

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

IB-788/(ND)/2020

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

Mrs. PARVEEN CHAWLA

Resident of:

Flat No. 6, Rashi Apartment,
Plot No. 3, Sector-7, Dwarka,
New Delhi- 110018

... *Operational Creditor/Applicant*

Versus

M/s MCF FINLEASE PRIVATE LIMITED

Registered office at:

B-204, Vikas Tower, Vikaspuri,
New Delhi.

Email Id: chawla.tarun86@gmail.com

... *Corporate Debtor/Respondent*

Coram:

SH. P.S.N. PRASAD,

Hon'ble Member (Judicial)

SH. RAHUL BHATNAGAR,

Hon'ble Member (Technical)

Appearance:

For Operational Creditor: Mr. Ritesh Singh, Advocate.

For Corporate Debtor: Mr. Alok Kumar, Mr. Nikhil Malhotra, Mr. Manan Gambhir and Ms. Garima Soni, Advocates.

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Mrs. Parveen Chawla vs M/s MCF Finlease Private Limited



ORDER

Per P.S.N. PRASAD, Member (Judicial)

Date: 15.02.2022

1. This is an application filed by the Operational Creditor, 'Mrs. Parveen Chawla, seeking to initiate Corporate Insolvency Resolution Process ("CIRP") under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code") against the Corporate Debtor, 'M/s MCF Finlease Private Limited for the alleged default on the part of the Corporate Debtor in clearing the debt of Rs. 16,44,231/- (Rupees Sixteen Lakhs Forty-Four Thousand Two Hundred and Thirty-One Only), as alleged by the Operational Creditor, towards the services provided. The Date of Default as provided in the Part-IV of Form-5 is 03.09.2019. The details of transactions leading to the filing of this application as averred by the Operational Creditor are as follows:

- i. That the Operational Creditor was the employee of the Corporate Debtor and provided her services from 01.04.2007 to 31.07.2019. It was further submitted that the Corporate Debtor is a Non- Banking Financial Company, whose main business is to lend money to borrowers and to charge interest on the loan, hire -purchase financing, financing lease, discounting of bills, trading and investing in stocks and other aspects of financial business.
- ii. The Operational Creditor submitted that the Corporate Debtor has not paid her salary of Rs. 11,25,000/- for the period starting



from 01.05.2018 to 31.07.2019. It was also alleged that the Corporate Debtor has not paid the statutory payments of Gratuity for twelve years and the due amount of Gratuity is Rs. 5,19,231/-. It was further alleged that the Corporate Debtor has unreasonably withheld the total amount of Rs. 16,44,231/- which is due and payable to the Operational Creditor.

- iii. That on 24.09.2019 the Operational Creditor issued the statutory Demand Notice under section 8 of IBC, 2016 upon the Corporate Debtor demanding the payment of Rs. 20,76,932/- which was duly served upon the Corporate Debtor. It was further submitted that the Corporate Debtor neither raised any dispute nor gave any reply to the said demand notice before the expiry of statutory period of 10 days.
- iv. The Operational Creditor stated that the Corporate Debtor replied to the Demand Notice vide reply letter dated 05.10.2019 which was received by the Operational Creditor on 09.10.2019. The Corporate Debtor in its reply letter denied the due amount and raised dispute regarding the amount due.

2. Consequent to the notice issued by this Tribunal the Corporate Debtor filed its reply affidavit submitting the following:

- a. That the Corporate Debtor is a Non- Banking Financial Company primarily dealing in vehicle finance and loan against property registered with the Reserve Bank of India and is offering financial services provided as per section 3(17) of IBC.



The Corporate Debtor submitted that the CIRP cannot be initiated against the Corporate Debtor as it does not fall within the definition of Corporate Person.

- b. The Corporate Debtor submitted that the alleged claim of the Operational Creditor is Rs. 16,44,231/- (Rupees Sixteen Lacs Forty-Four Thousand two hundred and thirty-one) under Section 9 of Insolvency and Bankruptcy Code, 2016 ('IBC') is contrary to the amount claimed in Form of Demand Notice annexed as Annexure A-7 of the Application. present application is not maintainable since the same is based on wrong facts and misrepresentation.
- c. That the Operational Creditor has not disclosed in her application that she is a shareholder of the Corporate Debtor Company and holds 2.97 % of the total shareholding in the Corporate Debtor and a total of 10.65% along with related party i.e., her husband. Hence, the present application filed by her is not maintainable.
- d. The Corporate Debtor further submitted that the Operational Creditor in her application under reply has also not disclosed that a Company Petition bearing no.25/241/2019 titled "Satpal Chawla & Ors. v. MCF Finlease Pvt. Ltd." has also been filed by the Operational Creditor against the Corporate Debtor and its shareholders alleging mismanagement of affairs of the Corporate Debtor company and oppression of minority shareholders which is pending adjudication before this Tribunal wherein the

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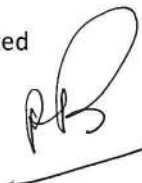
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Mrs. Parveen Chawla vs M/s MCF Finlease Private Limited



Operational Creditor is Petitioner No. 2 in the capacity of a shareholder of the Corporate Debtor company. The Corporate Debtor annexed the copy of the Company Petition with reply as Annexure R-5 and submitted that the abovesaid petition constitutes a dispute under section 5(6) of IBC, 2016.

- e. The Corporate Debtor submitted that it has also replied to the Demand notice of the Operational Creditor within 10 days of delivery of the same and had in its Reply raised the dispute with respect to the claim of the Operational Creditor. It was further submitted by the Corporate Debtor that the Operational Creditor is allegedly claiming salary from 01.05.2018 to 31.07.2019 as well as Gratuity in her Application under Reply, however, the Operational Creditor had stopped working in the Corporate Debtor Company from 22.02.2018 and was paid a salary by the Corporate Debtor Company up to March, 2018. Thereafter, a Criminal Complaint was filed against the Operational Creditor on 31.05.2018. the Corporate Debtor has also annexed the copy of the Criminal Complaint dated 31.05.2018 as Annexure R-6.
- f. It was further submitted that the Corporate Debtor filed criminal cases against the Operational Creditor and her husband which are pending adjudication in the court of Sh. Deepak Vats, Dwarka District Court and in view of the above, the Gratuity of the Operational Creditor has been forfeited as per section 4(6)(b) of the Payment of Gratuity Act, 1972.

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g. The Corporate Debtor submitted that the account details of the Operational Creditor's Bank Account bearing number 09271000005494 has been provided on Page 29 of the Application. However, from page no. 30 onwards the amounts which have been listed in the table below are those of her husband S.P. Chawla and were paid to him. That the amount of Rs. 75,000/- as mentioned on Page no 31 of the Application has been paid to the shareholders i.e., the Operational Creditor, Mr. Satpal Chawla, Ms. Leena Chawla as repayment of their loan given to the Corporate Debtor Company as shareholders. The same has been categorically stated in the reply to Demand Notice at page 47 of the Application.

Date	Particulars	Amount Deposited (In Rs.)
06.01.2018	MCF	50,850
02.02.2018	MCF	50,850
13.03.2018	MCF	50,850
11.04.2018	MCF	50,850
25.05.2018	MCF	75,000

h. That, the salary which was being received by the Operational Creditor was Rs. 39,100/- and not Rs. 75,000/- as has been wrongly represented by the Operational Creditor in her application under Reply. This fact has been mentioned by the




Corporate Debtor Company in its Reply to the Demand Notice on Page no.44 of the Application under Reply and the same has been confirmed by the TDS Certificate for Assessment year 2018-2019, filed by the Operational Creditor on Page no. 55 which clearly reflects that the quarterly salary of the Operational Creditor is Rs. 1,20,000/-and the TDS which is deducted on the same is Rs. 2700/-.

3. While arguing the matter before the Tribunal the Ld. Counsel for the Operational Creditor has submitted that the Operational Creditor changed the total due amount from Rs. 20,76,923/- (Twenty Lakh Seventy-Six Thousand Nine Hundred Twenty-Three Only) to Rs. 16,43,231/- (Sixteen Lakh Forty-Three Thousand Two Hundred Thirty-One Only) because the Operational Creditor accepted the assertion of the Corporate Debtor that she has been in employment with the Corporate Debtor since April 2007. Accordingly, the Operational Creditor reduced the Gratuity amount from Rs. 9,51,923/- (Nine Lakh Fifty-One Thousand Nine Hundred Twenty-Three Only) to Rs. 5,19,2314/- (Five Lath Nineteen Thousand Two Hundred Thirty-One Only).
4. The Ld. Counsel further submitted that the Corporate Debtor in its reply stated that the services of the Operational Creditor were terminated on 22.03.2018 but vide its letter dated 17.09.2019, the Corporate Debtor stated that the resignation of Operational Creditor dated 03.09.2019 cannot be accepted.

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5. The Ld. Counsel while arguing the matter further submitted that even if the reply of Corporate Debtor is taken on its face value, it will become clear that at least the Operational Creditor is entitled to payment of gratuity amount. This being an Insolvency Proceeding, it is established that Corporate Debtor is not in a position to pay the admitted debts over and above Rs.1,00,000/- and that is why the Corporate Debtor is a fit company to go under Corporate Insolvency Resolution Process.
6. Ld. Counsel for the Operational Creditor also submitted that the ground of prior dispute has been raised for the first time in its reply to the Demand Notice and even prior dispute, which has been raised, does not concern with the existence of amount of debt, the quality of goods and services or the breach of the representation or the warranty.
7. The Ld. Counsel for the Corporate Debtor while arguing the matter reiterated the facts submitted in reply and also stated that the Corporate Debtor is a Non-Banking Financial Company (NBFC) and carries on the activities of providing financial service to the public in accordance with Section 3(16) of the IBC. That it is settled principle of law that CIRP cannot be initiated against the Corporate Debtor as it does not fall within the definition of 'Corporate Person' as defined in Section 3(7) of the IBC. The Ld. Counsel also relied upon the Judgement of the Hon'ble NCLAT in case **of Randhiraj Thakur v.**

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M/s Jindal Saxena Financial Services, Company Appeal (AT)

(Insolvency) No. 32 and 50 of 2018 held that:

'10. If the entire scheme of the I&B Code is seen, it will be evident that the Code is to consolidate and amend the laws relating to reorganization and insolvency resolution of 'corporate persons', 'partnership firms' and 'individual' in a time bound manner. It is a self-contained Code which is exhaustive in nature when it comes to reorganization and insolvency resolution. However, an exception had been carved out while enacting the Code that the 'financial service providers' have been kept outside the purview of the Code. Being a consolidating legislation only those acts are permitted which are mentioned in the Code and it cannot be made applicable to financial service providers' including 'non-banking financial institutions' and MFI's banks, which have been kept outside the purview of the Code.'

8. The Ld. Counsel also submitted that an insolvency application is not maintainable against the Corporate Debtor under Section 9 of IBC, by the Applicant as the Operational Creditor is a shareholder having subscribed to 2.97% of the issued shares in Respondent company and the same is clear from the decision of the Hon'ble NCLAT in ***Lalit Mishra v. Sharon Bio Medicine Company Appeal (AT) (Insolvency) No. 164 of 2018, wherein it was held that:***

"12. Admittedly, the shareholders and promoters are not the creditors and thereby the 'Resolution Plan' cannot balance the maximization of the value of the assets of the 'Corporate Debtor' at par with the 'Financial Creditors' or 'Operational Creditors' or 'Secured Creditors' or 'Unsecured Creditors'. They are also ineligible to submit the Resolution Plan' to again control or takeover the management of the 'Corporate Debtor'.

9. We have heard the arguments advanced by the Learned Counsels for both the parties and perused the documents filed, the Operational Creditor herein has prayed for the initiation of Corporate Insolvency



Resolution Process against the Corporate Debtor for the outstanding debt of Rs. 16,44,231/-. The Statutory Demand Notice dated 24.09.2019 under section 8 of IBC, 2016 has been sent by the Operational Creditor to the Corporate Debtor. The Corporate Debtor replied to the Demand Notice by way of letter dated 05.10.2019 and raised pre-existence of dispute.

10. The fact that the Operational Creditor sent the Demand Notice under section 8 of IBC, 2016 dated 24.09.2019 in prescribed Form-3 demanding the payment of unpaid operational debt amounting to Rs. 20,76,923/- however, the Operational Creditor while filing the present application in prescribed Form-5 wherein, the part-IV containing Particulars of Operational Debt states that the Total amount of debt is 16,44,231/- which is a contrary amount to what was stated in section 8 Demand notice, however the Ld. Counsel for the Operational Creditor submitted that reason for change in amount is because the operational creditor accepted the assertion of the Corporate Debtor regarding being in employment since, 2007 and accordingly the Operational Creditor reduced the Gratuity amount.

11. Before proceeding further, it is pertinent to mention that the Corporate Debtor in its reply has stated that the present application needs to be dismissed as the Corporate Debtor is a Non- Banking Financial Company (NBFC) and has also annexed the copy of the Registration Certificate issued by Reserve Bank of India on 10.09.1999



as annexure R-3 of the reply, therefore clearly establishing the fact that the Corporate Debtor is an NBFC. The definition of 'Corporate Person' under section 3(7) of IBC is:

*"a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of subsection (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force **but shall not include any financial service provider**"*

From the perusal of the above- stated provision, it is clear that a financial service provider is excluded from the definition of "Corporate Person". This view has been duly affirmed by the Hon'ble NCLAT in the case of *Randhiraj Thakur v. M/s Jindal Saxena Financial Services, Company Appeal (AT) (Insolvency) No. 32 and 50 of 2018.*

12. Whereas, section 3(17) of the code defines "*Financial Service Provider*" means a person engaged in the business of providing financial services in terms of authorization issued or registration granted by a financial sector regulator.

13. In the present case in hand the corporate debtor is a person engaged in the business of providing financial services in terms of the registration granted to it by the Reserve Bank of India, therefore it is clear that the Respondent do not come within the meaning of the Corporate Person/Corporate Debtor.



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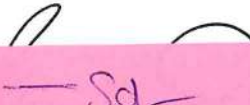
14. For the reasons aforesaid, this Tribunal hold that the present application under section 9 of IBC, 2016 is not maintainable.

15. Accordingly, we hereby **dismiss** the present application.



— Sd —

(SH. RAHUL BHATNAGAR)
MEMBER (TECHNICAL)



— Sd —

(SH. P.S.N. PRASAD)
MEMBER (JUDICIAL)

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