



Whether Sec 9(3)C of Ibc is mandatory or directory in nature

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Abstract

Section 9(3)(c), Rule 6 and form 5 of the I&B (Application to Adjudicating authority) Rules, 2016, it is clear that sec 9(3)(c) is not mandatory, but only directory and that, in the said section, “shall” should be read as “may”, when a serious inconvenience is caused to the 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 directory only. The word ‘confirming’ in sec 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. Section 9(3)(c), Rule 6 and form 5 of the I&B (Application to Adjudicating authority) Rules, 2016, it is clear that sec 9(3)(c) is not mandatory, but only directory and that, in the said section, “shall” should be read as “may”, when a serious inconvenience is caused to the 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 directory only. The word ‘confirming’ in sec 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.

Keywords: Rule, particular, operational, mandatory, nature

1. Introduction

Whether, in relation to an operational debt, the provision contained in section 9(3) (c) of the code is mandatory?

- Section 9(3)(c) ^[1], Rule 6 and form 5 of the I&B (Application to Adjudicating authority) Rules, 2016, it is clear that sec 9(3)(c) is not mandatory, but only directory and that, in the said section, “shall” should be read as “may”, when a serious inconvenience is caused to the 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 directory only.
- The word ‘confirming’ in sec 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.

1.1 The condition under sec 9(3) (c) is directory or mandatory?

- The furnishing of a copy of the certificate from a financial institution maintaining accounts of the operational creditor confirming non-payment of operational debt required under Section 9(3)(c) of the Code is 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, which only “confirms” that there is no payment of an unpaid operational debt. There is a requirement of furnishing other information and documentary evidence involving particulars of operational debt as well along with the application. This can be gathered from a reading of Section 9(3) (d) of

the Code along with the entries mentioned in Part V of Form 5 under Rule 6.

- The important condition precedent is an occurrence of a default which can be proved, by means of other documentary evidence such as a letter written by the corporate debtor to the operational creditor confirming that a particular operational debt is due and payable. Despite having sufficient evidence, dismissal of a petition simply because a copy of the financial certificate is not available leads to an absurd result.
- Section 9(3)(c) is only a procedural provision which is directory in nature as the Adjudicatory Authority Rules read with the Code demonstrate.

1.2 Can sec 9(3)(c) be interpreted in a discriminatory manner?

- There may be situations where the operational creditor does not have a certificate from a financial institution as defined in Section 3(14) of the Code. For instance, a foreign operational creditor may have a foreign banker or an operational creditor may have a non-scheduled Bank as its banker, which is not within the definition of a ‘financial institution’ under Section 3(14) of 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.
- The argument that such persons may be excluded from triggering the Code against their corporate debtor, despite being operational creditors as defined, may lead to violation of Article 14 of the Constitution of India,

¹ Section 9 of Insolvency & Bankruptcy Code

1950 ^[2], which applies to all persons including foreigners. The operational creditors cannot be divided into two subclasses of those who deal with a financial institution that is recognized under Section 3(14) and those who do not.

- Interpreting the expression ‘shall’ as making the provision mandatory would amount to a situation wherein serious general inconvenience would be caused to innocent persons without furthering the object of the Act.
- *Macquarie Bank Limited vs Shilpi Cable Technologies Ltd* ^[3] on 15 December, 2017. The Hon'ble Supreme Court observed that a creative interpretation of Section 9(3)(c) is necessary in the present case as the literal interpretation would be unreasonable and would create hardships for Appellants and other foreign banks in the future. Also, the requirement of certificate as a document is not necessary for substantiating the existence of default as it can be proved by other documents as well. Also, in such cases where such certificates are impossible to furnish, serious inconvenience will be caused to the innocent persons like Appellant when such requirements are not even necessary to further the object of the Act. While dealing with the other issue related to whether a lawyer can issue a demand notice on behalf of the Creditor, the Hon'ble Supreme Court read sections 8 and 9 of the IB Code conjointly along with Section 30 of the Advocates Act which talks about the Right of the Advocates to practice. While dealing with the other issue related to whether a lawyer can issue a demand notice on behalf of the Creditor, the Hon'ble Supreme Court read sections 8 and 9 of the IB Code conjointly along with Section 30 of the Advocates Act which talks about the Right of the Advocates to practice. The Hon'ble Supreme Court relied upon the judgment of "*Byram Pestonji Gariwala v. Union Bank of India*"² where a signature affected by the lawyer on behalf of his client on a document related to a compromise was held to be effective in law. It was observed in the judgment that "the courts in India have consistently realized the role of lawyer when it comes to disputes 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."
- Therefore, the decision of the NCLT and NCLAT was overruled by the Hon'ble Supreme Court and the matter was remanded back for consideration.

2. Section 9(3) (C) of the code is procedural in nature like section 9(5) of the code, therefore not mandatory.

Section 9: “Application for initiation of corporate insolvency resolution process by operational creditor. (3) The operational creditor shall, along with the application furnish— (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor

² Article 14 of the Indian Constitution- Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

³ *Macquarie Bank Limited vs. Shilpi Cable Technologies Civil Appeal No.15135 OF 2017*

confirming that there is no payment of an unpaid operational debt by the corporate debtor.

In the present case Thanos as per section 99 had moved to NCLT10 for initiation of the corporate insolvency resolution process against Hulk. Thanos, operational creditor with due course of time had already sent various reminders to the corporate debtor11, Hulk. Thanos Bank, operational debtor sent an email to the hulk on 27.08.15 for the payment of the outstanding amount also several other reminders were also sent by the operational creditor, Thanos Bank. But no heed was paid to

Macquarie Bank Limited vs. Shilpi Cable Technologies Civil Appeal No.15135 OF 2017 9 Section 9 of Insolvency & Bankruptcy Code 10 The Central Government has constituted National Company Law Tribunal (NCLT) under section 408 of the Companies Act, 2013 (18 of 2013) ^[4] w.e.f. 01st June 2016. 11 Section 3(8) ^[5]: “corporate debtor” means a corporate person who owes a debt to any person these reminders by the corporate debtor, Hulk. Hulk did not even take any effort to revert back to the mails which were sent by the operational creditor. Thanos bank not finding any other resort to get back the dues from the hulk sent a statutory notice on 28.01.16 under section 433 & 434 of Companies Act, 1956. As per section 433(e)12 of the particular act states that hulk was unable to pay the debts also as per 434(C)13 of the act it is very prudent to make out that the corporate debtor was unable to pay the debts. After reply was issued by the corporate debtor denying any such liability on 09.03.16. It is clear from this fact that Hulk had no intention of paying back the due amount to the operational debtor because in spite of sending several reminders Hulk did not raise the point of denying such liability at that particular point of time. Neither did Hulk denied his liability in due performance of agreement. Thanos Bank thinking of no other measure to get the outstanding amount sent a demand notice after enactment of the Insolvency & Bankruptcy Code, 2016 as per section 8 of the said code on 18.17.16. In the reply Hulk not only denied paying the outstanding amount but also questioned the validity of the agreement dated 02.02.15. According to this fact it is clear that the Hulk had no issue with the validity of the agreement until 01.10.17 which is very absurd as already mentioned above several reminders were sent to the corporate debtor and no such issue was taken into consideration then. To get the due amount back from the Hulk, Thanos Bank Initiated proceeding against the Hulk before NCLT on 12.10.17. The tribunal dismissed the application on the grounds that there is noncompliance of the mandatory provision under section 9(3) (c) of the code. Section 433(e) ^[6] in The Companies Act, 1956: if the company is unable to pay its debts Section 434 ^[7]. Company when deemed unable to pay its debts. (c) if it is proved to the satisfaction of the Court that the company is unable to

⁴ The Central Government has constituted National Company Law Tribunal (NCLT) under section 408 of the Companies Act, 2013 (18 of 2013) w.e.f. 01st June 2016.

⁵ Section 3(8): “corporate debtor” means a corporate person who owes a debt to any person

⁶ Section 433(e) in The Companies Act, 1956: if the company is unable to pay its debts

⁷ Section 434. Company when deemed unable to pay its debts. (c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company. After moving to the appeal to the NCLAT they also dismissed the appeal on the same grounds. Therefore, the basic contentions from the Operational creditor are as follows:

Section 9: “Application for initiation of corporate insolvency resolution process by operational creditor. (3) The operational creditor shall, along with the application furnish— (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.

As per the definition of the said section of the code it is very much clear that Here it is relevant to mention that Section 9(3) (c) of the Code provides for the documents to be furnished along with application for initiation of corporate insolvency resolution process by operational creditor under Section 9 of the Code. In this context the Court made reference to the requisite elements necessary to trigger the Code under Section 9(1): 1. Occurrence of a default 2. delivery of a demand notice of an unpaid operational debt or invoice demanding payment of the amount involved; The fact that the operational creditor, Thanos Bank has not received payment from Hulk, the corporate debtor within a period of 10 days of receipt 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.

3. A Certificate by a financial Institution is merely a confirmatory evidence.

In the landmark judgment of Mobilox Innovations Private Limited v. Kirusa Software Private Limited ^[8], The two member bench comprising of Justice R.F.Nariman and Justice Navin Sinha observed “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 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. 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.” 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.

Even Form 5 under Rule 6 of the Adjudicating Authority Rules clarifies that item 7 of Part V is only one of the documents to be submitted as evidence of 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”.

Therefore, a certificate under section 9 is not a pre-condition to trigger 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.

In the judgment *Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd.*¹⁵ the Supreme Court of India has enshrined various aspects and interpreted the said section 9(3)(c) of the code directory rather than mandatory because requirement of the certificate by the financial institution is just another document along with the other documents which could be relied upon by the Operational Creditor in order to prove the existence of an Operational Debt.

The Hon’ble Supreme Court observed that a creative interpretation of Section 9(3) (c) is necessary in the present case as the literal interpretation would be unreasonable and would create hardships for Appellants and other foreign banks in the future. Also, the requirement of certificate as a document is not necessary for substantiating the existence of default as it can be proved by other documents as well. Also, in such cases where such certificates are impossible to furnish, serious inconvenience will be caused to the innocent persons like Appellant when such requirements are not even necessary to further the object of the Act. Therefore it is humbly submitted before the Hon’ble court that section 9(3) (c) of the Insolvency & Bankruptcy Code, 2016 directory, not mandatory in nature. Also to initiate the insolvency resolution against the corporate debtor.

The provision contained in section 9(3)(c) of the code is mandatory?

- Sec 9(3)(c) is a jurisdictional condition precedent, which is clear from the “initiation” and the expression “shall”, both showing that the Sec is a mandatory condition precedent which has to be satisfied before the adjudicating authority can proceed further.
- A copy of certificate from a financial institution is a very important document which makes it clear, almost conclusively that there is an unpaid operational debt.
- The consequence of not furnishing the copy of the certificate under Sec 9(3)(c) is that, under sec 9(5)(ii)(a), the application that is made would be incomplete and, subject to the provision, would have to be dismissed on that score.
- 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 provision, would have to be dismissed on that score. 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.
- 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 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

⁸ CIVIL APPEAL NO. 9405 OF 2017

evidence, albeit a very important piece of evidence, which only "confirms" that there is no payment of an unpaid operational debt. This becomes clearer when we go to Section 9(3) which requires such other information as may be specified has also to be furnished along with the application.

- Sec 9(3)(c) is a jurisdictional condition precedent, which is clear from the "initiation" and the expression "shall", both showing that the Sec is a mandatory condition precedent which has to be satisfied before the adjudicating authority can proceed further.
- A copy of certificate from a financial institution is a very important document which makes it clear, almost conclusively that there is an unpaid operational debt.
- The consequence of not furnishing the copy of the certificate under Sec 9(3)(c) is that, under sec 9(5)(ii)(a), the application that is made would be incomplete and, subject to the provision, would have to be dismissed on that score.
- The basic principle of *Taylor vs. Taylor* (1875) 1 Ch. D 426 it was long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision which was followed by Lord Roche in *Nazir Ahmad vs. King Emperor*^[9]; AIR 1936 PC 253.
- *Macquarie Bank Limited v. Shilpi Cable* relied upon the principle propounded in *Taylor v Taylor*^[10], i.e., 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. With respect to this, the Court opined that when this principle leads to impractical, unworkable and inequitable results, it cannot be applied out of context in situations which are predominately rocedural in nature.
- *Smart Timing Steel Ltd. vs. National Steel and Agro*^[11] Industries Ltd Referring to Section 9 of the Code, NCLAT observed that the entire provision of sub-clause (3) of Section 9 is "required to be mandatorily followed and it is not empty statutory formality".
- *Macquarie Bank Limited v. Uttam Galva Metallics Limited*^[12], In Civil Appeal 15481/2017, Macquarie Bank Limited, Singapore filed a petition under Section 9 of the Code as an operational creditor before the National Company Law Tribunal ('Adjudicating Authority') against Uttam Galva Metallics Limited. However, the Adjudicating Authority dismissed the petition on the ground that the operational creditor did not furnish a certificate from the financial institutions maintaining accounts of the operational creditor, confirming the non-payment of operational debt, as is mandatory under Section 9(3)(c) of the Code. Macquarie Bank appealed against the decision before the Appellate Tribunal. The Appellate Tribunal in *Macquarie v. Uttam Galva* affirmed the decision of the Adjudicating Authority and held that it is mandatory to furnish a certificate from a financial institution under Section 9(3) (c) of the Code, failing which the petition under Section 9 must be dismissed. It was further held

that an advocate cannot issue a demand notice on behalf of the operational creditor under Section 8 of the Code in the absence of any authority by the operational creditor and if such person does not hold any position with or in relation to the operational creditor. However, the petition under Section 9 of the Code filed by Macquarie Bank against Shilpi Cables was admitted by the Adjudicating Authority. On appeal, the Appellate Tribunal relied on the decision in *Macquarie v. Uttam Galva*^[13], to dismiss the appeal for non-compliance of Section 9(3)(c) of the Code.

- In *Uttam Galva Steels Limited vs. DF Deutsche Forfait AG& Anr.*, [28.07.2017], NCLAT, while relying upon *Smart Timing*(supra) reaffirmed that certificate from Financial Institution is mandatory. In *Uttam Galva*, the certificate was issued by a foreign bank and is not recognised as a 'financial institution'. The said Certificate has been issued by 'collecting agency' as distinct from 'Financial Institution' and genuity of the same cannot be verified by the Adjudicating Authority.

4. The section 9(3) (c) is mandatory like section 9(5).

In determining the question whether a provision is mandatory or directory, one must look into the subject-matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the Intent of the law-maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

(A) Phraseology of the Provision

The words used by the Legislature themselves declare the legislative intent particularly where the words of the statute are clear, plain and unambiguous. In such case, effort must be to give a meaning to each and every word used by the Legislature and it is not sound principle of construction to brush aside words in statute as being redundant or surplus, and particularly when such words can have proper application in circumstances conceivable within the contemplation of the statute. The use of word "shall"

Case

State of Mysore v. V K Kangan [1976] 2 SCC 895 11
Manilal Shah v. Sardar Sayed Ahmed [1955] 1 SCR 108^[14]
 where statute itself provide consequences of breach or non-compliance, normally the provision has to be regarded as having mandatory in nature.12 Sub-section (3) puts an obligation on the part of the operational creditor to furnish the information stipulated therein. Once such an application is filed and received by the adjudicating authority, fourteen days time is granted to the adjudicating authority to ascertain from the records of an information utility or on the basis of other evidence furnished by the operational creditor, whether default on the part of corporate debtor exists or not. This exercise, as per sub-section (5), is to be accomplished by the adjudicating authority within fourteen days. Sub-section (5) provides two alternatives to the adjudicating

⁹ AIR 1936 PC 253.

¹⁰ (1875) 1 Ch.D 426

¹¹ (1972) 2 SCC 744

¹² (2017) 142 SCL 483

¹³ (2017) 142 SCL 483

¹⁴ [1955] 1 SCR 108

authority while dealing with such an application. In case it is satisfied that conditions mentioned in clause (i) of Section 9(5) are satisfied, the adjudicating authority may pass an order admitting such an application. On the other hand, if the adjudicating authority finds existence of any eventuality stated in subsection (2), it may order rejection of such an application. Therefore, the noncompliance with section 9 (3) (c) will result in rejection of the application by the adjudicating authority under section 9 (5) clause (i). On perusal of entire section (3) along with sub-sections and clauses, inclusive of proviso, it would be crystal clear that, the entire provision of sub-section (3) of section 9 required to be mandatorily followed and it is not empty statutory formality.

(B) Intention of law makers

If the operational creditor does not receive either the payment of the debt or a notice of existence of dispute in relation to the debt claim from the corporate debtor, he can file an application with the adjudicating authority for initiating the insolvency resolution process in respect of such debtor. He also has to furnish proof of default and proof of non-payment of the debt along with an affidavit verifying that there has been no notice regarding the existence of a dispute in relation to the debt claim. The Joint Committee in April, 2016 made certain small changes in the said Bill, by which

In *Manilal Shah v. Sardar Sayed Ahmed* [1955] 1 SCR 108¹⁵, *M/S. Surendra Trading Company vs M/S. Juggilal Kamlapat Jute Mills Company Limited and others* The Committee stated. Mode of delivery of demand notice of unpaid operational debt – Clause 8 The Committee find that clause 8(1) of the Code provides that an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form as may be prescribed, through an information utility, wherever applicable, or by registered post or courier. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and 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. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it.

5. Conclusion

Section 9(3)(c), Rule 6 and form 5 of the I&B (Application to Adjudicating authority) Rules, 2016, it is clear that sec 9(3)(c) is not mandatory, but only directory and that, in the said section, “shall” should be read as “may”, when a serious inconvenience is caused to the 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 directory only. The word ‘confirming’ in sec 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. Section 9(3)(c), Rule 6 and form 5 of the I&B (Application to Adjudicating authority) Rules, 2016, it is clear that sec 9(3)(c) is not mandatory, but only directory and that, in the said section, “shall” should be read as “may”, Therefore, a certificate under section 9 is not a pre-condition to trigger 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. In the judgment *Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd.*¹⁵ the Supreme Court of India has enshrined various aspects and interpreted the said section 9(3) (c) of the code directory rather than mandatory because requirement of the certificate by the financial institution is just another document along with the other documents which could be relied upon by the Operational Creditor in order to prove the existence of an Operational Debt. But The basic principle of *Taylor vs. Taylor* (1875) 1 Ch.D 426 it was long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision which was followed by Lord Roche in *Nazir Ahmad vs. King Emperor*¹⁶; AIR 1936 PC 253.

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¹⁵ [1955] 1 SCR 108

¹⁶ AIR 1936 PC 253.