

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
COURT No. V, MUMBAI BENCH**

**C.P. No. 1444/I&B/2020**

Under section 8 & 9 of the IBC, 2016

In the matter of

**Gopakumar Puthan Kattoor**

M/s. Vyas & Bhalwal

Advocates, Solicitors & Notary,

218/220, 2<sup>nd</sup> Floor, Vardhaman

Chambers, Cawasji Patel Street,

Fort, Mumbai 400001

**Petitioner / Operational Creditor**

**V/s.**

**Oil Tools International Services Pvt. Ltd.**

Registered Office: 63/1B, 62/1B, 61/1B, 62/2,

AT POST KHARSUNDI VILLAGE,

TALUKA KHALAPUR, DISTRICT

RAIGAD, MAHARASHTRA 410202

**Corporate Debtor/Respondent.**

**Order Pronounced on 12.05.2023**

**Coram:**

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Shri Prabhat Kumar, Member (Technical)

***Appearances (via Video Conferencing):***

For the Petitioner: Mr. Subhash Bhalwal a/w. Kundanlal M. Patil i/b  
M/s. Vyas & Bhalwal

For the Corporate Debtor: None appeared

*Per: - Kuldip Kumar Kareer, Member (Judicial)*

**ORDER**

1. This Company petition is filed by **Gopakumar Puthan Kattoor** (hereinafter called "**the Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) **Oil Tools International Services Pvt. Ltd** (hereinafter called "**Corporate Debtor**") alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 9 Insolvency and bankruptcy code (hereinafter called "**Code**") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor had failed to make payment of a sum of Rs. **13,62,75,159/-**.

**Submissions by the Operational Creditor: -**

3. It is stated that Corporate Debtor had filed a Petition under Section 397 & 398 of the Companies Act, 1956 against the Respondents named in the said Petition and Operational Creditor was arrayed as Respondent No. 5 bearing TCP No. 44/397-398/2015. The order in the aforesaid petition was decided on 18.09.2017.
4. The aforesaid order was challenged before the National Company Law Appellate

Tribunal New Delhi in Company Appeal Bearing No. 338 & 373 of 2017 wherein the Hon'ble Tribunal was pleased to pass an order dated 9<sup>th</sup> March 2018 in favour of Operational Creditor as under:

29. Hence the above reasons we pass the following order:

- i) CA(AT) No.338 of 2017 is disposed in terms of Order being passed in CA(AT) No.338/2017. Parties to bear their own cost.
- ii) CA(AT)No.338 of 2017 is partly allowed. Direction No.(i) to (iii) of the impugned order passed by NCLT Mumbai are maintained.
- iii) In place of Direction No.(iv) recorded by NCLT, following direction is given:
  - iv) (a) The original petitioners may ascertain from records infusion of funds by R5 towards loan given by the original R5 to the company and funds infused for purchase of shares, and utilization and refund the amount within two months from the date of the order in this appeal. The shareholding issued to R5 stands quashed.
  - b) In case original petitioners No1 and 2 for any reasons do not act as per iv(a) supra, it is directed:-

After ascertainment of infusion of funds from R5, loan given by the shareholders, utilisation of the same and company funds and siphoning of funds, if any, from 31.3.2013 till date, R1 company, as per the report given by the auditor, shall refund the funds actually infused by R5 either in the form of share capital or in the form of loans, within three months from the date of forensic audit report, with interest @ 10% per annum from the date of filing of the company petition in NCLT, Mumbai. The shareholding issued to R5, stands quashed.

5. In pursuance of the aforesaid orders of NCLT and NCLAT, the NCLT appointed M/s Shah & Gutka to conduct the following:
  - i) A forensic audit to be conducted to confirm that funds from the new investor (Mr. Gopa Kumar P.K.) has come to Oil Tools International Services Private Limited Company as a loan to the company as stated by the respondents.
  - ii) A fair valuation of the company is to be completed to provide an exit route to Mr. Ajith Venugopal, Mr. Sajith Venugopal and Mr. Kunimal Venugopal.
6. Once the Forensic Audit Report was submitted by the Forensic Auditors, the Corporate Debtor using the services of its director Mr. S.K. Mehta, newly appointed director of Corporate Debtor No.2 filed a criminal complaint for misappropriation of funds with the Khalapur Police Station. The Ratnagiri Police Department, to whom the inquiry was transferred by the Spl. IGT of Konkan Range, after conducting a thorough inquiry submitted a charge sheet addressing the allegations cited in the FIR but absolved the Operational Creditor of any wrong-doings.
7. On the basis of the above referred orders dated 18.09.2017 passed by NCLT and dated 09.03.2018 passed by Hon'ble NCLAT whereby it was clearly held that the money infused by the Operational Creditor in the Corporate Debtor was to be refunded to him. However, no such money was refunded to the Operational Creditor.
8. Due to non-payment of the said outstanding amount by the Corporate Debtors, the Operational Creditor was constrained to issue the statutory notice dated 07.10.2019 under Section 8 of the Insolvency and Bankruptcy Code 2016 calling upon the Corporate Debtor to pay the outstanding amount of Rs. 11,67,61,580/- along with interest at the rate of 10% per annum as on 31.03.2019, within 10 days from the receipt of this notice.

9. In the circumstances aforesaid, the Applicant submits that the Corporate Debtor is bound and liable to pay to the Operational Creditor the said outstanding amount as on dated 31.03.2019 of Rs. 11,67,61,580/- together with further interest thereon at the rate of 10% per annum till payment or realization as per order of NCLAT dated 09.03.2018.

**Findings:**

10. We have heard the Counsel for the Petitioner and have gone through the record.
11. In this case the Respondent/Corporate Debtor has not come forward to contest the Petition and was proceeded against ex-parte. It is evident from the record that vide order dated 03.10.2017 passed in TCP No. 44/397/398/2015 passed by the NCLT Mumbai, a direction was issued to the Corporate Debtor to refund the funds infused by Respondent No. 5 who is the Petitioner/Operational Creditor in the present case. For the sake of convenience, the operative part of the order is being reproduced hereunder:-

*38. In view of the reasons aforesaid given, we hereby hold that the conduct of respondents in dealing with the affairs of R1 Company is oppressive against the Petitioners and prejudicial to the interest of P1, therefore, by invoking Section 402 of the Companies Act, 1956 this Bench hereby directs as follows:*

- 1) That P1 being a majority shareholder, P1 through P2 shall take over the management of the Company on restoration of P2 as director of the company and with liberty to the petitioners to appoint more members as directors of R1 Company within 15 days from the date Order is made available. R2-R4 will not continue as directors after 15 days from the date of delivery of this Order and they shall not pass any Board Resolution without approval of P2.*
- 2) A forensic audit is to be conducted from 01.04.2013 till date to find out as to whether funds come to R1 Company as stated by*

*the Respondents or not? To conduct a lit, M/s. Shah & Gutka are hereby appointed as Auditor with remuneration proportionate to their shareholding of the petitioners and R2-4 in the ratio of 85:15. The Auditor can fix remuneration of him depending on the volume of work involved in this case.*

*3) The Petitioners shall provide exit to R2 to R4 on fair valuation taking 31.03.2017 as cut-off date. The valuation of the shares shall be conducted by the same auditor after forensic report has been given by the Auditor.*

*4) After ascertainment of infusion of funds from R5, loans given by the shareholders, utilization of the same and company funds and siphoning of funds if any from 31.03. 2013 till date, R1 Company, as per the report given by the auditor, shall refund the funds actually infused by R5 either in the form of share capital or in the form of loans within three months from the date valuation of share value and after preparation of forensic audit report. If such payment is not made within three months as stated above, the petitioners shall pay interest @10% over the amount payable to R5 after completion of three months as stated above.*

12. Against the order dated 18.09.2017 an Appeal was filed before the Hon'ble NCLAT where the Appeal was disposed of vide order dated 03.10.2017 in the following terms:-

- v) CA(AT) No.338 of 2017 is disposed in terms of Order being passed in CA(AT) No.338/2017. Parties to bear their own cost.*
- vi) CA(AT)No.338 of 2017 is partly allowed. Direction No.(i) to (iii) of the impugned order passed by NCLT Mumbai are maintained.*
- vii) In place of Direction No.(iv) recorded by NCLT, following direction is given:*

*viii) (a) The original petitioners may ascertain from records infusion of funds by R5 towards loan given by the original R5 to the company and funds infused for purchase of shares, and utilization and refund the amount within two months from the date of the order in this appeal. The shareholding issued to R5 stands quashed.*

*b) In case original petitioners No1 and 2 for any reasons do not act as per iv(a) supra, it is directed:-*

*After ascertainment of infusion of funds from R5, loan given by the shareholders, utilisation of the same and company funds and siphoning of funds, if any, from 31.3.2013 till date, R1 company, as per the report given by the auditor, shall refund the funds actually infused by R5 either in the form of share capital or in the form of loans, within three months from the date of forensic audit report, with interest @ 10% per annum from the date of filing of the company petition in NCLT, Mumbai. The shareholding issued to R5, stands quashed.*

13. A perusal of the above orders clearly reveals that the some funds were infused by the Petitioner in the Corporate Debtor either in the form of share capital or in the form of loans which have been ordered to be refunded in terms of the aforesaid orders. Now it has to be seen as to whether the funds infused as share capital or otherwise given as loan can be treated as Operational Debt for the purposes of pursuing an application under Section 9 of the Code. In this regard, a reference can be made to an order passed by the Hon'ble NCLAT in **Kushan Mitra Vs. Amit Goyal 2021 IBC law.in 616** whereby it has been held that refund of share application of money in the event of non-allotment of shares falls within the ambit of financial debt. Even otherwise in the above referred orders of NCLT and NCLAT, there is a reference that funds were infused by the Petitioner (referred to as R5 in the said orders) in the form of share capital or in the form of loans which further implies that some loan was advanced by the

Petitioner.

14. Therefore, looking at the case from any angle i.e. either the money was given for allotment of shares or as loan, it would not be covered under the definition of operational debt in terms of Section 5(21). Therefore, in our considered view, no case is made out to initiate proceedings under Section 9 of the Code as the Petitioner has failed to prove that the nature of the debt claimed as an operational debt which is defined in terms of Section 5(21) of the Code as a claim in respect of the provision of goods or services including employment or a debt in respect of payment of dues arising under the law for the time being in force and payable to the Central Government, State Government or any local Authority. Since the Petitioner has failed to prove that the claim raised in the Petition is in respect of an operational debt, in our considered view, the same is liable to fail on this ground alone.

15. Accordingly, the Petition under Section 9 filed by the Petitioner is dismissed.

**Sd/-**  
**Prabhat Kumar**  
**Member (Technical)**

**Sd/-**  
**Kuldip Kumar Kareer**  
**Member(Judicial)**