



ILS BRIEFS

www.indolegalservices.com

2023



121, Tower 11, Supreme
Enclave, New Delhi- 110091



ashutosh@indolegalservices.com
gaurav@indolegalservices.com



+91- 9871433339; +91- 8588999046



ILS BRIEFS

WHETHER THE CREDITOR IS ENTITLED TO CHOOSE BETWEEN FORM 3 AND 4, FOR THE PURPOSE OF SERVING DEMAND NOTICE UNDER IBC?

This interesting question was decided by the NCLAT in the case of *Neeraj Jain Versus Cloundwalker Streaming Technologies Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 1354 of 2019* also popularly known as Flipkart case wherein NCLAT also occasioned to held that “losses” and “damages” caused to the Operational Creditor on account of breach of contract by the Corporate Debtor would not fall under the definition of Operational Debt under Section 5(21) of the Insolvency and Bankruptcy Code, 2016 (IBC).

In the said Operational Creditor had chosen to serve the Demand Notice in Form 3, instead of Form 4 prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, as under the latter serving of invoice would be mandatory, while the Operational Creditor, whose alleged claim is solely based on the “damages” caused by the Corporate Debtor by breaching a formal obligation, certainly would not have fallen under Form 4. So, the Operational Creditor apparently as per its own sweet will carefully have chosen to serve under Form 3 instead of Form 4.

NCLAT held that the application of Operational Creditor ought to be rejected because of defective demand notice having been served upon the Corporate Debtor, while laying that choosing between the two forms, is not a discretion that lies upon the creditor as per their convenience, rather the same has to be decided as per the nature of transaction. Where the nature of operational transaction would have required the creditor to issue invoice per transaction, the service of invoice i.e., serving notice under Form 4 is mandatory.



ILS BRIEFS

NCLAT relied upon a general rule of interpretation that if a plain interpretation of any legislative provision, for the reason of imperfect drafting, gives absurd consequences, the provision should be interpreted as such that such absurdity stands avoided without violating the object of the legislation. Hence, “Or” used under Section 8 of IBC, between Form 3 and 4, is not to be interpreted literally as to give discretion to the creditor for his convenience, but to be applied as per the varied nature of transaction between the Creditor and the Corporate Debtor.

