

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.2077/NCLT/MB-IV/2019

Under Section 9 of the IBC, 2016

In the matter of

Anil Vora

...Operational Creditor /

v/s.

Kavya Build-Con Private Limited

[CIN: U45200MH2004PTC145368]

...Corporate Debtor

Order Delivered on: 07.01.2022

Coram:

Mr. Rajesh Sharma
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner : Mr. Dhruva Gandhi, Advocate.

For the Respondent : Mr. Shanay Shah, Advoacte.

ORDER

Per: Rajesh Sharma, Member (Technical)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by Anil Vora, ("the Operational Creditor"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Kavya Build-Con Private Limited ("the Corporate Debtor"), [CIN: U45200MH2004PTC145368].
2. The Corporate Debtor is a Company incorporated on 29.03.2004 under the Companies Act, 1956, as a Private Company Limited by Shares with the

Registrar of Companies, Maharashtra, Mumbai. Its Corporate Identity Number (CIN) is U45200MH2004PTC145368. Its registered office is at 2nd Floor,99 C, Kavya Aura, Sitaram Ghadigaonkar Marg, Tulsiwadi, Tardeo Mumbai, Maharashtra-400034. Therefore, this Bench has Jurisdiction to deal with the present petition.

3. The present Petition was filed by the Operational Creditor before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a total sum of Rs.1,35,00,000/- (Rupees one crore thirty-five lakh only). The Date of Default is 18.04.2016 which is the date of Dishonour of the Cheque.
4. The case of the Operational Creditor is as under:
 - a) The Operational Creditor was a Partner in a Partnership Firm M/s Kamkshi Enterprises (Firm) upon the terms and conditions contained in the Deed of Partnership dated 28.12.2011 and 20.09.2012 and also supplementary Deed of Partnership dated 02.11.2015. The Firm approached the Operational Creditor with a proposal whereby the Operational Creditor retire from the Firm and for this purpose it was agreed to execute a Retirement Deed, which was executed on 31.12.2015. As per the said Retirement Deed, the Firm agreed to jointly and severally pay a lumpsum consideration of Rs.1,35,00,000/- (Rupees one crore thirty-five lakh only) including the amount standing towards the Operational Creditor's credit in the Books of Accounts as on 31.12.2015 in full and final settlement of all the Operational Creditor's claims in Capital, Goodwill Profits and Assets (including movable/immovable properties) and interest in capital of the Firm as also the benefit directly or indirectly attached to the Firm and its business or rights or properties

as also its share in net assets of the Firm. The Deed of Retirement is attached at pp 29-39 as Exhibit-2 of the Petition.

- b) The Firm issued a cheque bearing No. 047005 dated 20.01.2016 drawn on Oriental Bank of Commerce. The cheque was dishonoured by a return memo dated 18.04.2016 by the Operational Creditor's Bank with remark 'Fund Insufficient'. The copy of the Cheque and the return memo is attached at pp 40 & 41 as Exhibit-3 and Exhibit-4 of the Petition respectively.
- c) The Corporate Debtor being a partner of the Firm is jointly and severally liable for the payments. The Corporate Debtor has bought the entire right, title and interest of the Operational Creditor in the said Firm for which Cheque was issued.
- d) Thereafter, the Operational Creditor has vide RTGS from the said Partnership Firm received an amount of Rs.5 lakh in his account on 29.08.2016. However, thereafter no amount has been received by the Operational Creditor either from the said Partnership Firm nor from the Corporate Debtor towards payment of their liability.
- e) Pursuant to the above default, the Operational Creditor filed Insolvency Petition bearing CP (IB) – 481/MB/2018 before this Tribunal which was Dismissed as Infructuous by this Tribunal vide order dated 31.10.2018 as the CIRP was admitted against Corporate Debtor in another Company Petition bearing CP (IB) NO. 109/MB/2018. However, the Operational Creditor filed its claim before IRP.
- f) The Corporate Debtor challenged the admission order dated 31.10.2018 before the NCLAT wherein the Operational Creditor filed an Intervention Application. As the matter got settled between the parties,

the Petition bearing CP (IB) – 109/MB/2018 was set aside by the NCLAT vide order dated 21.12.2018 and the Intervening Application was not taken into consideration.

g) Aggrieved by the order, the Operational Creditor herein filed a Civil Appeal before the Hon'ble Supreme Court of India vide Civil Appeal Dairy No. 3949 of 2019 which has been disposed vide order dated 11.02.2019 wherein the Hon'ble Supreme Court granted liberty to the Operational Creditor to file the Petition afresh, which application will be decided on its own merits without being influenced by any observations made in the impugned order and without placing any time bar against the Applicant. The order of the Hon'ble Supreme Court is attached at p.51 as Exhibit-7 of the Petition. Hence, the Operational Creditor has filed the present Petition under section 9 of the Code. The date from which debt fell due is firstly on 31.12.2015 which is the date of Deed of Retirement and thereafter on 18.04.2016 which is the date of dishonour of the Cheque.

5. The Corporate Debtor has filed its Written Submissions and submits as under:

a) The Corporate Debtor submits that the Operational Creditor seeking the enforcement of the Deed of Retirement dated 31.12.2015 executed between the Partners of Kamakshi Enterprises, who is a Partnership Firm duly registered under the provisions of the Partnership Act, 1936. The Operational Creditor and the Corporate Debtor were the Partners of the said Firm. There is no specific provisions under IBC with respect to the proceedings to be initiated against the Partnership Firm.

- b) The claim of the Operational Creditor does not fulfil the ingredients of the definition of the “Operational Creditor” as defined under section 5(21) of the Code and hence the Operational Creditor is not entitled under the law to initiate the CIRP against the Corporate Debtor.
- c) The Company vide its letter dated 30.11.2017 which is the reply to the Demand Notice dated 06.11.2017 issued by the Operational Creditor, has denied the existence of debt and default and its liability to pay the alleged claim of the Operational Creditor and the claim if any could only be initiated against the Firm and not against the Company. The Operational Creditor has filed section 9(3) (b) Affidavit even after denial and dispute raised by the Corporate Debtor for the said amount.
- d) The Operational Creditor, the Corporate Debtor, Mrs. Sunita Krishand Pai and Mr. Vihaan Mithul Doshi were the Partners of Kamakshi Enterprises registered vide Deed of Partnership dated 28.12.2011 and 20.09.2012 as also Admission Deed dated 02.11.2015.
- e) As per the Deed of Retirement dated 31.12.2015, the Operational Creditor sought retirement as agreed mutually, from the firm upon the terms and conditions more particularly set out therein. Hence the Operational Creditor was retired from the said Firm w.e.f. 31.12.2015.
- f) As per the said Deed of Retirement, it was agreed between the partners to the said Partnership Firm to pay to the Operational Creditor a sum of Rs.1,35,00,000/- (Rupees one crore thirty-five lakh only) subject to Operational Creditor executing necessary documents, stipulated under clause 3(ii) and Authority in favour of the continuing partners under clause (4) of the said Partnership Firm so as to enable the continuing partners to carry on the business of the Firm.

- g) As the Operational Creditor did not fulfilled its obligation of executing the relevant documents, the remaining continuing partners were unable to carry on the business.
6. The Operational Creditor issued a Demand Notice in Form 3 dated 06.11.2017 to the Corporate Debtor claiming total outstanding of Rs.1,72,36,327/- (Rupees one crore seventy-two lakh thirty-six thousand three hundred twenty-seven only) together with the interest @ 18% p.a. from 18.04.2016 to 31.10.2017, which is at pp 14-19 of the Petition in terms of section 8 of the IBC. The Corporate Debtor has replied vide letter dated 30.11.2017 to the said Demand Notice denying the Operational Debt. The said reply is attached at pp 20-23 of the Petition. The Operational Creditor again sent the re-joinder vide its letter dated 24.01.2018 to the said reply of the Corporate Debtor. The Re-joinder is at pp 24-26 of the Petition.
7. The Operational Creditor has filed the Affidavit of no dispute under section 9(3)(b) of the Code which is at pp 70-72 of the Petition. The Operational Creditor has also filed the Bank Statement which is at pp 52-64 of the Petition.

Findings:

8. We have heard the arguments of Learned Counsel for Operational Creditor and Corporate Debtor and perused the records.
9. After considering the contentions of the Operational Creditor, the question arose can the Retirement amount arising out of the Partnership Firm constitutes the Operational Debt?
10. It is observed by the Bench that the Operational Creditor and the Corporate Debtor were the Partners of the Firm. This Bench is well aware about the

relationship between the Partners with its Partnership Firm and also accepts the contentions of the Operational Creditor with respect to the joint and several liability with the other partners or with the Firm. However, the Bench is of considered view that even the liability of the Corporate Debtor is proved in all aspect, the IBC does not protect the interest or claim of the Partner against another Partner or the Firm. The claim and the cause of action arose on the transaction between the Partners. Therefore, the Petition itself is not maintainable in the eye of law.

11. The Operational Creditor may be liable to the claims against the Corporate Debtor not under the IBC but under the any other law which provides the remedy to the Operational Creditor. The Retired Partner has no right under the IBC to file claim against the Partner or the Firm.
12. For supporting the above view, this Bench relied upon the NCLAT Judgment in *Gammon India Ltd V. Neelkanth Mansions and Infrastructure Pvt. Ltd.* (2018 SCC OnLine NCLAT 994) at para 11 wherein it was held that:

“It is not dispute that the amount due to the Applicant is from ‘Gammon Neelkanth Realty Corporation’. The bill was raised against the said Partnership firm namely- ‘Gammon Neelkanth Realty Corporation’. ‘Neelkanth Realtors Pvt. Ltd.’, ‘Gammon Housing and Estates Developers Ltd.’ And ‘Neelkanth Mansions and Infrastructure Pvt. Ltd.’ Are the partners, therefore, even if one of the partners or more than one partner is the ‘Corporate Debtor’ as the amount is due from the partnership firm, the application under section 9 of the ‘I&B Code’ against one of the partners of such partnership firm will not be maintainable.”

13. In view of the above observations, this Bench rejects the Application filed by Operational Creditor under section 9 of the Code and hence the Petition bearing CP No. 2077/NCLT/MB-IV/2019 is hereby dismissed with no cost.

Sd/-

Kishore Vemulapalli
Member (Judicial)

07.01.2022

Sd/-

Rajesh Sharma
Member (Technical)