therefore, had any knowledge about change of the registered office of the respondent company as in the official records the same address continued to exist. Therefore, sending of the notices by the petitioner at the registered office of the respondent in terms of the official records has to be held to be legal and valid and the present proceeding cannot be held to be not maintainable because the same could not be served on the respondent company as it in the meantime changed its office. There is full compliance by the petitioner as required by the provisions of Sections 433 and 434 and the petition cannot be dismissed on the aforesaid ground as alleged by the respondent.”

29. The counsel of the Operational Creditor has relied on the judgement of Hon'ble High Court of Bombay passed in the matter of **Cavendish Shipping Limited V/s. Polaris Marine Management Pvt. Ltd. & Ors.** In Company Petition No. 723 of 2008. The relevant Para so relied by the counsel are quoted below:

“33. Before concluding, it would be necessary to advert to the submission that service of the statutory notice was not effected at the Registered Office of the Company. The requirement of serving a statutory notice under Section 434(1)(a) arises when the deeming fiction that is created by the provision is sought to be pressed in aid. The deeming fiction under Section 434(1)(a) is, however, not exhaustive of the power of the Company Court if a Company is unable to pay its debts within the meaning of clause (e) of Section 433. The effect of Section 434(1)(a) is to create a deeming fiction that the Company is unable to pay its debts if a creditor has served upon the Company by registered post or otherwise a demand under his hand requiring the Company to pay the sum due and the Company

has neglected to pay the sum or to secure or to compound it for a period of three weeks. In Tailors Industrial Flooring Ltd. vs. M&H Plant Hire (Manchester) Ltd. the Court of Appeal in the U.K. held:

"There is no requirement that a creditor must serve a statutory demand. The practice for a long time has been that the vast majority of creditors who seek to petition for the winding up of companies do not serve statutory demands. The practical reason for that is that if a statutory demand is served, three weeks have to pass until a winding up petition can be presented. If, after the petition has been presented, a winding up order is made, the winding up is only treated as commencing at the date of the presentation of the petition; thus, if the creditor takes the course of serving a statutory demand, it would be giving the company an extra three weeks' grace in which such assets as the company may have may be dissipated in attempting to keep an insolvent business afloat, or may be absorbed into the security of a debenture holder bank. So there are practical reasons for not allowing extra time, particularly where commercial conditions and competition require promptness in the payment of companies' debts so that the creditor companies can manage their own cash flow and keep their own costs down. The first limb is that if a debt is due and an invoice sent and the debt is not disputed, then the failure of the debtor company to pay the debt is itself evidence of inability to pay.

34. That apart, in the present case, it has been averred in the Company Petition that the statutory notice was addressed to the Registered Office of the Company as stated in the records of the Registrar of Companies, Maharashtra (ROC). The Petitioner obtained a certified copy from the record of the ROC with regard to the registered office address of the Company. However, the notices having been remitted on the address of the Registered Office as shown in the record of the ROC, all notices came back with the remark "not known". The affidavit in reply does not proceed on the basis that the address mentioned in the statutory notice is not the Registered Office of the Company. In a judgment of the Delhi High Court in Hotline Teletubes & Components Ltd. v. A.S. Impex Ltd., Dr.

Justice Mukundakam Sharma (as he then was) dealt with a case where a statutory notice addressed to the Registered Office of the Company was returned with the remark that the addressee had left the premises. The Delhi High Court held that the documents which were placed on the record indicated that the Petitioner had sent the statutory notices to the Company at the address at which the Registered Office was located. In the meantime, the Company changed the address of its Registered Office as a result of which the statutory notices were not served. The Court held that sending of the notices by the Petitioner at the Registered Office of the Company in terms of the official records had to be regarded as legal and valid and the proceedings could not be held to be not maintainable because the Company had, in the meantime, changed its office. There is, therefore, no merit in the submission in regard to the maintainability of the Petition for want of a statutory notice under Section 434(1)(a).”

OBSERVATION OF THE TRIBUNAL:

30 It is noted that the Operational Creditor had filed earlier one application having no. **CP(IB)/87/2024** against the same Corporate Debtor for the initiation of the Corporate Insolvency Resolution Process of the Corporate Debtor i.e, M/s. Mascot Suryapur LLP under section 9 of the Insolvency and Bankruptcy code, 2016. In the above matter the demand notice under section 8(1) was issued by the operational creditor on 30.12.2023 to the registered office of the corporate debtor which was returned stating that “the demand notice so served on Mascot’s registered address as

per MCA records was returned for the reason that “**such office is not in possession of Mascot anymore and it is occupied by another company.**” The said petition was hence withdrawn by the Operational Creditor vide order dated 23.02.2024.

31 In the present case it is noted that the Demand Notice under section 8(1) was issued by the operational creditor for a debt amounting to Rs. Rs.1,21,27,895.00 at the following address:-

Sr. No.	Particulars
1.	Email ID <u>corp@identize.com</u> as available in the records of the Ministry of the Corporate Affairs.
2.	Email ID dipak@mascotinfra.com as given by the Operational Creditor to NeSL in for issuance of Form-D.
3.	The Registered Office of Mascot Suryapur LLP as available in the records of the Ministry of the Corporate Affairs.
4.	Head office of Mascot Suryapur LLP as recorded in the website of Mascot Suryapur LLP.

32. According to the Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which

provides mode for service of Demand Notice by the Operational Creditor. The said rule is hereby reproduced:-

“Demand notice by operational creditor.

(1) An operational creditor shall deliver to the corporate debtor, the following documents, namely.-

(a) A demand notice in Form 3; or

(b) A copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) At the registered office by hand, registered post or speed post with acknowledgement due; or

(b) By electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

33. The Demand Notice dated 18.03.2024 (Annexure-19) is stated to be delivered to the head office via RPAD as well as through e-mail. But the service of Demand Notice dated 18.03.2024 at the **Registered Office** was not affected successfully in terms of **Rule-5(2)(a)** of the I&B (AAA) Rules, 2016. Because, the Demand Notice dated 18.03.2024 which was addressed to the Registered Office of

Respondent/Corporate Debtor as per MCA record, was returned un-delivered as admittedly Registered Office is not in possession of the Respondent/Corporate Debtor and it is occupied by another company which reflects from the previous Service report of Previous Demand Notice dated 30.12.2023 (Annexure-17).

34. It is noted that in the earlier case filed by the Operational Creditor i.e, CP(IB)/87/2024 the said demand notice was issued by the Operational Creditor to the Corporate Debtor at the same registered office address and the said notice was returned with a remark which is reproduced as follows:

“The demand notice so served on Mascot’s registered address as per MCA records was returned for the reason that such office is not in possession of Mascot anymore and it is occupied by another company.”

The above remark with which the said demand notice is returned clearly shows that the company was not in existence at that address and the Operational Creditor having the knowledge of same decided to issue the demand notice dated 18.03.2024 on the same address itself.

35. Hence in our opinion, when the Operational Creditor was aware that the company does not exist at that address as it was stated in the remark through which the notice was returned, then in that case the Operational Creditor should have chosen some alternative mode for the service of the demand notice under section 8(1) of the Insolvency and Bankruptcy Code 2016 and hence in accordance with the facts of this case the judgement of Hon'ble High Court of Delhi passed in ***Hotline Teletubes & Componentes Limited Vs. A.S.Impex Limited*** in ***Company Petition No. 408 of 2001*** is not to be relied upon.

36. Further the judgement passed by Hon'ble High Court of Bombay in the matter of ***Cavendish Shipping Limited V/s. Polaris Marine Management Pvt. Ltd. & Ors. In Company Petition No. 723 of 2008***, cannot be relied upon in the present case, because in the present case the Operational Creditor was aware that the operational creditor is not operating at the address of the registered office as the demand notice issued dated 30.12.2023 was returned for a reason that the said office is no more in the possession of

the operational creditor but it is occupied by some other company.

37. The counsel for the Operational Creditor stated that they have also sent a demand notice under section 8(1) on the registered e-mail address i.e. corp@identize.com as available in the records of the Ministry of the Corporate Affairs as well as to one Mr. Dipak i.e. dipak@mascotinfra.com and stated that he is a Key Managerial Personal of the Corporate Debtor. The copy of the e-mail through which the notice is served is produced at “**Annexure 19**” at pg. no. 234.

Hon’ble NCLAT, New Delhi has laid down in the case of ***Jyoti Strips Private Limited Vs. JSC Ispat Private Limited in Company Appeal (AT) (INS) No. 775 of 2020***, the relevant para of the said judgement is produced below:

“12. We have perused the ‘Master Data’ relied upon by the Appellant Counsel and also the subject email and note that there is no documentary evidence on record to establish that the email was sent as per the provisions mandated under Rule 5 of the Insolvency and Bankruptcy Rules, 2016. Hence, we concur with the findings given by the Learned Adjudicating Authority with respect to the fact that the Appellant herein had nowhere mentioned in the Application to whom the email was addressed to as it is clearly stipulated in Rule 5(1) of the Insolvency and Bankruptcy Rules 2016, that the notice shall be delivered by electronic mail service to a whole time Director or Designated

Partner or Key Managerial Personnel, if any, of the Corporate Debtor.”

In accordance with this judgement, in the present case it is noted that the body of the e-mail so addressed does not provide the designation of the person to whom the said notice was addressed. Further, no evidence or material of Corporate Debtor is placed on record to in support of alternative alleged e-mail address i.e. dipak@mascotinfra.com. as the said Email ID as only given by the Operational Creditor to NeSL in for issuance of Form-D. Hence, in our opinion service of Demand Notice through the e-mail on either the registered e-mail address i.e. corp@identize.com or on e-mail address i.e. dipak@mascotinfra.com cannot be considered as a valid and effective service as per rule **5(2) (b)** of I&B (AAA) Rules, 2016.

38. The counsel for the Operational Creditor had stated that they have duly served the Demand Notice under section 8(1) of the Insolvency and Bankruptcy Code 2016 to the operational creditor at A-602 Empire Business Hub, Science

City Road, Ahmedabad – 380006. This address is alleged to be the address of the head office of the operational creditor. The counsel for the Operational Creditor had relied on the website of the operational creditor for obtaining the address of the operational creditor. But no website or screenshot or any other evidence is placed on record to prove that such website is the original website of the operational creditor and that such a head office is actually the head/corporate office of the operational creditor.

39. Further upon perusal it is found that one Reminder dated 09.11.2023 was alleged to have sent by the operational creditor to the corporate debtor through Registered A.D. at the alleged head/corporate office of the corporate debtor. However, there is no proof on record to suggest the said communication was ever served upon the corporate debtor. The said Reminder dated 09.11.2023 is produced at “**Annexure 14**” at pg no. 189. The record of the Ministry of Corporate Affairs which is produced at Pg. no. 21 in “Annexure 1” provides for the address of the registered office

only and no address of the Corporate Office is provided in the record of MCA.

40. Furthermore, the said communication tagged as “Reminder-4” which is alleged to be served through RPAD is not produced with any service report or tracking detail. And hence this address cannot be relied on to establish the said address to be the address of the Head/Corporate office of the Operational Creditor. Hence the judgement which is relied by the Operational Creditor of Hon’ble NCLAT, New Delhi passed in the matter of ***Alloysmin Industries Vs. Raman Casting (P.) Ltd.*** in *Company Appeal (AT) (INS) No. 684 of 2018*. And Judgement passed by Hon’ble NCLAT ***Ashok Agarwal VS. Amitex Polymers Private limited*** in *Company Appeal (AT) (INS) No. 608 of 2020* Will not be applicable to the facts of the present case as in this case no evidences are placed on record to establish the correct address of the Head/Corporate office of the Operational creditor nor any proof from website is placed on record.

41. Further the Operational Creditor has also relied on the judgement of Hon'ble **Supreme Court of India** in the case of **C.C.Alavi Haji Vs. Palapetty Muhammed & Anr.** Criminal Appeal No. 767 of 2007. In the facts of the present case we are not inclined to rely on this judgement as this pertains to criminal proceedings under section 138 of the Negotiable Instrument Act, 1881 and not to proceedings under the Insolvency and Bankruptcy Code 2016.
42. Hence, in view of the facts and reasons stated above, the present petition filed U/s 9 of the Insolvency and Bankruptcy Code 2016 by the Operational Creditor is defective being incomplete in terms of section 9 (5)(ii)(c) of the IBC, 2016.
43. Therefore, **CP(IB)/219/2024** is hereby dismissed accordingly.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

RS

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)