

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

IB-2422/(ND)/2019

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:

Hyderabad Deccan UM
Through its Proprietor
Srilatha Mantravadi
Having its office at:-
I-10-208, Ashok Nagar,
Beside Oriental Bank of Commerce
Hyderabad, Telangana-500020.

...Operational Creditor/Petitioner

Versus

UM Lohia Two Wheelers Pvt. Ltd.
Having its Registered office at:-
A-79, DDA Shed, Okhla Industrial Area,
Phase 2, New Delhi-1100020.

...Corporate Debtor/Respondent Company

Coram:

P.S.N. PRASAD
Hon'ble Member (Judicial)
DR. V.K. SUBBURAJ
Hon'ble Member (Technical)

Counsel for Operational Creditor: Mr.Anshuman Sharma, Advocate
Mr. Vishesh Khundia, Advocate
Counsel for Corporate Creditor: Mr. Shailendra Singh, Advocate
Mr. Abhishek Parmar. Advocate

Order Delivered on: 07.09.2020



ORDER

per se: P.S.N. Prasad, Hon'ble Member (Judicial)

1. This is a petition filed by Hyderabad Deccan UM Through its Proprietor Srilatha Mantravadi the petitioner/operational creditor seeking to initiate CIRP against the Respondent company /Corporate Debtor M/s Metro Irrigation Private Ltd., under Section 9 of IBC 2016 for the alleged default on the part of the Corporate Debtor in settling the amount of Rs. 26,05,420/- as on 08.07.2019 along with Applicable Interest of 12% p.a. including the interest component towards the goods supplied. The details of transactions leading to the filing of this petition as averred by the petitioner are as follows:-

- a) The UM Lohia Two Wheelers Private Limited (Corporate Debtor) is a private limited company dealing in manufacture and sale of two wheelers such as motorbikes and related spare parts. The company is duly incorporated under the provisions of the Companies Act 2013 having its registered office at A-79, DDA Shed, Okhla Industrial Area, Phase 2, New Delhi-110020.
- b) Hyderabad Deccan UM (Operational Creditor) is a Dealership of UM Lohia Two Wheelers Private Limited (Corporate Debtor) under the Sole Proprietorship of Ms. Srilatha Mantravadi. It came into existence after the Dealership Agreement (non-exclusive basis) dated 19th October, 2016

was signed between the Corporate Debtor and the Sole Proprietor of the Operational Creditor.

- c) That the Operational Creditor as per the clauses of the Dealership Agreement complied with all the sections of the said Agreement including arrangement of proper infrastructural facilities, tools, equipment's and amenities deemed necessary at our own expenses and cost. The Operational Creditor also deposited Rs. 2 lac as an interest free refundable security deposit. The same appears in the Ledger Account of the Corporate Debtor as Security Deposit of Rs. 2 lac made on 31.08.2017.
- d) That since 1st April 2018 the Corporate Debtors started defaulting in making payments to the Operational creditor. According to the account statements for the period 1st April 2018 to 10th May, 2019, the Corporate Debtor is liable to pay a sum of Rs. 20,22,293.79/-.
- e) That the Operational Creditor had sent multiple reminders to the Corporate Debtor to make the necessary payments via various emails dated 05.09.2018, 06.09.2018, 27.09.2018, 04.10.2018, 16.10.2018, 15.11.2018, 10.05.2019 and 09.07.2019. However, the Corporate Debtor has defaulted in making the said payments and none has been received by the Operational Creditor.
- f) That the Operational Creditor issued the Demand Notice (Form 3) as per Rule 5(1) (a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to the Corporate Debtor via Speed

Post on 10.08.2019 at the registered office and via email on 20.08.2019 for an amount of Rs. 26,05,420/- as on 08.07.2019 along with Applicable Interest of 12% p.a.

- g) That after the issuance of the demand notice, no communication has taken place between the Operational Creditor and Corporate Debtor. The applicant since then and till date is continuously demanding for making the outstanding payment and the Corporate Debtor are falsely assuring that the payments will be made, but however, no payments have been made, till the filing of this application. That in fact the Corporate Debtor acknowledged outstanding dues in several emails and assured that the same would be paid but to no payments have been received.
- h) That the Operational Creditor on the elapse of 10 days from the date of the statutory Demand Notice was entitled to initiate a corporate Insolvency resolution process in respect of the Corporate Debtor. There has been no repayment of the unpaid operational debt till date. There is no other dispute of the unpaid operational debt pending between the Operational Creditor and Corporate Debtor before the issue of demand notice as per the insolvency and Bankruptcy Code, 2016 in any court of law or authorities as on day.
- i) That the Tribunal had issued notice to the Corporate Debtor vide order dated 01.10.2019 and regular hearings were conducted on 24.10.2019, 27.11.2019, 10.12.2019 and 09.01.2020. On the last hearing dated

21.01.2020 the Hon'ble Tribunal reserved the orders in this instant Company Petition and directed to file written submissions.

2. In support of their contention and pleadings the applicant in its written submission has relied upon following judgement:

- i. *In Shah Kritkumar Babulal Ni Company vs. H.M. Industrial (P) Ltd. [CP (IB) No. 81/2019] dated 07.06.2019, the where the Company Petition under Section 9 of the IBC 2016 was filed by the Sole Proprietary Concern, the Hon'ble Tribunal allowed the Company Petition and initiated the CIRP against the Corporate Debtor.*
- ii. *The High Court of Calcutta in its judgment of Devendra Surana vs. Bank of Baroda [W.P. No. 5521 of 2017] has stated that, "A natural person and his sole proprietorship firm are the same legal entity. The liability of the sole proprietorship firm is that of the natural person carrying on business under its name. The sole proprietorship firm of a natural person and the natural person owning the firm do not enjoy the benefit of being treated as separate legal entities." Therefore, it is submitted that a Sole Proprietary concern and its Sole Proprietor are one legal entity in law. It is for this reason, that the Sole Proprietor has unlimited liability, the income of the proprietary concern is considered as the income of the individual and hence is taxed accordingly.*
- iii. *The High Court of Andhra Pradesh in its judgment of Traders "N" Traders Vs. State Andhra Pradesh has stated that, "In the instant case,*

Mr. V. Bhaskar Murthy filed the complaint on behalf of M/s. Traders “N” Traders, which is a proprietary concern representing the said proprietary concern in the capacity of its sole proprietor. Since Mr. V. Bhaskar Murthy is the proprietor of M/s. Traders “N” Traders and he is carrying on business in the name of the said business concern, he being the sole proprietor of the said business concern is solely responsible for conduct of its business. Therefore, he can file a complaint on behalf of the proprietary concern.” Therefore, it is submitted that role of the Proprietary concern and the Sole proprietor as inter-changeable. The Sole Proprietor is eligible under law to execute court proceedings on behalf of the Sole Proprietary concern.”

3. The Corporate Debtor in its written submission to the application submits that:

- a) That the petitioner has filed the present petition as proprietorship firm being operational creditor. The present Petition is not maintainable in accordance to definition laid down under the law as per section 5(20) and section 3(23) of the IBC, 2016. The petitioner herein doesnot fall under the definition of “Person”and thereby present petitioner has no locus to file this petition.
- b) That the Corporate debtor in his support of the argument has relied upon the judgement of “**R.G. Steels V. Berrry Auto Ancillaries(p)**”

Ltd” in which it has been held that sole proprietorship concern is not entitled to initiate CIRP on its own owing to the reason that Section 3(23) of the Code never intended to include sole proprietorship under the definition of “persons”.

4. We have gone through the documents filed by the petitioner and heard the arguments made by the counsel of the petitioner.
5. Section 3(23) of the IBC defines person as:
“Person” includes
 - i. An individual
 - ii. a Hindu Undivided Family
 - iii. A Company
 - iv. Trust
 - v. a partnership
 - vi. Limited Liability Partnership;
 - vii. and includes a person resident outside India
6. A look at the definition specifies that it is an inclusive definition and hence the categories mentioned in the definition are only illustrative and there can be others also which can be covered under the definition. Thus to restrict the definition to those categories which have been enumerated in the definition is not the correct interpretation of the law.



7. The Hon'ble National Company Appellate Tribunal ('NCLAT') in the case of *Neeta Saha v. Ram Niwas Gupta* passed on **25.02.2020** has addressed the issue of the maintainability of an application filed under Section 9 by a sole proprietorship and clarified that Section 2 of IBC amongst other entities, applies to proprietorship firms. Moreover, it also noted that the definition of 'person' in Section 3(23) of IBC is an inclusive definition. Thereafter, Hon'ble NCLAT has approved the initiation of CIRP against the CD after the sole proprietor filed the amended memo of parties by including his name.
8. In the light of the order passed by Hon'ble NCLAT, in the present matter the operational creditor is a sole proprietorship firm and would fall within the definition of a person. An Operational Creditor means a person to whom an operational debt is owed/due. From the above, it is clear that the petitioner is an operational creditor of the respondent." Accordingly, the petition filed by a proprietary concern under Section 9 of the Code was held to be maintainable.
9. Going by the above details the operational creditor has clearly established the existence of debt and default on the part of the corporate debtor. Hence this Tribunal initiates CIRP on the corporate debtor with immediate effect.
10. A moratorium in terms of Section 14 of the Code is imposed forthwith in following terms:



- “(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

- (3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.”

11.The Operational Creditor has not proposed the name of any IRP. Accordingly, we appoint Mr. Satya Prakash Registration No.IBBI/IPA-002/IP-N00906/2019-2020/12920 email--- cs.satyaprakash@gmail.com duly empanelled with the IBBI as the IRP. He shall take such other and further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days.

12.The Operational Creditor is directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIRP costs.

Let Copy of the order be served to the parties including IRP and IBBI.

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(DR. V.K.SUBBURAJ)
MEMBER (TECHNICAL)

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