MACQUARIE BANK LIMITED

v.

SHILPI CABLE TECHNOLOGIES LTD.

(Civil Appeal No. 15135 of 2017)

DECEMBER 15, 2017

[R. F. NARIMAN AND NAVIN SINHA, JJ.]

Insolvency and Bankruptcy Code, 2016:

s.9(3)(c) – Provision in relation to operational debt, contained in s.9(3)(c) of the Code if mandatory or directory – Held: Sub-clause (c) of s.9(3) makes it clear that a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is certainly not a condition precedent to trigger the insolvency process under the code – 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 one goes to sub-clause (d) of s.9(3) which requires such other information as may be specified has also to be furnished along with the application – Read with the Code, the Adjudicatory Authority Rules form a self-contained code being contemporanea expositio *by the Executive which is charged with carrying out the provisions of the Code – The true construction of s. 9(3)(c) is that it is a procedural provision, which is directory in nature, as the Adjudicatory Authority Rules read with the Code clearly demonstrate – The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 – r.6 and Form 5 – Doctrines/ Principles – Principle of* Contemporanea expositio.

ss.8 and 9 – Demand notice of an unpaid operational debt issued by a lawyer on behalf of the operational creditor – Propriety of – Held: Proper – s.8 of the Code speaks of an operational creditor delivering a demand notice –Intention of Legislature was not to restrict such demand notice being sent by the operational creditor himself, otherwise the expression used would perhaps have been "issued" and not "delivered" – Delivery, therefore, would postulate

A *that such notice could be made by an authorized agent – Further, Form of demand notice and Form of application by operational creditor to initiate corporate insolvency resolution process, i.e. Forms 3 and 5 require such authorized agent to state his "position with" or "in relation" to the operational creditor – Expression "in relation to" is a very wide expression, which specifically includes a* B *position which is outside or indirectly related to the operational creditor – Both expressions "authorize to act" and "position in relation to the operational creditor" go to show that an authorized agent or a lawyer acting on behalf of his client is included within the aforesaid expression – Further, a conjoint reading of s.30 of* C *the Advocates Act and ss.8, and 9 of the Code together with Adjudicatory Authority Rules and Forms thereunder would yield result that a notice sent on behalf of the operational creditor by a lawyer would be in order – Advocates Act, 1961 – s.30 – Interpretation of Statutes – Harmonious Construction – The* D *Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 – Forms 3 and 5.*

Allowing the appeals, the Court

HELD: Whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory.

E **1.1 From sub-clause (c) of Section 9(3) of the Insolvency and Bankruptcy Code, 2016, it is clear that a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is certainly not a** F **condition precedent to triggering the insolvency process under the Code. 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 one goes to sub-clause (d) of Section 9(3) which requires such other** G **information as may be specified has also to be furnished along with the application. [Para 14] [774-F-G]**

1.2 When Form 5 under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is perused, it becomes clear that Part V thereof speaks of

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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 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, and that if such accounts are not available, a certificate based on such accounts cannot be given, if Section 9 is to be read the Adjudicating Authority Rules and the Forms therein, all of which set out the statutory conditions necessary to invoke the Code. [Para 15] [774-H; 775-A-C]

1.3 In the present case, the rules merely flesh out what is already contained in the statute and must, therefore, be construed along with the statute. Read with the Code, they form a self-contained code being *contemporanea expositio* by the Executive which is charged with carrying out the provisions of the Code. The true construction of Section 9(3)(c) is that it is a procedural provision, which is directory in nature, as the Adjudicatory Authority Rules read with the Code clearly demonstrate. [Para 16] [776-G-H; 777-A]

1.4 It is true that the expression "initiation" contained in the marginal note to Section 9 does indicate the drift of the provision, but from such drift, to build an argument that the expression "initiation" would lead to the conclusion that Section 9(3) contains mandatory conditions precedent before which the Code can be triggered is a long shot. Equally, the expression "shall" in Section 9(3) does not take us much further when it is clear that Section 9(3)(c) becomes impossible of compliance in cases like the present. It would amount to a situation wherein serious general inconvenience would be caused to innocent persons, such as the appellant, without very much furthering the object of the Act. Obviously, therefore, section 9(3)(c) would have to be construed as being directory in nature. [Para 19] [778-B-D]

A Whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor.

2.1 Insofar as demand notice of an unpaid operational debt issued by a lawyer on behalf of the operational creditor is concerned, the first thing that is to be noticed is that Section 8 of
B the Code speaks of an operational creditor delivering a demand notice. It is clear that had the legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been "issued" and not "delivered". Delivery, therefore, would postulate that such notice could be made by an authorized agent. In fact, in Form 3 (Form
C of demand notice/Invoice demanding payment under the Code) and Form 5(Application by operational creditor to initiate corporate insolvency resolution process under the Code), it is clear that this is the understanding of the draftsman of the Adjudicatory Authority Rules, because the signature of the person
D "authorized to act" on behalf of the operational creditor must be appended to both the demand notice as well as the application under Section 9 of the Code. The position further becomes clear that both forms require such authorized agent to state his position with or in relation to the operational creditor. A position with the operational creditor would perhaps be a position in the company
E or firm of the operational creditor, but the expression "in relation to" is significant. It is a very wide expression which specifically includes a position which is outside or indirectly related to the operational creditor. It is clear, therefore, that both expressions "authorized to act" and "position in relation to the operational
F creditor" go to show that an authorized agent or a lawyer acting on behalf of his client is included within the aforesaid expression. [Para 33][790-B-F]

2.2 The expression "practise" in s.30 Advocates Act, 1961 is an expression of extremely wide import, and would include all preparatory steps leading to the filing of an application before a
G Tribunal. Since there is no clear disharmony between the two Parliamentary statutes in the present case i.e. Advocates Act, 1961 and the Code which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also Section 30 of the Advocates Act deals with the fundamental
H right under Article 19(1)(g) of the Constitution to practice one's

profession. Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order. [Paras 34, 36][791-B-C; 796-G-H; 797-A]

2.3 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. [Para 38][799-E]

State of Haryana v. Raghubir Dayal **(1995) 1 SCC 133 : [1994] 5 Suppl. SCR 448;** *Harish Uppal (Ex-Capt.) v. Union of India* **(2003) 2 SCC 45 : [2002] 5 Suppl. SCR 186;** *Harshad S. Mehta v. State of Maharashtra* **(2001) 8 SCC 257 : [2001] 2 Suppl. SCR 577;** *CTO v. Binani Cements Ltd.* **(2014) 8 SCC 319 : [2014] 3 SCR 1 ;** *Binoy Viswam v. Union of India* **(2017) 7 SCC 59;** *Balchand Jain v. State of M.P.* **(1976) 4 SCC 572 : [1977] 2 SCR 52 ;** *R.S. Raghunath v. State of Karnataka* **(1992) 1 SCC 335 : [1991] 1 Suppl. SCR 387;** *Central Bank of India v. State of Kerala* **(2009) 4 SCC 94 : [2009] 3 SCR 735;** *Byram Pestonji Gariwala v. Union Bank of India* **(1992) 1 SCC 31 : [1991] 1 Suppl. SCR 187;** *Renusagar Power Co. Ltd. v. General Electric Co.* **(1984) 4 SCC 679 : [1985] 1 SCR 432;** *State of Karnataka v. Azad Coach Builders (P) Ltd.* **(2010) 9 SCC 524 : [2010] 12 SCR 895 – relied on.**

Taylor v. Taylor **(1875) 1 Ch. D. 426;** *Smart Timing Steel Ltd. v. National Steel and Agro Industries Ltd.* **decided on 19.5.2017;** *Mobilox Innovations Private Limited v. Kirusa Software Private Limited* **2017(11) SCALE 754 ;** *State of U.P. v. Babu Ram* **[1961] 2 SCR 679;** *Desh Bandhu Gupta v. Delhi Stock Exchange* **(1979) 4 SCC 565 : [1979] 3 SCR 373;** *D.T.U. v. B.B.L. Hajelay* **(1972) 2 SCC 744 : [1973] 2 SCR 114;** *ADM (Rev.) Delhi Admn. v. Siri Ram* **(2000) 5 SCC 451 : [2000] 3 SCR 1019;** *Ispat Industries Ltd. v. Commissioner of*

A *Customs* **(2006) 12 SCC 583 : [2006] 6 Suppl. SCR 733;** *Innoventive Industries Ltd. v. ICICI Bank & Anr.* **[2017] 11 SCALE 4;** *Ms. Eera through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr.* **[2017] 8 SCALE 112;** *Raghunath Rai Bareja v. Punjab*
B *National Bank* **(2007) 2 SCC 230 : [2006] 10 Suppl. SCR 287;** *Nazir Ahmad v. King Emperor* **63 IA 372 (1936);** *Ukha Kolhe v. State of Maharashtra* **(1964) 1 SCR 926;** *Madan & Co. v. Wazir Jaivir Chand* **(1989) 1 SCC 264 : [1988] 3 Suppl. SCR 983;** *Kunhayammed v. State of Kerala* **(2000) 6 SCC 359 : [2000] 1 Suppl.**
C **SCR 538;** *Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Others* **[2017] 11 SCALE 634;** *Mahanth Ram Das v. Ganga Das* **[1961] 3 SCR 763 – referred to.**

Case Law Reference

D	(1875) 1 Ch. D. 426	referred to	Para 7
	2017(11) SCALE 754	referred to	Para 11
	[1961] 2 SCR 679	referred to	Para 16
	[1979] 3 SCR 373	referred to	Para 16
	[1973] 2 SCR 114	referred to	Para 16
E	[2000] 3 SCR 1019	referred to	Para 16
	[2006] 6 Suppl. SCR 733	referred to	Para 16
	[1994] 5 Suppl. SCR 448	relied on	Para 19
	[2017] 11 SCALE 4	referred to	Para 21
	[2017] 8 SCALE 112	referred to	Para 23
	[2006] 10 Suppl. SCR 287	referred to	Para 24
F	63 IA 372 (1936)	referred to	Para 25
	[1964] 1 SCR 926	referred to	Para 25
	[1988] 3 Suppl. SCR 983	referred to	Para 27
	[2000] 1 Suppl. SCR 538	referred to	Para 28
	[2017] 11 SCALE 634	referred to	Para 32
G	[1961] 3 SCR 763	referred to	Para 32
	[1985] 1 SCR 432	relied on	Para 33
	[2010] 12 SCR 895	relied on	Para 33
	[2002] 5 Suppl. SCR 186	relied on	Para 34
	[2001] 2 Suppl. SCR 577	relied on	Para 35
	[2014] 3 SCR 1	relied on	Para 35
H	(2017) 7 SCC 59	relied on	Para 35

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[1977] 2 SCR 52	**relied on**	**Para 36**	
[1991] 1 Suppl. SCR 387	**relied on**	**Para 36**	
[2009] 3 SCR 735	**relied on**	**Para 36**	
[1991] 1 Suppl. SCR 187	**relied on**	**Para 37**	

CIVIL APPELLATE JURISDICTION: Civil Appeal No.15135 of 2017. B

From the Judgment and Order dated 01.08.2017 of the National Company Law Appellate Tribunal, New Delhi in Company Appeals (AT) (INS) No.101 of 2017.

WITH

C.A. Nos.15447 and 15481 of 2017. C

Mukul Rohatgi, Arvind P. Datar, Sr. Advs., Rahul Chitnis, Mustafa Motiwala, Shwetabh Sinha, Ms. Ashmi Mohan, Ms. Pragya Nalwa, Ms. Misha Rohatgi, Ms. Palak Mahajan, Ujjal Banerjee, Advs. for the Appellant.

Dr. Abhishek Manu Singhvi, Shyam Diwan, Abhinav Vasisht, D Sr. Advs., Arvind Kumar, Deeraj, Ms.Sada Purna, Gaurav Aggarwal, C.S. Chauhan, Mrs. V.S. Lakshmi, A. Venayagam Balan, Sumit K. Batra, Mohinder Jit Singh, Advs. for the Respondent.

The Judgment of the Court was delivered by

R. F. NARIMAN, J. 1. The present appeals raise two important E questions which arise under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code"). The first question is whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory; and secondly, whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the F operational creditor.

2. The facts contained in the three appeals are similar. For the purpose of this judgment, the facts contained in Civil Appeal No.15481 of 2017 will now be set out. Hamera International Private Limited executed an agreement with the appellant, Macquarie Bank Limited, G Singapore, on 27.7.2015, by which the appellant purchased the original supplier's right, title and interest in a supply agreement in favour of the respondent. The respondent entered into an agreement dated 2.12.2015 for supply of goods worth US$6,321,337.11 in accordance with the terms and conditions contained in the said sales contract. The supplier issued two invoices dated 21.12.2015 and 31.12.2015. Payment terms under H

A the said invoices were 150 days from the date of bill of ladings dated 17.12.2015/19.12.2015. Since amounts under the said bills of lading were due for payment, the appellant sent an email dated 3.5.2016 to the contesting respondent for payment of the outstanding amounts. Several such emails by way of reminders were sent, and it is alleged that the contesting respondent stated that it will sort out pending matters. B Ultimately, the appellant issued a statutory notice under Sections 433 and 434 of the Companies Act, 1956. A reply dated 5.10.2016 denied the fact that there was any outstanding amount.

3. After the enactment of the Code, the appellant issued a demand notice under Section 8 of the Code on 14.2.2017 at the registered office C of the contesting respondent, calling upon it to pay the outstanding amount of US$6,321,337.11. By a reply dated 22.2.2017, the contesting respondent stated that nothing was owed by them to the appellant. They further went on to question the validity of the purchase agreement dated 27.7.2015 in favour of the appellant. On 7.3.2017, the appellant initiated D the insolvency proceedings by filing a petition under Section 9 of the Code. On 1.6.2017, the NCLT rejected the petition holding that Section 9(3)(c) of the Code was not complied with, inasmuch as no certificate, as required by the said provision, accompanied the application filed under Section 9. It, therefore, held that there being non-compliance of the mandatory provision of Section 9(3)(c) of the Code, the application would E have to be dismissed at the threshold. However, the NCLT also went into the question as to whether a dispute has been raised in relation to the operational debt and found that such dispute was in fact raised by the reply to the statutory notice sent under Sections 433 and 434 of the Companies Act, 1956 and that, therefore, under Section 9(5)(ii)(d), the F application would have to be dismissed.

4. By the impugned judgment dated 17.7.2017, the NCLAT agreed with the NCLT holding that the application would have to be dismissed for non compliance of the mandatory provision contained in Section 9(3)(c) of the Code. It further went on to hold that an advocate/lawyer cannot G issue a notice under Section 8 on behalf of the operational creditor in the following terms:

> "In the present case, as the notice has been given by an advocate/ lawyer and there is nothing on the record to suggest that the lawyer was authorized by the appellant, and as there is nothing on the record to suggest that the said lawyer/ advocate hold any position

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with or in relation to the appellant company, we hold that the notice issued by the advocate/ lawyer on behalf of the appellant cannot be treated as notice under Section 8 of the 'I & B Code'. And for the said reason also the petition under Section 9 at the instance of the appellant against the respondent was not maintainable." A

5. Shri Mukul Rohatgi, learned senior advocate appearing on behalf of the appellant, referred us to various provisions of the Code. According to learned senior counsel, on a conjoint reading of Section 9(3)(c), Rule 6 and Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ("Adjudicating Authority Rules"), it is clear that Section 9(3)(c) is not mandatory, but only directory and that, in the said section, "shall" should be read as "may". He cited a number of judgments for the proposition that when serious general inconvenience is caused to innocent persons or the general public without really furthering the object of the particular Act, the said provision should not be read as mandatory, but as directory only. Further, according to learned senior counsel, Section 9(3)(c) is a procedural section, which is not a condition precedent to the allowing of an application filed under Section 9(1). This is further clear from the fact that under Section 9(5), if there is no such certificate, the application does not need to be rejected. He also stressed the fact that at the end of Form 5, what has to be attached to the application, by way of Annexure III, is a copy of the relevant accounts from banks/financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the operational debt only "if available". Also, according to learned counsel, this is only an additional document, which along with other documents that are mentioned in Item 8 of Part V, would go to prove the existence of the operational debt. The word "confirming" in Section 9(3)(c) would also show that this is only one more document that can be relied upon by the operational creditor, apart from other documents, which may well prove the existence of the operational debt. According to learned senior counsel, on the second ground as well it is clear, on a perusal of Form 5, that a "person authorised to act on behalf of the operational creditor" is a person who can sign Form 5 on behalf of the operational creditor. Also, the expression "position with or in relation to the operational creditor" shows that a lawyer, who is authorized by the operational creditor, is certainly within the said expression. He also referred us to Section 30 of the Advocates Act, 1961 and judgments on the effect of the expression "practise" when it applies to lawyers, vis-a-vis Tribunals such as the NCLT and NCLAT. B C D E F G H

A 6. Shri Arvind Datar, learned senior advocate, supported the arguments of Shri Rohatgi and went on to add that the definition of "person" contained in Section 2(23) of the Code includes a person resident outside India, and when read with the definition of "operational creditor" in Section 5(20) of the Code would make it clear that persons, such as the appellant, are certainly operational creditors within the meaning of B the Code. He stressed the fact that if a copy of the certificate under Section 9(3)(c) can only be from a "financial institution" as defined under Section 3(14) of the Code, and if a non resident bank or financial institution, such as the appellant, may not be included either as a scheduled bank under Section 3(14)(a) or as such other institution as the Central C Government may by notification specify as a financial institution under Section 3(14)(d), it is clear that Section 9(3)(c) cannot operate to non suit the appellant, as it would be impossible to get a certificate from a financial institution as defined. This being the case, he argued that the Court should add words into the expression "financial institution", as it would otherwise lead to absurdity and that if Section 9(3)(c) is held to be D mandatory, then a certificate from a foreign bank, who is not a "financial institution" as defined under the Code, should be read into Section 9(3)(c). Otherwise, the learned senior counsel supported Shri Rohatgi's argument that Section 9(3)(c) is a directory provision which need not mandatorily be complied with. A further argument was made that the definition in E Section 3(14), though exhaustive, is subject to context to the contrary and that, therefore, it is clear that a financial institution would include a bank outside the categories mentioned in Section 3(14) when it comes to an operational creditor who is a resident outside India.

7. All these arguments were countered by Dr. A.M. Singhvi, F learned senior counsel appearing on behalf of the respondent. First and foremost, according to learned senior counsel, the object of the Code is not that persons may use the Code as a means of recovering debts. The Code is an extremely draconian piece of legislation and must, therefore, be construed strictly. If this is kept in mind, it is clear that Section 9(3)(c) is mandatory and requires to be complied with strictly or else the G application should be dismissed at the threshold. He stated that in the context of it being recognized by our judgments that a financial creditor and operational creditor are completely, differently and separately dealt with in the Code, and that so far as an operational creditor is concerned, it is important to bear in mind that a very low threshold is required in

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order that an operational creditor's application be rejected, namely, there being a pre-existing dispute between the parties. According to learned senior counsel Section 9(3)(c) is a jurisdictional condition precedent, which is clear from the expression "initiation" and the expression "shall", both showing that the Section is a mandatory condition precedent which has to be satisfied before the adjudicating authority can proceed further. According to learned senior counsel, a copy of the certificate from a financial institution is a very important document which makes it clear, almost conclusively, that there is an unpaid operational debt. According to him, the principle contained in **Taylor v. Taylor** (1875) 1 Ch. D. 426, has been followed by a number of judgments and is applicable inasmuch as when a statute requires a particular thing to be done in a particular manner, it must be done in that manner or not at all. He also referred us to various Sections of the Code, the Insolvency and the Adjudicating Authority Rules, Form 5 in particular, together with the Viswanathan Committee and report Joint Committee report of the Parliament. According to the learned senior counsel, it is clear from the definition of "financial institution" contained in Section 3(14) that certain foreign banks are included within the expression "scheduled banks" under Section 3(14)(a) and that, under Section 3(14)(d), the Central Government may, by notification, specify other foreign banks as financial institutions. It is only where operational creditors have dealings with banks which fall within Section 3(14), that they can avail the opportunity of declaring a corporate debtor as insolvent under Sections 8 and 9 of the Code. Persons who may be residents outside India and who bank with entities that are not contained within the definition of Section 3 (14) would, therefore, be outside the Code.

8. According to the learned senior counsel, the consequence of not furnishing a copy of the certificate under Section 9(3)(c) is that, under Section 9(5)(ii)(a), the application that is made would be incomplete and, subject to the proviso, would have to be dismissed on that score. Also, according to the learned senior counsel, the NCLAT was right in following the judgment contained in **Smart Timing Steel Ltd. v. National Steel and Agro Industries Ltd** decided on 19.5.2017, which, according to the learned senior counsel, has merged in an order of this Court dismissing an appeal from the said judgment.

9. According to the learned senior counsel, a lawyer's notice cannot be given under Section 8, read with the Adjudicating Authority

A Rules and Form 5 therein. Either the operational creditor himself must send the requisite notice, or a duly authorized agent on his behalf should do so, and such authorized agent can only be an "insider", namely, a person who is authorized by the operational creditor, being an employee, director or other person from within who alone can send the notice under Section 8 and sign the application under Section 9. Dr. Singhvi also
B stated that it is clear, from Forms 3 and 5, that only a person authorized to act on behalf of the operational creditor can send the notice and/or sign the application. He stressed the word "position" with or in relation to the operational creditor and stated that this would also indicate that it is only an insider who can be so authorized by the operational creditor
C and not a lawyer. According to learned senior counsel, the provisions contained in certain statutes such as Section 434(2) of the Companies Act, 1956 and Rule 4 of the Debts Recovery Tribunal (Procedure) Rules, 1993 under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("Debts Recovery Rules") would also make it clear that where
D a lawyer can do things on behalf of a party, it is expressly so mentioned unlike the present case.

10. Having heard learned counsel for the parties, it is necessary to set out the relevant Sections of the Code and the Adjudicating Authority Rules.

E "3. In this Code, unless the context otherwise requires,—

(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

(14) "financial institution" means—

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(a) a scheduled bank;

(b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934;

(c) public financial institution as defined in clause (72) of section
G 2 of the Companies Act, 2013; and

(d) such other institution as the Central Government may by notification specify as a financial institution;

(23) "person" includes—

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(a) an individual;

(b) a Hindu Undivided Family;

(c) a company;

(d) a trust;

(e) a partnership;

(f) a limited liability partnership; and

(g) any other entity established under a statute, and includes a person resident outside India;

(25) "person resident outside India" means a person other than a person resident in India;

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5. In this Part, unless the context otherwise requires,—

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

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8. Insolvency resolution by operational creditor-

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

A (b) the repayment of unpaid operational debt –

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

B (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. –For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

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9. Application for initiation of corporate insolvency resolution process by operational creditor-

D (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

E (2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

F (3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

G (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(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; and (d) such other information as may be specified.

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(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

A (6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

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B **The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016**

5. Demand notice by operational creditor.—

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

C (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,

D (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 E under this rule by an operational creditor shall also be filed with an information utility, if any.

6. Application by operational creditor.—

(1) An operational creditor, shall make an application for initiating the corporate insolvency resolution process against a corporate F debtor under section 9 of the Code in Form 5, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) The applicant under sub-rule (1) shall dispatch forthwith, a G copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

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FORM 3

(See clause (a) of sub-rule (1) of rule 5)

FORM OF DEMAND NOTICE / INVOICE DEMANDING PAYMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

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(Under rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) [Date]

To,

[Name and address of the registered office of the corporate debtor]

C

From,

[Name and address of the registered office of the operational creditor]

Subject: Demand notice/invoice demanding payment in respect of unpaid operational debt due from [corporate debtor] under the Code.

D

Madam/Sir,

1. This letter is a demand notice/invoice demanding payment of an unpaid operational debt due from [*name of corporate debtor*].

2. Please find particulars of the unpaid operational debt below:

E

PARTICULARS OF OPERATIONAL DEBT		
1.	TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE	
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF DEFAULT IN TABULAR FORM)	
3.	PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)	

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4.	DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS	
5.	RECORD OF DEFAULT WITH THE INFORMATION UTILITY (IF ANY)	
6.	PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH DEBT HAS BECOME DUE	
7.	LIST OF DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT	

3. If you dispute the existence or amount of unpaid operational debt (in default) please provide the undersigned, within ten days of the receipt of this letter, of the pendency of the suit or arbitration proceedings in relation to such dispute filed before the receipt of this letter/notice.

4. If you believe that the debt has been repaid before the receipt of this letter, please demonstrate such repayment by sending to us, within ten days of receipt of this letter, the following:

(a) an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(b) an attested copy of any record that [*name of the operational creditor*] has received the payment.

5. The undersigned, hereby, attaches a certificate from an information utility confirming that no record of a dispute raised in relation to the relevant operational debt has been filed by any person at any information utility. (if applicable)

6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [*name of corporate debtor*].

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor
Name in block letters
Position with or in relation to the operational creditor
Address of person signing

Instructions

1. Please serve a copy of this form on the corporate debtor, ten days in advance of filing an application under section 9 of the Code.

2. Please append a copy of such served notice to the application made by the operational creditor to the Adjudicating Authority.

Form 5

(See sub-rule (1) of rule 6)

APPLICATION BY OPERATIONAL CREDITOR TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE CODE.

(Under rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

[Date]

To,
The National Company Law Tribunal
[*Address*]

From,
[*Name and address for correspondence of the operational creditor]*

In the matter of [*name of the corporate debtor*]

Subject: Application to initiate corporate insolvency resolution process in respect of [*name of the corporate debtor*] under the Insolvency and Bankruptcy Code, 2016.

A Madam/Sir,

[*Name of the operational creditor*], hereby submits this application to initiate a corporate insolvency resolution process in the case of [*name of corporate debtor*]. The details for the purpose of this application are set out below:

B **Part – I**

	PARTICULARS OF APPLICANT	
1.	NAME OF OPERATIONAL CREDITOR	
2.	IDENTIFICATION NUMBER OF OPERATIONAL CREDITOR (IF ANY)	
3.	ADDRESS FOR CORRESPONDENCE OF THE OPERATIONAL CREDITOR	

C

Part - II

D

	PARTICULARS OF CORPORATE DEBTOR	
1.	NAME OF THE CORPORATE DEBTOR	
2.	IDENTIFICATION NUMBER OF CORPORATE DEBTOR	
3.	DATE OF INCORPORATION OF CORPORATE DEBTOR	
4.	NOMINAL SHARE CAPITAL AND THE PAID-UP SHARE CAPITAL OF THE CORPORATE DEBTOR AND/OR DETAILS OF GUARANTEE CLAUSE AS PER MEMORANDUM OF ASSOCIATION (AS APPLICABLE)	
5.	ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR	
6.	NAME, ADDRESS AND AUTHORITY OF PERSON SUBMITTING APPLICATION ON BEHALF OF OPERATIONAL CREDITOR (ENCLOSE AUTHORISATION)	
7.	NAME AND ADDRESS OF PERSON RESIDENT IN INDIA AUTHORISED TO ACCEPT THE SERVICE OF PROCESS ON ITS BEHALF (ENCLOSE AUTHORISATION)	

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Part-III

	PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL [IF PROPOSED]	
1.	NAME, ADDRESS, EMAIL ADDRESS AND THE REGISTRATION NUMBER OF THE PROPOSED INSOLVENCY PROFESSIONAL	

Part-IV

	PARTICULARS OF OPERATIONAL DEBT	
1.	TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE	
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DATES OF DEFAULT IN TABULAR FORM)	

Part-V

	PARTICULARS OF OPERATIONAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]
1.	PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)
2.	DETAILS OF RESERVATION / RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS
3.	PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)
4.	RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)

5.	DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)
6.	PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH OPERATIONAL DEBT HAS BECOME DUE
7.	A STATEMENT OF BANK ACCOUNT WHERE DEPOSITS ARE MADE OR CREDITS RECEIVED NORMALLY BY THE OPERATIONAL CREDITOR IN RESPECT OF THE DEBT OF THE CORPORATE DEBTOR (ATTACH A COPY)
8.	LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT

I, [*Name of the operational creditor / person authorised to act on behalf of the operational creditor*] hereby certify that, to the best of my knowledge, [*name of proposed insolvency professional*], is fully qualified and permitted to act as an insolvency professional in accordance with the Code and the rules and regulations made thereunder. [*WHERE APPLICABLE*]

[*Name of the operational creditor*] has paid the requisite fee for this application through [*state means of payment*] on [*date*].

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor
Name in block letters
Position with or in relation to the operational creditor
Address of person signing

Instructions - A

Please attach the following to this application:

Annex I Copy of the invoice / demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the corporate debtor.

B

Annex II Copies of all documents referred to in this application.

Annex III Copy of the relevant accounts from the banks/financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the relevant unpaid operational debt by the operational debtor, if available. C

Annex IV Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Annex V Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and D Bankruptcy (Application to Adjudicating Authority) Rules, 2016. [*WHERE APPLICABLE*]

Annex VI Proof that the specified application fee has been paid.

Note: Where workmen/employees are operational creditors, the application may be made either in an individual capacity or in a E joint capacity by one of them who is duly authorised for the purpose."

11. The first thing to be noticed on a conjoint reading of Sections 8 and 9 of the Code, as explained in **Mobilox Innovations Private Limited v. Kirusa Software Private Limited**, Civil Appeal No. 9405 F of 2017 decided on 21.9.2017, at paragraphs 33 to 36, is that Section 9(1) contains the conditions precedent for triggering the Code insofar as an operational creditor is concerned. The requisite elements necessary to trigger the Code are:

i. occurrence of a default; G

ii. delivery of a demand notice of an unpaid operational debt or invoice demanding payment of the amount involved; and

iii. the fact that the operational creditor has not received payment from the corporate debtor within a period of 10 days of receipt H

A of the demand notice or copy of invoice demanding payment, or received a reply from the corporate debtor which does not indicate the existence of a pre-existing dispute or repayment of the unpaid operational debt.

12. It is only when these conditions are met that an application B may then be filed under Section 9(2) of the Code in the prescribed manner, accompanied with such fee as has been prescribed. Under Section 9(3), what is clear is that, along with the application, certain other information is also to be furnished. Obviously, under Section 9(3)(a), a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor is to be furnished. We C may only indicate that under Rules 5 and 6 of the Adjudicating Authority Rules, read with Forms 3 and 5, it is clear that, as Annexure I thereto, the application in any case must have a copy of the invoice/demand notice attached to the application. That this is a mandatory condition precedent to the filing of an application is clear from a conjoint reading D of sections 8 and 9(1) of the Code.

13. When we come to Section 9(3)(b), it is obvious that an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt can only be in a situation where the corporate debtor has not, within the period of 10 days, sent E the requisite notice by way of reply to the operational creditor. In a case where such notice has, in fact, been sent in reply by the corporate debtor, obviously an affidavit to that effect cannot be given.

14. When we come to sub-clause (c) of Section 9(3), it is equally clear that a copy of the certificate from the financial institution maintaining F accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is certainly not a condition precedent to triggering the insolvency process under the Code. 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 G 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.

15. When Form 5 under Rule 6 is perused, it becomes clear that Part V thereof speaks of particulars of the operational debt. There are

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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 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, and that if such accounts are not available, a certificate based on such accounts cannot be given, if Section 9 is to be read the Adjudicating Authority Rules and the Forms therein, all of which set out the statutory conditions necessary to invoke the Code.

16. In **State of U.P. v. Babu Ram** 1961 2 SCR 679 at 701-702, this Court dealt with the position of rules made under a statute as follows:

> "What then is the effect of the said propositions in their application to the provisions of the Police Act and the rules made thereunder? The Police Act of 1861 continues to be good law under the Constitution. Para 477 of the Police Regulations shows that the rules in Chapter XXXII thereof have been framed under Section 7 of the Police Act. Presumably, they were also made by the Government in exercise of its power under Section 46(2) of the Police Act. Under para 479(a) the Governor's power of punishment with reference to all officers is preserved; that is to say, this provision expressly saves the power of the Governor under Article 310 of the Constitution. "Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation": see Maxwell "On the Interpretation of Statutes", 10th edn., pp. 50-51. The statutory rules cannot be described as, or equated with, administrative directions. If so, the Police Act and the rules made thereunder constitute a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal.

Equally, in **Desh Bandhu Gupta v. Delhi Stock Exchange** (1979) 4 SCC 565 at 572, this Court laid down the principle of *contemporanea expositio* as under:

A "The principle of *contemporanea expositio* (interpreting a statute or any other document by reference to the exposition it has received from contemporary authority) can be invoked though the same will not always be decisive of the question of construction (Maxwell 12th ed. p. 268). In Crawford on Statutory Construction (1940 ed.) in para 219 (at pp. 393-395) it has been stated that B administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to C considerable weight; it is highly persuasive. In *Baleshwar Bagarti* v. *Bhagirathi Dass* [ILR 35 Cal 701 at 713] the principle, which was reiterated in *Mathura Mohan Saha* v. *Ram Kumar Saha* [ILR 43 Cal 790 : AIR 1916 Cal 136] has been stated by Mukerjee, J., thus:

D "It is a well settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. I do not suggest for a moment that such interpretation has by any means a controlling effect upon the Courts; such interpretation E may, if occasion arises, have to be disregarded for cogent and persuasive reasons, and in a clear case of error, a court would without hesitation refuse to follow such construction."

However, Dr. Singhvi referred to the following three judgments for the proposition that rules cannot override the substantive provisions F of an Act: **D.T.U. v. B.B.L. Hajelay** (1972) 2 SCC 744 (para 13); **ADM (Rev.) Delhi Admn. v. Siri Ram** (2000) 5 SCC 451 (para 16); and **Ispat Industries Ltd. v. Commissioner of Customs** (2006) 12 SCC 583 (para 21). The aforesaid judgments only have application when rules are ultra vires the parent statute. In the present case, the G rules merely flesh out what is already contained in the statute and must, therefore, be construed along with the statute. Read with the Code, they form a self-contained code being *contemporanea expositio* by the Executive which is charged with carrying out the provisions of the Code. The true construction of Section 9(3)(c) is that it is a procedural

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provision, which is directory in nature, as the Adjudicatory Authority Rules read with the Code clearly demonstrate. A

17. There may be situations of operational creditors who may have dealings with a financial institution as defined in Section 3(14) of the Code. There may also be situations where an operational creditor may have as his banker a non-scheduled bank, for example, in which case, it would be impossible for him to fulfill the aforesaid condition. A foreign supplier or assignee of such supplier may have a foreign banker who is not within Section 3(14) of the Code. The fact that such foreign supplier is an operational creditor is established from a reading of the definition of "person" contained in section 3(23), as including persons resident outside India, together with the definition of "operational creditor" contained in Section 5(20), which in turn is defined as "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred". That such person may have a bank/financial institution with whom it deals and which is not contained within the definition of Section 3(14) of the Code would show that Section 9(3)(c) in such a case would, if Dr. Singhvi is right about the sub-section being a condition precedent, amount to a threshold bar to proceeding further under the Code. The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code. It is no answer to state that such person can approach the Central Government to include its foreign banker under Section 3(14) of the Code, for the Central Government may never do so. Equally, Dr. Singhvi's other argument that such persons ought to be left out of the triggering of the Code against their corporate debtor, despite being operational creditors as defined, would not sound well with Article 14 of the Constitution, which applies to all persons including foreigners. Therefore, as the facts of these cases show, a so called condition precedent impossible of compliance cannot be put as a threshold bar to the processing of an application under Section 9 of the Code. B C D E F G

18. However, it was argued that there are various other categories of creditors who cannot file insolvency petitions, such as government authorities who have pending tax dues. Such authorities have ample powers under taxation statutes to coercively collect outstanding tax arrears. Besides they form a class, as a whole, who are kept out of the H

A Code, unlike persons who are resident outside India who, though being operational creditors, are artificially divided, if we are to accept Dr. Singhvi's argument, into two sub-classes, namely, those who bank with an institution that is recognized by Section 3(14) of the Code and those who do not. This argument also does not commend itself to us.

B 19. It is true that the expression "initiation" contained in the marginal note to Section 9 does indicate the drift of the provision, but from such drift, to build an argument that the expression "initiation" would lead to the conclusion that Section 9(3) contains mandatory conditions precedent before which the Code can be triggered is a long shot. Equally, the expression "shall" in Section 9(3) does not take us much further when it C is clear that Section 9(3)(c) becomes impossible of compliance in cases like the present. It would amount to a situation wherein serious general inconvenience would be caused to innocent persons, such as the appellant, without very much furthering the object of the Act, as has been held in the **State of Haryana v. Raghubir Dayal** (1995) 1 SCC 133 at paragraph D 5 and obviously, therefore, Section 9(3)(c) would have to be construed as being directory in nature.

20. Even otherwise, the important condition precedent is an occurrence of a default, which can be proved, as has been stated hereinabove, by means of other documentary evidence. Take for example E the case of an earlier letter written by the corporate debtor to the operational creditor confirming that a particular operational debt is due and payable. 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. If Dr. Singhvi's submissions were to be accepted, despite the availability of such documentary evidence F contained in the Section 9 application as other information as may be specified, such application filed under Section 9 would yet have to be rejected because there is no copy of the requisite certificate under Section 9(3)(c). Obviously, such an absurd result militates against such a provision being construed as mandatory.

G 21. It is unnecessary to further refer to arguments made on the footing that Section 7 qua financial creditors has a process which is different from that of operational creditors under Sections 8 and 9 of the Code. The fact that there is no requirement of a bank certificate under Section 7 of the Code, as compared to Section 9, does not take us very H much further. The difference between Sections 7 and 9 has already

been noticed by this Court in **Innoventive Industries Ltd. v. ICICI Bank & Anr.**, Civil Appeal Nos. 8337-8338 of 2017 decided on August 31, 2017, as follows:- A

> "29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to B the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing C – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.
>
> 30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating D authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is E payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

The fact that these differences obtain under the Code would have no direct bearing on whether Section 9(3)(c) ought to be construed in F the manner indicated by Dr. Singhvi.

22. It was also submitted that Sections 65 and 76 of the Code provide for criminal prosecution against banks issuing false bank certificates and that a foreign bank issuing such a certificate may not be amenable to the jurisdiction of the Code. It is unnecessary to answer G this submission in view of the fact that the necessity for such a certificate has itself been held by this judgment to be directory in nature.

23. Equally, Dr. Singhvi's argument that the Code leads to very drastic action being taken once an application for insolvency is filed and admitted and that, therefore, all conditions precedent must be strictly H

A construed is also not in sync with the recent trend of authorities as has been noticed by a concurring judgment in **Ms. Eera through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr**, Criminal Appeal Nos. 1217-1219 of 2017 decided on July 21, 2017. In this judgment, the correct interpretation of Section 2(1)(d) of the Protection of Children from Sexual Offences Act, 2012 arose. After B referring to the celebrated **Heydon's case**, 76 E.R. 637 [1584] and to the judgments in which the golden rule of interpretation of statutes was set out, the concurring judgment of R.F. Nariman, J., after an exhaustive survey of the relevant case law, came to the conclusion that the modern trend of case law is that creative interpretation is within the *Lakshman* C *Rekha* of the Judiciary. Creative interpretation is when the Court looks at both the literal language as well as the purpose or object of the statute, in order to better determine what the words used by the draftsman of the legislation mean. The concurring judgment then concluded:

> "It is thus clear on a reading of English, U.S., Australian and our D own Supreme Court judgments that the '*Lakshman Rekha*' has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of **Heydon**, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It E started out by the rule as stated in 1584 in **Heydon's case**, which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid 1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in **Heydon's case**."

F In dealing with penal statutes, the Court was confronted with a body of case law which stated that as penal consequences ensue, the provisions of such statutes should be strictly construed. Here again, the modern trend in construing penal statutes has moved away from a mechanical incantation of strict construction. Several judgments were G referred to and it was held that a purposive interpretation of such statutes is not ruled out. Ultimately, it was held that a fair construction of penal statutes based on purposive as well as literal interpretation is the correct modern day approach.

24. However, Dr. Singhvi cited **Raghunath Rai Bareja v. Punjab** H **National Bank**, (2007) 2 SCC 230 and relied upon paragraphs 39 to 47

for the proposition that the literal construction of a statute is the only mode of interpretation when the statute is clear and unambiguous. Paragraph 43 of the said judgment was relied upon strongly by the learned counsel, which states:

> "In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see *G.P. Singh's Principles of Statutory Interpretations*, 9th Edn., pp. 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection."

Regard being had to the modern trend of authorities referred to in the concurring judgment in **Ms. Eera through Dr. Manjula Krippendorf** (supra), we need not be afraid of each Judge having a free play to put forth his own interpretation as he likes. Any arbitrary interpretation, as opposed to fair interpretation, of a statute, keeping the object of the legislature in mind, would be outside the judicial ken. The task of a Judge, when he looks at the literal language of the statute as well as the object and purpose of the statute, is not to interpret the provision as he likes but is to interpret the provision keeping in mind Parliament's language and the object that Parliament had in mind. With this caveat, it is clear that judges are not knight-errants free to roam around in the interpretative world doing as each Judge likes. They are bound by the text of the statute, together with the context in which the statute is enacted; and both text and context are Parliaments', and not what the Judge thinks the statute has been enacted for. Also, it is clear that for the reasons stated by us above, a fair construction of Section 9(3)(c), in consonance with the object sought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent as has been contended by Dr. Singhvi.

25. Dr. Singhvi then argued that the application of the principle in **Taylor** (supra) should be followed when it comes to the correct interpretation of Section 9(3)(c) of the Code. The principle of **Taylor**

A (supra), namely that where a statute states that a particular act is to be done in a particular manner; it must be done in that manner or not at all, was followed by the Privy Council in **Nazir Ahmad v. King Emperor,** 63 IA 372 (1936). In that case, the Privy Council held that Sections 164 and 364 of the Code of Criminal Procedure, 1898 prescribed the mode in which confessions are to be recorded by Magistrates, when made B during investigation, and a confession before a Magistrate not recorded in the manner provided was inadmissible. In **Ukha Kolhe v. State of Maharashtra** (1964) 1 SCR 926 at 948-949, a Constitution Bench of this Court held that the principle contained in **Taylor** (supra) would not apply when proof of a specified fact could be obtained by means other C than that statutorily specified. The argument in that case was that Sections 129A and 129B prescribed the mode of taking blood in the course of investigation of an offence under the Bombay Prohibition Act, 1949, and that, therefore, production or examination of a person before a registered medical practitioner during the course of such investigation is the only method by which consumption of an intoxicant may be proved. After D setting out Sections 129A and 129B and the judgment of the Privy Council in **Nazir Ahmad** (supra), this Court held:

> "The rule in *Taylor* v. *Taylor* [(1875) I Ch D 426] on which the Judicial Committee relied has, in our judgment, no application to this case. Section 66(2), as we have already observed, does not E prescribe any particular method of proof of concentration of alcohol in the blood of a person charged with consumption or use of an intoxicant. Section 129-A is enacted primarily with the object of providing when the conditions prescribed are fulfilled, that a person shall submit himself to be produced before a registered medical F practitioner for examination and for collection of blood. Undoubtedly, Section 129-A(1) confers power upon a Police or a Prohibition Officer in the conditions set out to compel a person suspected by him of having consumed illicit liquor, to be produced for examination and for collection of blood before a registered medical practitioner. But proof of concentration of alcohol may G be obtained in the manner described in Section 129-A(1) and (2), or otherwise; that is expressly provided by sub-section (8) of Section 129-A, The power of a Police Officer to secure examination of a person suspected of having consumed an intoxicant in the course of investigation for an offence under the H Act is undoubtedly restricted by Section 129-A. But in the present

case the Police Officer investigating the offence had not produced the accused before a medical officer; it was in the course of his examination that Dr Kulkarni, before any investigation was commenced, came to suspect that the appellant had consumed liquor, and he directed that specimen of blood of the appellant be collected. This step may have been taken for deciding upon the line of treatment, but certainly not for collecting evidence to be used against the appellant in any possible trial for a charge of an offence of consuming liquor contrary to the provisions of the Act. If unlawful consumption of an intoxicant by a person accused, may be proved otherwise than by a report obtained in the conditions mentioned in Section 129-A(1) and (2), there would be no reason to suppose that other evidence about excessive concentration of alcohol probative of consumption is inadmissible. Admissibility of evidence about concentration of alcohol in blood does not depend upon the exercise of any power of the Police or Prohibition Officer. Considerations which were present in *Nazir Ahmad case* [(1936) LR 63 IA 372] regarding the inappropriateness of Magistrates being placed in the same position as ordinary citizens and being required to transgress statutory provisions relating to the method of recording confessions also do not arise in the present case."

26. This judgment applies on all fours to the facts of the present case inasmuch as, like Section 129A(8) of the aforesaid Act, proof of the existence of a debt and a default in relation to such debt can be proved by other documentary evidence, as is specifically contemplated by Section 9(3)(d) of the Code. Like Section 66(2) of the aforesaid Act in **Ukha Kolhe** (supra), Section 8 of the Code does not prescribe any particular method of proof of occurrence of default. Consequently, we are of the opinion that the principle contained in **Taylor** (supra) does not apply in the present situation.

27. Also, in **Madan & Co. v. Wazir Jaivir Chand** (1989) 1 SCC 264 at 268-270, the interpretation of Section 11 of the Jammu and Kashmir Houses and Shops Rent Control Act, 1966 was under consideration of this Court. As stated in paragraph 4 of the judgment, the controversy in that case turned on the question whether the notice sent by the Respondent by registered post can be said to have been served and the Petitioner can be said to have been in receipt of the said notice. In the words of the judgment:

A "4. On the terms of the above sections, the controversy in this case turned on the question whether the notice sent by the respondent by registered post on 26-11-1976 can be said to have been *served* and the petitioner can be said to have been in *receipt* of the said notice. If the answer to this question is in the affirmative, as held by all the courts concurrently, there is B nothing further to be said. The contention of the appellant tenant however, is that the statute postulates a factual service of the notice on, and the actual receipt of it by, the tenant and that this admittedly not being the position in the present case, no eviction could have been decreed.

C 5. Shri Soli J. Sorabjee, learned counsel appearing for the tenant submitted that the safeguards in Sections 11 and 12 of the Act are intended for the benefit and protection of the tenant and that, therefore, where the Act provides for the service of the notice, by post, this requirement has to be strictly complied with. He referred D to the decisions in *Hare Krishna Das* v. *Hahnemann Publishing Co. Ltd.*[(1965-66) 70 Cal WN 262] and *Surajmull Ghanshyamdas* v. *Samadarshan Sur* [AIR 1969 Cal 109 : ILR (1969) 1 Cal 379] to contend that such postal service can neither be presumed nor considered to be good service where the letter is returned to the sender due to the non-availability of the E addressee. He urges that, in the absence of any enabling provision such as the one provided for in Section 106 of the Transfer of Property Act, service by some other mode, such as affixture, cannot be treated as sufficient compliance with the statute. In this context, he referred to the frequently applied rule in *Taylor* F v. *Taylor* [(1875) 1 Ch D 426] that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. He urged that even if service by affixture can be considered to be permissible, there are stringent prerequisites for service by affixture, such as those outlined in Order V Rules 17 G to 19, of the Code of Civil Procedure (CPC) and that these prerequisites were not fulfilled in the present case. He pointed out that even under the CPC, service by such affixture can be recognised as valid only if sincere and vigilant attempts to serve the notice on the addressee personally are unsuccessful. In the

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present case, it is submitted, the evidence shows that the postman made no serious efforts to ascertain the whereabouts of the addressee even though the evidence showed that a servant of the petitioner firm was known to the postman and was present in the neighbourhood. He, therefore, submitted that the High Court should have dismissed the suit for eviction filed by the landlord on the ground that the requirements of Sections 11 and 12 of the Act were not satisfied."

The Court turned down the contention based on **Taylor** (supra) in the following terms:

"We are of opinion that the conclusion arrived at by the courts below is correct and should be upheld. It is true that the proviso to clause (*i*) of Section 11(1) and the proviso to Section 12(3) are intended for the protection of the tenant. Nevertheless it will be easy to see that too strict and literal a compliance of their language would be impractical and unworkable."

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"In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word "served" as "sent by post", correctly and properly addressed to the tenant, and the word "receipt" as the tender of the letter by the postal peon at the address mentioned in the letter. No other interpretation, we think, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by, the tenant."

This judgment is also supportive of the proposition that when the principle in **Taylor** (supra) leads to impractical, unworkable and inequitable results, it cannot be applied out of context in situations which are predominantly procedural in nature.

28. The decision in **Smart Timing** (supra) by the NCLAT, which was relied upon by the impugned judgment, was then pressed into service by Dr Singhvi stating that an appeal from this judgment has been dismissed by this Court and that, therefore, following the principle in **Kunhayammed v. State of Kerala** (2000) 6 SCC 359, the NCLAT's judgment has merged with the Supreme Court's order dated August 18, 2017, which reads as follows:

A "Heard the learned counsel appearing for the appellant.

We do not find any reason to interfere with the order dated 19.05.2017 passed by the National Company Law Appellate Tribunal, New Delhi. In view of this, we find no merit in the appeal.

Accordingly, the appeal is dismissed."

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Whether or not there is a merger, it is clear that the order dated August 18, 2017 is not "law declared" within the meaning of Article 141 of the Constitution and is of no precedential value. Suffice it to state that the said order was also a threshold dismissal by the Supreme Court, having heard only the learned counsel appearing for the appellant.

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29. Dr. Singhvi then relied upon the Viswanathan Report dated November 2015, in particular Box 5.2, which reads as follows:

Box 5.2 – Trigger for IRP

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1. The IRP can be triggered by either the debtor or the creditors by submitting documentation specified in the Code to the adjudicating authority.
2. For the debtor to trigger the IRP, she must be able to submit all the documentation that is defined in the Code, and may be specified by the Regulator above this.

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3. The Code differentiates two categories of creditors: financial creditors where the liability to the debtor arises from a solely financial transaction, and operational creditors where the liability to the debtor arises in the form of future payments in exchange for goods or services already delivered. In cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity, the creditor will be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt is more than half the full liability it has with the debtor.

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4.The Code will require different documentation for a debtor, a financial creditor, and an operational creditor to trigger the IRP. These are listed Box 5.3 under what the Adjudicator will accept as requirements to trigger the IRP.

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30. Item 2 in Box 5.2 does show that for the corporate debtor to trigger the IRP, it must be able to submit all the documentation that is defined in the Code and that different documentation is required insofar as financial creditors and operational creditors are concerned, as is evident from Item 4 in Box 5.2. The sentence which is after Box 5.2 is significant. It reads, "therefore, the Code requires that the creditor can only trigger the IRP on clear evidence of default." Nowhere does the report state that such "clear evidence" can only be in the shape of the certificate, referred to in Section 9(3)(c), as a condition precedent to triggering the Code. In fact, in Item 2(c) in Box 5.3, the Committee, by way of drafting instructions for how the IRP can be triggered, states:

> "If an operational creditor has applied, the application contains:
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> i. Record of an undisputed bill against the entity, and where applicable, information of such undisputed as filed at a registered information utility."

31. When it comes to the Joint Committee report dated April 2016, the draft Section contained therein, namely the definition of financial institution contained in Section 3(14) of the Code, has added into it a sub-clause (c) which is a public financial institution as defined in Section 2(72) of the Companies Act, 2013. Apart from this, the draft statute that was placed before the Joint Committee contains Section 9(3)(c) exactly as it is in the present Code. This report again does not throw much light on the point at issue before us.

32. Shri Mukul Rohatgi strongly relied upon a recent judgment delivered by this Court in **Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Others**, Civil Appeal No. 8400 of 2017 decided on September 19, 2017. In this case, the question of law framed by the NCLAT for its decision was whether the time limit prescribed for admitting or rejecting a petition for initiation of the insolvency resolution process is mandatory. The precise question was whether, under the proviso to Section 9(5), the rectification of defects in an application within 7 days of the date of receipt of notice from the adjudicating authority was a hard and fast time limit which could never be altered. The NCLAT had held that the 7 day period was sacrosanct and could not be extended, whereas, insofar as the adjudicating authority is concerned, the decision to either admit or reject the application within the period of 14 days was held to be directory. This Court, in disagreeing

A with the NCLAT on the 7 day period being mandatory, held:

"We are not able to decipher any valid reason given while coming to the conclusion that the period mentioned in proviso is mandatory. The order of the NCLAT, thereafter, proceeds to take note of the provisions of Section 12 of the Code and points out the time limit
B for completion of insolvency resolution process is 180 days, which period can be extended by another 90 days. However, that can hardly provide any justification to construe the provisions of proviso to sub-section (5) of Section 9 in the manner in which it is done. It is to be borne in mind that limit of 180 days mentioned in Section 12 also starts from the date of admission of the application. Period
C prior thereto which is consumed, after the filing of the application under Section 9 (or for that matter under Section 7 or Section 10), whether by the Registry of the adjudicating authority in scrutinising the application or by the applicant in removing the defects or by the adjudicating authority in admitting the application is not to be
D taken into account. In fact, till the objections are removed it is not to be treated as application validly filed inasmuch as only after the application is complete in every respect it is required to be entertained. In this scenario, making the period of seven days contained in the proviso as mandatory does not commend to us. No purpose is going to be served by treating this period as
E mandatory. In a given case there may be weighty, valid and justifiable reasons for not able to remove the defects within seven days. Notwithstanding the same, the effect would be to reject the application.

F The court further went on to hold:

"Further, we are of the view that the judgments cited by the NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting proviso to sub-section (5)
G of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.

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Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like to enter a caveat.

We are also conscious of the fact that sometimes applicants or their counsel may show laxity by not removing the objections within the time given and make take it for granted that they would be given unlimited time for such a purpose. There may also be cases where such applications are frivolous in nature which would be filed for some oblique motives and the applicants may want those applications to remain pending and, therefore, would not remove the defects. In order to take care of such cases, a balanced approach is needed. Thus, while interpreting the provisions to be directory in nature, at the same time, it can be laid down that if the objections are not removed within seven days, the applicant while refilling the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes up for admission/order before the adjudicating authority, it would be for the adjudicating authority to decide as to whether sufficient cause is shown in not removing the defects beyond the period of seven days. Once the adjudicating authority is satisfied that such a case is shown, only then it would entertain the application on merits, otherwise it will have right to dismiss the application."

This judgment also lends support to the argument for the appellant in that 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. As has been held in **Mahanth Ram Das v. Ganga Das** (1961) 3 SCR 763 at 767-768, we have traveled far from the days of the laws of the Medes and the Persians wherein, once a decree was promulgated, it was cast in stone and could not be varied or extended later:

"Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full

A money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding, even though a final order had been passed."

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33. Insofar as the second point is concerned, the first thing that is to be noticed is that Section 8 of the Code speaks of an operational creditor delivering a demand notice. It is clear that had the legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been "issued" and not "delivered". Delivery, therefore, would postulate that such notice could be made by an authorized agent. In fact, in Forms 3 and 5 extracted hereinabove, it is clear that this is the understanding of the draftsman of the Adjudicatory Authority Rules, because the signature of the person "authorized to act" on behalf of the operational creditor must be appended to both the demand notice as well as the application under Section 9 of the Code. The position further becomes clear that both forms require such authorized agent to state his position with or in relation to the operational creditor. 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. It is a very wide expression, as has been held in **Renusagar Power Co. Ltd. v. General Electric Co.,** (1984) 4 SCC 679 at 704 and **State of Karnataka v. Azad Coach Builders (P) Ltd.** (2010) 9 SCC 524 at 535, which specifically includes a position which is outside or indirectly related to the operational creditor. It is clear, therefore, that both the expression "authorized to act" and "position in relation to the operational creditor" go to show that an authorized agent or a lawyer acting on behalf of his client is included within the aforesaid expression.

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34. Quite apart from the above, Section 30 of the Advocates Act states as follows:

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> "**Right of advocates to practise.**—Subject to provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends,—

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(i) in all courts including the Supreme Court; A

(ii) before any tribunal or person legally authorised to take evidence; and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise." B

That the expression "practise" is an expression of extremely wide import, and would include all preparatory steps leading to the filing of an application before a Tribunal. This is clear from a Constitution Bench judgment of this Court in **Harish Uppal (Ex-Capt.) v. Union of India,** (2003) 2 SCC 45 at 72, which states: C

"The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can D participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for clients before an arbitrator or arbitrators etc."

35. The doctrine of harmonious construction of a statute extends also to a harmonious construction of all statutes made by Parliament. In E **Harshad S. Mehta v. State of Maharashtra** (2001) 8 SCC 257 at 280-81, the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 was held, insofar as the criminal jurisdiction of the Special Court was concerned, to be harmoniously construed with the Code of Criminal Procedure, 1973 in the following terms:

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"48. To our mind, the Special Court has all the powers of a Court of Session and/or Magistrate, as the case may be, after the prosecution is instituted or transferred before that Court. The width of the power of the Special Court will be same whether trying such cases as are instituted before it or transferred to it. The use G of different words in Sections 6 and 7 of the Act as already noticed earlier also shows that the words in Section 7 that the prosecution for any offence shall be instituted only in the Special Court deserve a liberal and wider construction. They confer on the Special Court all powers of the Magistrate including the one at the stage of

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A investigation or inquiry. Here, the institution of the prosecution means taking any steps in respect thereof before the Special Court. The scheme of the Act nowhere contemplates that it was intended that steps at pre-cognizance stage shall be taken before a court other than a Special Court. We may note an illustration given by Mr Salve referring to Section 157 of the Code. Learned counsel B submitted that the report under that section is required to be sent to a Magistrate empowered to take cognizance of offence. In relation to offence under the Act, the Magistrate has no power to take cognizance. That power is exclusively with the Special Court and thus report under Section 157 of the Code will have to be sent C to the Special Court though the section requires it to be sent to the Magistrate. It is clear that for the expression "Magistrate" in Section 157, so far as the Act is concerned, it is required to be read as "Special Court" and likewise in respect of other provisions of the Code. If the expression "Special Court" is read for the expression "Magistrate", everything will fall in line. This D harmonious construction of the provisions of the Act and the Code makes the Act work. That is what is required by principles of statutory interpretation. Section 9(1) of the Act provides that the Special Court shall in the trial of such cases follow the procedure prescribed by the Code for the trial of warrant cases before the E Magistrate. The expression "trial" is not defined in the Act or the Code. For the purpose of the Act, it has a wider connotation and also includes in it the pre-trial stage as well. Section 9(2) makes the Special Court, a Court of Session by a fiction by providing that the Special Court shall be deemed to be a Court of Session and shall have all the powers of a Court of Session. In case, the Special F Court is held not to have the dual capacity and powers both of the Magistrate and the Court of Session, depending upon the stage of the case, there will be a complete hiatus. It is also to be kept in view that the Special Court under the Act comprises of a High Court Judge and it is a court of exclusive jurisdiction in respect of G any offence as provided in Section 3(2) which will include offences under the Indian Penal Code, the Prevention of Corruption Act and other penal laws. It is only in the event of inconsistency that the provisions of the Act would prevail as provided in Section 13 thereof. Any other interpretation will make the provision of the Act unworkable which could not be the intention of the legislature. H

Section 9(2) does not exclude Sections 306 to 308 of the Code from the purview of the Act. This section rather provides that the provisions of the Code shall apply to the proceedings before the Special Court. The inconsistency seems to be only imaginary. There is nothing in the Act to show that Sections 306 to 308 were intended to be excluded from the purview of the Act." A B

Similarly, in **CTO v. Binani Cements Ltd.** (2014) 8 SCC 319 at 332, the rule of construction of two Parliamentary statutes being harmoniously construed was laid down as follows:

"35. Generally, the principle has found vast application in cases of there being two statutes: general or specific with the latter treating the common subject-matter more specifically or minutely than the former. *Corpus Juris Secundum*, 82 C.J.S. Statutes § 482 states that when construing a general and a specific statute pertaining to the same topic, it is necessary to consider the statutes as consistent with one another and such statutes therefore should be harmonised, if possible, with the objective of giving effect to a consistent legislative policy. On the other hand, where a general statute and a specific statute relating to the same subject-matter cannot be reconciled, the special or specific statute ordinarily will control. The provision more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special statute clearly includes the matter in controversy (*Edmond* v. *United States* [137 L Ed 2d 917 : 520 US 651 (1997)] , *Warden* v. *Marrero* [41 L Ed 2d 383 : 417 US 653 (1974)])." C D E

More recently, in **Binoy Viswam v. Union of India** (2017) 7 SCC 59 at 132, this Court construed the Income Tax Act, 1961 and the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 harmoniously in the following manner: F

"98. In view of the above, we are not impressed by the contention of the petitioners that the two enactments are contradictory with each other. A harmonious reading of the two enactments would clearly suggest that whereas enrolment of Aadhaar is voluntary when it comes to taking benefits of various welfare schemes even if it is presumed that requirement of Section 7 of the Aadhaar Act that it is necessary to provide Aadhaar number to avail the benefits G H

A of schemes and services, it is up to a person to avail those benefits or not. On the other hand, purpose behind enacting Section 139-AA of the Act is to check a menace of black money as well as money laundering and also to widen the income tax net so as to cover those persons who are evading the payment of tax."

B 36. The non-obstante clause contained in Section 238 of the Code will not override the Advocates Act as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act. In **Balchand Jain v. State of M.P.** (1976) 4 SCC 572 at 585-86, the anticipatory bail provision contained in Section 438 of the Code of Criminal Procedure was held not to be C wiped out by the non-obstante clause contained in Rule 184 of the Defence and Internal Security of India Rules, 1971. Fazal Ali, J. concurring with the main judgment, held:

"16. Having regard to the principles enunciated above, we feel that there does not appear to be any direct conflict between the D provisions of Rule 184 of the Rules and Section 438 of the Code. However, we hold that the conditions required by Rule 184 of the Rules must be impliedly imported in Section 438 of the Code so as to form the main guidelines which have to be followed while the court exercises its power under Section 438 of the Code in offences E contemplated by Rule 184 of the Rules. Such an interpretation would meet the ends of justice, avoid all possible anomalies and would at the same time ensure and protect the liberty of the subject which appears to be the real intention of the legislature in enshrining Section 438 as a new provision for the first time in the Code. We think that there is no real inconsistency between Section 438 of F the Code and Rule 184 of the Rules and, therefore, the non obstante clause cannot be interpreted in a manner so as to repeal or override the provisions of Section 438 of the Code in respect of cases where Rule 184 of the Rules applies."

Similarly, in **R.S. Raghunath v. State of Karnataka** (1992) 1 G SCC 335 at 348, the non-obstante clause contained in Rule 3(2) of the Karnataka Civil Services (General Recruitment) Rules, 1977 was held not to override the Karnataka General Service (Motor Vehicles Branch) (Recruitment) Rules, 1976. It was held:

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"As already noted, there should be a clear inconsistency between the two enactments before giving an overriding effect to the non-obstante clause but when the scope of the provisions of an earlier enactment is clear the same cannot be cut down by resort to non-obstante clause. In the instant case we have noticed that even the General Rules of which Rule 3(2) forms a part provide for promotion by selection. As a matter of fact Rules 1(3)(*a*) and 3(1) and 4 also provide for the enforceability of the Special Rules. The very Rule 3 of the General Rules which provides for recruitment also provides for promotion by selection and further lays down that the methods of recruitment shall be as specified in the Special Rules, if any. In this background if we examine the General Rules it becomes clear that the object of these Rules only is to provide broadly for recruitment to services of all the departments and they are framed generally to cover situations that are not covered by the Special Rules of any particular department. In such a situation both the Rules including Rules 1(3)(*a*), 3(1) and 4 of General Rules should be read together. If so read it becomes plain that there is no inconsistency and that amendment by inserting Rule 3(2) is only an amendment to the General Rules and it cannot be interpreted as to supersede the Special Rules. The amendment also must be read as being subject to Rules 1(3)(*a*), 3(1) and 4(2) of the General Rules themselves. The amendment cannot be read as abrogating all other Special Rules in respect of all departments. In a given case where there are no Special Rules then naturally the General Rules would be applicable. Just because there is a non-obstante clause, in Rule 3(2) it cannot be interpreted that the said amendment to the General Rules though later in point of time would abrogate the special rule the scope of which is very clear and which co-exists particularly when no patent conflict or inconsistency can be spelt out. As already noted Rules 1(3)(*a*), 3(1) and 4 of the General Rules themselves provide for promotion by selection and for enforceability of the Special Rules in that regard. Therefore there is no patent conflict or inconsistency at all between the General and the Special Rules."

In **Central Bank of India v. State of Kerala** (2009) 4 SCC 94 at 141-42, the non-obstante clauses contained in Section 34(1) of

A Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and Section 35 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 were held not to override specific provisions contained in the Bombay Sales Tax Act, 1959 and the Kerala Sales Tax Act 1963 dealing with a declaration of a
B first charge in the following terms:

> "130. Undisputedly, the two enactments do not contain provision similar to the Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions
C of the DRT Act and the Securitisation Act on the one hand and Section 38-C of the Bombay Act and Section 26-B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings
D initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be.
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> 131. The Court could have given effect to the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the
E Securitisation Act vis-à-vis Section 38-C of the Bombay Act and Section 26-B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as Parliament has not made any such provision in either of the enactments, the first charge created by
F the State legislations on the property of the dealer or any other person, liable to pay sales tax, etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors."

Since there is no clear disharmony between the two Parliamentary
G statutes in the present case which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also, we must not forget that Section 30 of the Advocates Act deals with the fundamental right under Article 19(1)(g) of the Constitution to practice one's profession. Therefore, a conjoint reading of Section 30 of the
H Advocates Act and Sections 8 and 9 of the Code together with the

Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

37. However, Dr. Singhvi referred to Rule 4 of the Debts Recovery Rules and Section 434(2) of the Companies Act, 1956, which state as follows:

"**4. Procedure for filing applications.-**

(1) The application under section 19 or section 31A, or under section 30(1) of the Act may be presented as nearly as possible in Form-I, Form-II and Form-III respectively annexed to these rules by the applicant in person or by his agent or by a duly authorised legal practitioner to the Registrar of the Bench within whose jurisdiction his case falls or shall be sent by registered post addressed to the Registrar.

(2) An application sent by post under sub-rule (1) shall be deemed to have been presented to the Registrar the day on which it was received in the office of the Registrar.

(3) The application under sub-rule (1) shall be presented in two sets, in a paper book along with an empty file size envelope bearing full address of the defendant and where the number of defendants is more than one, then sufficient number of extra paper-books together with empty file size envelopes bearing full address of each of the defendant shall be furnished by the applicant.

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434. COMPANY WHEN DEEMED UNABLE TO PAY ITS DEBTS-

(2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm."

The argument then made was that when Parliament wishes to include a lawyer for the purposes of litigation or to a pre-litigation stage, it expressly so provides, and this not being so in the Code, it must be inferred that lawyers are excluded when it comes to issuing notices

A under Section 8 of the Code. We are afraid that this argument must be rejected, not only in view of what has been held by us on a reading of the Code and on the harmonious construction of Section 30 of the Advocates Act read with the Code, but also on the basis of a judgment of this Court in **Byram Pestonji Gariwala v. Union Bank of India,** (1992) 1 SCC 31 at 47-48. In this judgment, what fell for consideration was Order B XXIII Rule 3 of the Code of Civil Procedure, 1908 after its amendment in 1976. It was argued in that case that a compromise in a suit had, under Order XXIII Rule 3, to be in writing and "signed by the parties". It was, therefore, argued that a compromise effected by counsel on behalf of his client would not be effective in law, unless the party himself C signed the compromise. This was turned down stating that Courts in India have consistently recognized the traditional role of lawyers and the extent and nature of the implied authority to act on behalf of their clients, which included compromising matters on behalf of their clients. The Court held there is no reason to assume that the legislature intended to curtail such implied authority of counsel. It then went on to hold: D

> "38. Considering the traditionally recognised role of counsel in the common law system, and the evil sought to be remedied by Parliament by the C.P.C. (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, E and allowing the compromise decree to comprehend even matters falling outside the subject matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by their duly F authorised agents. Any such presumption would be inconsistent with the legislative object of attaining quick reduction of arrears in court by elimination of uncertainties and enlargement of the scope of compromise.
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> 39. To insist upon the party himself personally signing the G agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite

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authorisation by vakalatnama, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated. A B

40. Accordingly, we are of the view that the words 'in writing and signed by the parties', inserted by the C.P.C. (Amendment) Act, 1976, must necessarily mean, to borrow the language of Order III Rule 1 CPC:

"any appearance, application or act in or to any court, required or authorized by law to be made or done by a party in such court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, *or by his recognized agent, or by a pleader*, appearing, applying or acting as the case may be, on his behalf: C D

Provided that any such appearance shall, if the court so directs, be made by the party in person."

38. Just as has been held in **Gariwala** (supra), 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. E

39. For all these reasons, we are of the view that the NCLAT judgment has to be set aside on both counts. Inasmuch as the two threshold bars to the applications filed under Section 9 have now been removed by us, the NCLAT will proceed further with these matters under the Code on a remand of these matters to it. The appeals are allowed in the aforesaid terms. F

Ankit Gyan

Appeals allowed.