IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH- IV

IB No. 317/ND/2020

IN THE MATTER OF:

M/s. Krishna Industries Sole Proprietorship Concern
KH.NO.7/12,7/13,7/13/1,
Prem Nagar-1, Kirari Road,
New Delhi-110086

...PETITIONER/ OPERATIONAL CREDITOR

VERSUS

M/s. Nikhil Footwears Pvt. Ltd.
100-101, Shahzada Bagh Industrial Area,
Old Rohtak Road, New Delhi-110035

... RESPONDENT / CORPORATE DEBTOR

Under Section 9 of the Insolvency and Bankruptcy Code, 2016.

Order delivered on: 23.02.2022.

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

MS. SUMITA PURKAYASTHA, HON'BLE MEMBER (TECHNICAL)

ORDER

Per: Sh. DHARMINDER SINGH, MEMBER (JUDICIAL)

The present Petition is filed under the Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter, The Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter, Rules) by M/s. Krishna Industries Sole Proprietorship Concern, (hereinafter "applicant"), with a prayer to initiate the Corporate Insolvency Resolution

Process against M/s. Nikhil Footwears Pvt. Ltd. (hereinafter, Respondent/Corporate Debtor).

2. As per averments made in the petition, The Operational Creditor is a sole proprietorship concern. The Operational Creditor is engaged in the business of services, trading and supplying of construction material.

3. The trade between the Operational Creditor and Corporate Debtor commenced from year 2017 with respect to the supply of the raw materials. All the goods supplied by the Operational Creditor were duly received by the Corporate Debtor without any dissatisfaction with respect to quantity and quality of the goods supplied.

4. The applicant issued Demand Notice dated 31.12.2019 in terms of section 8 of the Code to corporate debtor which was served through speed post.

5. As per part IV of the application, Rs. 3,33,86,135/- alongwith interest is still pending to paid by Corporate Debtor since 25.10.2017 to 27.09.2019.

6. Upon issuance of notice, Ld. Counsel for the respondent appeared and filed reply to the present petition raising the following objections against the admission of the present petition:

   a) It is alleged that the said petition is filed by the power of attorney holder and the same need to be rejected on the said ground. Further, relied upon the Judgement T.C.Mathai & Anr. V. District & Sessions Judge Thiruvanthapuram, Kerala (1999) 3 SCC 614, wherein, it was held by the Hon'ble Supreme Court held that Section 2 of the Power of Attorney Act, 1882 cannot override the specific provision of the statute which required that a particular act should be done by a party in person.

b) It is further submitted that instant petition is filed on behalf of a sole proprietorship firm and the same is not considered as a legal entity. Further, relied upon the order passed by this tribunal in the matter R.G. Steels v. Berry Auto Ancillaries (P.) Ltd., wherein, it was held that the Person's definition as contained in Section 3(23) of IBC does not include within its ambut a sole proprietary concern and therefore, sole proprietary concern taking into consideration the definition of a "person" is not entitled to approach the Adjudicating Authority.

c) Corporate Debtor also stated that in the instant case the demand notice of the Operational Creditor has been issued in the name of the 'Nikhil Footwears Pvt. Ltd.', however, the amount claimed as per the invoices is from the different entity i.e. 'Nikhil Footwears'.

d) It is further submitted that the Operational Creditor had not furnished any proof of serving a copy of demand notice.

7. The petitioner has filed rejoinder to the reply of respondent and submitted as follows:

a) It is submitted that the present petition is filed through authorized representative of Mr. Kapil Kumar Bansal proprietor of M/s Krishna Industries.

b) The Operational Creditor had been in business transaction with M/s Nikhil Footwear Pvt. Ltd. From past many years and also with the other sister concerned companies like M/s Nikhil Footwears.

c) It is pertinent to mentioned here that Mr. Naresh Kumar Agarwal Director of Corporate Debtor is the authorized signatory in M/s Nikhil Footwears as he is the one who has handed over cheques of sister company i.e. M/s Nikhil Footwears of M/s Nikhil Footwear Pvt. Ltd. To the Operational Creditor.

8. We have heard Ld. Counsel for the parties. We have perused the averments made in the application, reply, and rejoinder and additional affidavits filed by the parties.

9. On the basis of the rival arguments, the following points of deteremination has arisen:

I. **Whether the present petitioner being sole propreiteor is entitled to maintain the present petition as Operational Creditor?**

II. **Whether the present petitioner is entitled to initiate CIRP proceedings against the respondent on the basis that the respondent owed debt for the goods supplied by the petitioner?**

III. **Relief.**

FINDINGS WITH REASONS

POINT NO. I

10. Learned Counsel for the respondent vehemently contended that the present petition has been filed by the sole proprieto concern, , accordingly, the same is not maintainable as the same does not come under the purview of "definition of person" and could not be treated as Operational Creditor. In order to buttress his arguments, the Learned Counsel relied upon citation **RG Steels Vs. Berrys Auto Ancilliaries (P) Ltd. ,MANU/NC/6782/2019.**

11. On the other hand, Learned Counsel for the petitioner argued that the present citation has been over-ruled, thus, the sole proprietor can maintain the petitioner under Section 9 being Operational Creditor and also referred to definition 2(f) of the Code, whereby it is being said that the IBC Code is applicable to the sole proprietorship as well also Section 3(23) of the Code has to be read in consonance with 2(f) of the Code. Accordingly, prayed that the petition is well maintained.

12. Although, Section 5(21) "Operational Creditor" refers to a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred for goods and services done by them. No doubt, definition of "Operational Creditor" refer to "person".

13. Before embarking further discussion, it would be appropriate to go through Section 3(23) of IBC Code where the term "person" includes-

(a) an individual
(b) a company
(c) a trust
(d) a partnership
(e) a limited liability partnership ; and
(f) a limited liability partnership; and
(g) any other entity established under a statute;
and includes a person resident outside India;

14. From the bare perusal of the above said section, it is apparent that the term "person" includes "any other entity established under a statute". Therefore, there are various statute under the Indian Law which are very much applicable to sole proprietorship business, for example:

i. Issuance of PAN issued under Income Tax Act.
ii. Issuance of MSME registration certificate issued by Government of India
iii. Issuance of GST Registration certificate.
iv. Issuance of Shop and Establishment licence.
v. Opening of bank account under the name of Proprietary concerned.

15. Though, the sole proprietorship firm I not legal entity as that of partnership firm, but it has been still recognized under the

statute and have same identity as of person, because this is entity which require registration under the various acts like that of the person or individual. Further, Section 2(f) clearly laid down that the provisions of this Code are applicable to sole proprietorship firm also. Hence, Section 2(f) has to be read along with Section 3(23) of the Code. Section 2 (f) of IBC provides inter alia that the provision of the code are applicable to partnership firm and proprietorship firm.

16. Apart that it is settled law that the "doctrine of harmonious construction" has to be adopted because the Parliament makes a separate set of statute rules and regulations as well as Constitution of Provision under their well-defined power. While framing of these provisions, it has to be done very carefully, conflict still occurs sometimes due to overlapping in the proviosns of acts. This is because of that there are chances of certain gaps being left while framing of these provisions, which could not have been foreseen by the legislature. To deal such conflict, certain doctrine and rules are propounded by the Court that is used in the interpretation of statute. One such rule of interpretation is the "doctrine of harmonious construction" which laid down when there is a conflict between two or more statute or two or more parts of statute and the rule of harmonious construction need to be adopted. Every statute has a purpose and intent as per law and should be read as a whole. While using the harmonious rule, the

interpretation should be consistent with all the provisions of the statute.

17. In this regard, the eference can be made to citation **Union of India Vs. Dalip Kumar Singh, CIVIL APPEAL NOS.2466-2467 OF 2015, decided on 26, February 2015., wherein it is laid down** , The provision of statute must be read harmonious together, where this is not possible and there is reconcilable conflict between two section, it must be determined which provision is leading and which provisions subordinate provision and that which one must give way to the other. Hence, a construction giving effect to all the provisions of the statute should be adopted. In the matter in hand, very first definition of the Code i.e. 2(f) clearly laid down that the provisions of this Code shall apply to partnership firms and proprietorship firms.

18. Further, under the definition of 3(23) though,the word "sole proprietor" exclusively had not been mentioned, but at the last i.e. Section 3(23) (g) lays down in other entity established under statute. The sole proprietorship also entails various acts which are established by the Government of India and sole proprietorship requires registration under the various acts and regulations of the Government of India.

19. "Operational Creditor" refers to a word "person" and the definition of "person" is laid down under Section 3(23) of the Code,which does not include sole proprietorship concern specifically, but that Section 3(23) as to be read in consonance of

23/12

Section 2(f) to draw a harmonious construction among all these sections. . All these sections has to be taken into consideration together and not in a separate manner. Moreover, sole proprietorship has also to be taken as a entity constituted, which invites all the acts for registration and all the acts i.e. Provisions of the Income Tax Act, Shop and Establishment License Act, GST Registration Certificate, provisions are very much applicable. Thus, this leads to conclusion that both the sole proprietorship firm and the natural person are the same legal entity. Therefore, the sole proprietorship is entitled to maintain the application under Section 9 being Operational Creditor against any Corporate Debtor. In this regard, the reference can be made to citation, **Neeta Saha Vs. Ram Niwas Gupta, Company Appeal (AT) (Insolvency) No. 321 of 2020, NCLAT, New Delhi (2020).**

20. Further, in the case of **Devendra Surana V Bank of Baroda, W.P. No. 5521 (w) of 2017, Calcutta High Court ddecided on 12 December, 2018**, wherein it is held that the sole proprietorship firm and the natural person, both are the same legal entity.

21. Apparently, the present petition has been filed by Mr. Rahul Bansal being Authorized Representative of sole Proprietor of Kapil Bansal of Krishna Industries (sole proprietors concerned). Moreover, the citation referred on the part of the respondent has also been over-ruled by the Hon'ble NCLAT in the matter of Neha Saha supra.. Hence, the present petitioner is entitled to file the

2712

present petition on behalf of sole proprietorship concerned. This proposition stands settled in the matter of *Neeta Saha (supra)*, accordingly, the citation *i.e. D G Steels pvt.Ltd. (Supra)* referred on behalf of the respondent is not helpful to the Corporate Debtor. Hence, the contention raised by the Learned Counsel for the respondent stands discarded and it is held that the "sole proprietorship firm" is entitled to maintain the petition under Section 9 of the Code being "Operational Creditor" before NCLT. Consequently, this Point No. I stands decided accordingly in the favour of the petitioner against the respondent.

POINT NO. II:

22. *Now, it has to be seen whether the present petitioner actually owes dues against the present Corporate Debtor against the goods were supplied.* . In this context, it is to be mentioned that all the invoices placed on record pertains to M/s. Nikhil Footwear. Both the entities are having different GSTIN/UIN & PAN Numbers. As the GSTIN/UIN number of M/s. Nikhil Footwear Private Limited is 06AAACN0749A1Z1, whereas of M/s Nikhil Footwear is GSTIN/UIN is 06AANFN8088L1ZF and PAN Number of Nikhil Footwears is AANFN8088L, whereas the PAN Number of the Corporate Debtor is herein is AAACN0749A. All these bills contains GST and PAN No. of partnership firm and not of the respondent company.

23. Even, during the course of arguments, Learned Counsel for the petitioner herein also fairly admitted that the invoices pertains to

M/s, Nikhil Footwear i.e. partnership firm and not Nikhil Footwear Private Limited. Therefore, both these are different entities constituted under the different laws and having different GSTIN/UIN_Numbers. Hence, all the dues pertaining to invoices placed on record pertains to M/s Nikhil Footwear i.e. Partnership Firm not to M/s Nikhil Footwear Private Limited. No transaction pertains to the respondent company herein. Partnership firm still does not come under the jurisdiction of NCLT as such no petition can be maintained. Thus, this Point No. II stands decided against the petitioner and in favour of the respondent.

POINT NO. III (RELIEF):

24. In sequel of the above said discussion, the present petitioner miserably failed to prove on record that M/s Krishna Industries supplied any goods as per the invoices to the respondent company i.e. M/s Nikhil Footwear Pvt. Ltd. and dues were against the Corporate Debtor herein qua those bills/ invoices.

25. Resultantly, the present petition stands dismissed with no order to costs.

File be consigned to records.

-Sd-

(SUMITA PURKAYASTHA)
MEMBER (T)

-Sd-

(DHARMINDER SINGH)
MEMBER (J)