

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court -I)
KOLKATA**

CP(IB) No. 1191/KB/2019

*A petition under section 9 of the Insolvency and Bankruptcy Code, 2016 read
with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016.*

In the matter of:

1. Anindita Mitra, having address of correspondence: 2/1, Loudon Street,
Police Station – Shakespeare Sarani, Kolkata – 700016
2. Arnab Mitra, having address of correspondence: 2/1, Loudon Street,
Police Station – Shakespeare Sarani, Kolkata – 700016

.....Operational Creditors/ Petitioners

-Versus-

Sarcar Residency Private Limited, a company incorporated under the Companies Act, 1956 and being a company within the meaning of Companies Act, 2013 and having Corporate Identification No-U70102WB2010PTC152850 and its registered office at 7C, Kirn Shankar Roy Road, 1st Floor, Kolkata-700001, in the State of West Bengal.

.... Corporate Debtor

Date of Hearing : 23rd November, 2022

Date of pronouncing the order: 28th December, 2022

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/ physical):

For Operational Creditors : Mr. Deb Kumar Sen, Advocate
Ms. Buddhadeb Das, Advocate

For Corporate Debtor : Mr. Shaunak Mitra, Advocate
Mr. Aniroop Mitra, Advocate

ORDER

Balraj Joshi, Member (Technical):

1. This Court convened through hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code) by **Anindita Mitra and Arnab Mitra** (Operational Creditors), seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Sarcar Residency Private Limited** (“Corporate Debtor”).
3. The Corporate Debtor is a public company incorporated on 08.09.2010. The authorized share- capital of the company is ₹20,00,000/- and the paid-up share- capital of the company is ₹1,00,000/-.
4. The total amount claimed by the Operational Creditor is ₹95,20,000/- as on 3rd February 2018 along with further interest @12% per annum from 3rd February 2018. The Demand notice under section 8 of the Code was issued by the Operational Creditor on 18th February 2019. Reply to the same was issued by the Corporate Debtor on 2nd March 2019.
5. **Submissions on behalf of the Operational Creditor:**
 - 5.1 The case of the Operational Creditor is that a deed of sale was executed and registered on February 3, 2015, between one Ms. Dhira Mitra of premises No. 2/1, Loudon Street, Police Station - Shakespeare Sarani, Calcutta 700016, as "Vendor" and the as Corporate Debtor as "Purchaser", whereunder the Vendor sold and transferred her 1/27th undivided share and interest in an Immovable Property at premises No.

69, Dr. Suresh Chandra Banerjee Road (formerly: Beliaghata Main Road), Police Station Beliaghata, Calcutta - 700010, for consideration a total valuable Rs. of 1,70,00,000/- copy of the said deed of sale is annexed to the petition and marked - I (A).

- 5.2 It is submitted that in addition to the aforesaid consideration amount of Rs. 1,70,00,000/-, a sum of Rs. 95,20,000/- was agreed, under Sub-Clause: (viii) and (ix) of Clause : IV of the said deed of sale, to be paid to the Vendor by the Corporate Debtor, after 3 years from February 3, 2015 and after surrender of the Vendor's rights in her constructed areas in the said premises in its favour. Within the aforesaid amount of Rs. 95,20,000/-, an amount of Rs. 70,00,000/- was agreed to be paid towards consideration for surrender of the Vendor's rights in her constructed areas in the said premises in its favour and an amount of Rs. 25,20,000/- towards interest for 3 years to be calculated from February 3, 2015 @ 12% per annum on the aforesaid sum of Rs. 70,00,000/-.
- 5.3 It is further submitted that the Vendor requested in writing, to the Corporate Debtor to make payment of the aforesaid amount of Rs. 95,20,000/- to the Operational Creditors instead of her and also undertook and admitted that receipt and realization of payment of the aforesaid amount of Rs. 95,20,000/- by the Operational Creditors from the Corporate Debtor, would be a valid discharge of its debt due to her. The Corporate Debtor had knowledge of the aforesaid arrangement and it had consented in writing to discharge its legally enforceable contractual liability towards the Vendor to make payment of the aforesaid amount of Rs. 95,20,000/- in terms of the aforesaid sub-Clause: (viii) and (ix) of clause: IV of the deed of sale dated February 3, 2015, by duly making aforesaid payment amount Operational Creditors.
- 5.4 The Corporate Debtor, in due course of discharge of its liability towards Operational Creditors in terms of the aforesaid sub-clause: (viii) and (ix)

of clause: IV of the deed of sale dated February 3, 2015, issued 2 post-dated account payee cheques in the names of the Operational Creditors, for Rs. 69,30,000/- bearing cheque no. 399756 and for Rs. 22,68,000/- bearing cheque no. 399755, both drawn on the Shakespeare Sarani Branch of The State Bank of India. Both the aforesaid cheques appear to be signed by one Mr. Govind Garg in the capacity of the director of the Corporate Debtor, copies whereof are annexed to the petition and collectively marked - I (B).

- 5.5 The Corporate Debtor have alleged to have deducted a sum of Rs. 70,000/- from the amount of Rs. 70,00,000/- and a sum of Rs. 2,52,000/- as Tax at Source respectively while issuing the aforesaid cheques. It was agreed by the Operational Creditors that the aforesaid cheques shall not be deposited for encashment in their bank account before February 3, 2018, *i.e.* before. of a period of 3 years from February 3, 2015.
- 5.6 Pursuant to and in terms of the aforesaid sub clause: (viii) and (ix) of clause: IV of the deed of sale dated February 3, 2015, the Vendor has duly surrendered her rights in the constructed areas in the said premises to the Corporate Debtor which it has simultaneously accepted without raising any objection or demur, in any manner and extent whatsoever.
- 5.7 The aforesaid 2 cheques, issued by the Corporate Debtor in discharge of its liability towards the Operational Creditors, were duly deposited by them in their bank account at Dr. U. N. Brahmachari Road branch of The HDFC Bank Ltd. on February 15, 2018, upon prior intimation to the Corporate Debtor and with its consent but, were returned unpaid on February 16, 2018 due to Insufficiency of Funds in its account. Copies of the Deposit Slips and Return Memo issued by the banker of Operational Creditors are annexed to the petition and marked-1 (C) and I (D) respectively.

- 5.8 It is further submitted that a Demand Notice dated February 18, 2019 was issued by the Operational Creditors, a copy whereof is annexed to the petition and marked - I (E). The Corporate Debtor gave reply to the aforesaid Demand Notice dated February 18, 2019 of the Operational Creditors by their letter dated March 2, 2019, a copy whereof is annexed to the petition and marked -I (F). In spite of the said Demand Notice, no payment has been made from the Corporate Debtor till date.
- 5.9 The Operational Creditor has relied on the following documents to support his claims:
- a. Registered Deed of Sale, being Annexure I (X);
 - b. Dishonoured cheques bearing No. 399755 and 399756, being Annexure I(A);
 - c. Demand notice dated 18.02.2019 along with the reply dated 18.03.2019, being Annexure I(F).

6 Submissions on behalf of the Corporate Debtor:

- 6.1 The Corporate Debtor in its reply affidavit has taken multiple defences including:
- a) The alleged debt due to the Operational Creditors herein is not an 'operational debt' under the provisions of the Code and that the Operational Creditors do not come under the definition of the 'Operational Creditor' as envisaged by the Code;
 - b) There is no privity of contract between the Corporate Debtor and the Operational Creditors;
 - c) The Demand Notice under section 8 of the Code was not served on the Corporate Debtor at its registered address but on its advocate which is impermissible under the Code;

- d) There is no compliance with section 9(3)(d) of the Code as no record of default with an information utility has been produced, though this is now a mandatory pre-requirement.

7 Rejoinder on behalf of the Operational Creditor:

- 7.1 The Operational Creditor has denied the submissions made by the Corporate Debtor. Further, the Operational Creditor has stated that the Corporate Debtor had specifically consented in writing to discharge its liability towards the Operational Creditor and also to make payment of the sum of Rs. 95,20,000/- to them in terms of Clause VIII and IX of Clause IV of the Deed of Sale dated 3rd February 2015. On the aforesaid understanding between the Vendor and the Corporate Debtor, post dated cheques were issued on 10 January 2018 covering the aforesaid amount in favour of the Operational Creditors. Therefore, the Corporate Debtor now cannot avoid its obligation to make payment to the Operational Creditor by contending that there is no privity of contract between the Operational Creditor and the Corporate Debtor.
- 7.2 Further, it is explicit from the paragraphs under reply that the Corporate Debtor has in inexplicable terms admitted that the surrender of rights by Dhira Mitra was not a condition precedent in the Sale Deed for agitating any claim against SRPL. As such, not surrendering the entitlement in the said premises by Dhira does not give rise to a situation whereby the condition precedent in the Sale Deed could be said to have remained unsatisfied. It is further submitted that the Corporate Debtor never requested the Operational Creditor to surrender her entitlement in the said premises, even though Dhira Mitra had already communicated her intention to surrender her entitlement in the said premises.
- 7.3 The Corporate Debtor having given a post-dated cheque of Rs. 95,20,000/- and knowing fully well that the said cheque would be encashable at the sole and absolute discretion of the Dhira Mitra at the end of three years from the date of the Deed of Sale dated February 3,

2015 was under an obligation to maintain sufficient funds in such account from where the said post-dated cheques were issued with a view to honour the said cheques in due discharge of its obligation under the said Deed of Sale, particularly when Dhira Mitra had expressed her intention to surrender her entitlement in respect of the said premises.

- 7.4 It is further submitted that the Deed of Surrender, in order to give effect to the said intention to surrender, would have to be executed by both the parties. Steps are required to be taken jointly by the Operational Creditor and the Corporate Debtor in this regard.
- 7.5 There was no occasion for the operational creditor to execute and register Deed of Surrender without the payment obligations by the debtor being fulfilled.
- 7.6 It was agreed between the parties that the Operational Creditor would be entitled to the benefit of the entitlement of the said post-dated cheque in lieu of the entitlement of the constructed area meant for allocation of Dhira Mitra. It was on such understanding that the cheques were issued by the corporate debtor in the name of the applicants. It is denied that payment under the cheques were entitled to and meant for Dhira Mitra.

8 Analysis and Findings:

- 8.1 Heard the Ld. Counsel on behalf of the Operational Creditor and the Ld. Counsel on behalf of the Corporate Debtor and perused the record.
- 8.2 It is noted that *vide* order dated 21st July, 2022, this Adjudicating Authority allowed I.A.(I.B.C) No. 649/KB/2022 and thereby allowed the substitution of the name of the Operational Creditor No.1 since Ms. Anindita Mitra has passed away. As such, the name of Smt. Dhira Mitra was allowed to be brought on record as Operational Creditor No. 1.
- 8.3 Further, it is noted that while reserving the main petition being CP(IB) No. 648/KB/2019 for order, this Adjudicating Authority framed two main issues being:
- a. Whether the amount claimed is an operational debt or not;

b. Whether proper service of section 8 notice was done.

8.4 In regard to the first issue, we would like to refer to the definition of the term ‘operational debt’ given in section 5(21) of the code, which means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment 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.

On perusal of the provisions of the code, it is clear that the terms ‘goods’ and ‘services’ have not been defined in the code. Further, the definition of ‘property’ in section 3(21) of the code is a non-exhaustive one and includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property.

8.5 A conjoint reading of both the aforementioned definitions indicates that while both goods and land are both included in the term ‘property’, there is a clear distinction between them and the term ‘goods’ does not include land.

8.6 Further, it has been argued on behalf of the Operational Creditors, that since the Corporate Debtor was acting as a “developer”, the claim of the Operational Creditors would fall under the category of ‘services’ under the Central Goods and Services Tax Act, 2017 (GST Act). In this regard, we would like to refer to the decision of the Hon’ble National Company Law Apellate Tribunal (NCLAT) in the matter of ***Jaipur Trade Expocentre Private Limited vs. Metro Jet Airways Training Private Limited***¹ wherein it was held that:

“40. This Tribunal relying on Section 3(37) observed that words and expression used in IBC, which have not been defined, but which have been defined under Section 3 (37) can be directly imported. This Tribunal held that definition of ‘service’ in Consumer Protection Act, 2019 and Central

¹ 2022 SCC OnLine NCLAT 263

Goods and Services Tax Act, 2017 are not covered under Section 3(37). Hence, they cannot be treated as supply of service. In paragraph 13 and 15, following has been laid down:

“13. It is clear that words and expressions used in IBC which have not been defined but which have been defined in the Acts mentioned above can be directly imported. However, the Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 do not appear to have been covered under the Section 3 (37) and thus definition of “Service” and “Activities” to be treated as supply of service cannot simply be lifted and applied in IBC. Learned Counsel for parties in Anup Shushil Dubey v. National Agriculture Co-operative Marketing Federation of India Limited do not appear to have brought this to Notice of Bench. For such reasons, with all due respect, we find that we are unable to have a second look at the opinion we arrived at in the Judgment in the matter of “Mr. M. Ravindranath Reddy v. Mr. G. Kishan”

15. It is clear that the legislature was conscious regarding liabilities arising from lease but although for particular types of lease, as mentioned in above subclause (d), legislature made specific provision to even make it Financial Debt, while dealing with Operational Debt, no such provision has been made. Thus, even on the parameters of interpretation of statutes, we are not in a position to hold that the rents due could be treated as Operational Debt. For reasons recorded in the matter of Mr. M. Ravindranath Reddy v. Mr. G. Kishan, we do not find fault with Impugned Order.”

41. The observation of this Tribunal in the above case in respect of definition of ‘service’ under Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 are not covered by Section 3(37) of the Code, with regard to which observation, no exception can be taken. However, in the facts of the present case, where Agreement itself contemplate payment of GST for the services under the Agreement, on

which GST is payable, the definition of 'service' under Central Goods and Services Tax Act, 2017 cannot be said to be irrelevant.

- 8.7 In light of the aforementioned judgment and the provisions under the Code, it is clear that the definition of the terms 'goods' and 'services' can only be taken from the list of the Acts mentioned under section 3(37) of the Code and under the same, sale of land is not covered under the terms 'goods' and 'services'. As such, the claim of the petitioners is not an operational debt and accordingly, the petitioners do not qualify as Operational Creditors under the Code.
- 8.8 In regard to the second issue before this Adjudicating Authority, we would like to refer to section 8(1) of the Code, according to which an Operational Creditor may, on the occurrence of a default, deliver a demand notice to the Corporate Debtor, demanding payment of the amount involved in the default, in such form and manner as may be prescribed.
- 8.9 In the instant matter, the demand notice was not delivered to the Corporate Debtor by any of the aforesaid means. Rather, it was delivered to the advocates of the Corporate Debtor. It has been argued by the Ld. Counsel of Operational Creditor that the demand notice was sent by registered post to the registered office of the Corporate Debtor but the same was returned with the postal remark "Insufficient Address". As such, the demand notice was later delivered to the Advocates appearing on behalf of the Corporate Debtor in connection with the Criminal Complaint made by the Operational Creditors against the Corporate Debtor under section 138 of the Negotiable Instruments Act, 1982. However, on perusal of rule 5(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with section 8 of the Code, it becomes clear that 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 in either of the following ways:

- 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.

As such, the delivery of the demand notice to the advocate of the Corporate Debtor will not account for proper delivery of the same.

- 8.10 In light of the aforementioned facts and circumstances, it is clear that the petitioners are not Operational Creditors and that there was no proper service of demand notice. As such, this Adjudicating Authority is satisfied that the instant petition is not maintainable is liable to be rejected.
- 8.11 Consequently, **C.P.(IB) No. 1191/KB/2019** shall stand *rejected*. Needless to say, the Operational Creditor is free to pursue its remedies under any other law, and the dismissal of the present petition shall not stand in the way of such pursuit of remedies.
- 8.12 The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
- 8.13 Certified Copy of this order may be issues, if applied for, upon compliance of all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the day of December, 2022

SM[LRA]