IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT - II

C.P.(IB)-46(MB)/2018

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Vyankatesh Construction

Address for Correspondence: L-11, Crown Complex, Opp. Rajiv Gandhi Bhavan, Sharanpur Road, Nashik-422022, Maharashtra.

…Operational Creditor

Vs

Orchid Housing Infra LLP

Having Registered Office at: 601, Sunshine Plaza, Naigaum Cross Road, Dadar (East), Mumbai, MH- 400014.

…Corporate Debtor

Order delivered on: 08.07.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Shri Shyam Babu Gautam

Appearances:

For the Operational Creditor : Mr. Rohit Gupta, Counsel

For the Corporate Debtor : Mr. Rohan Kama, Counsel

ORDER

Per- Justice P.N. Deshmukh (Retd.), Member Judicial

1. The Present Application is filed under section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by Vyankatesh Construction an unregistered partnership firm (for brevity 'Operational Creditor') for initiating Insolvency Resolution Process (CIRP) against Orchid Housing Infra LLP (for brevity 'Corporate Debtor') for default in repaying Principal amount of **₹1,48,13,754** together with interest of **₹3,55,876**, aggregating to **₹1,51,69,630** as on 10.11.2017.

2. On reading the application and other material placed before this Bench, the Corporate Debtor issued various work orders and purchase orders to the Operational Creditor during the Financial year 2015-16 and 2016-17 for following purpose:
   i.) Construction of Building Structures at Sunshine Swapna Nagari, Chamtoli, Tal. Ambernath consisting of 10 individual building structures of ground and four upper floors, terrace, Lift machine room and water tanks.
   ii.) Supply of Gabion Box Cages.

iii.) RCC, masonry, plastering and other civil works including Sales Pavilion and also for labour supply at sunshine Swapna Nagari, Chamtoli, Tal. Ambernath.

iv.) Construction of Jack Well, Pump House and Intake Chamber for project “Sunshine Swapna Nagari”, At-Chamtoli, Badlapur-East. mentered into a service agreement dated 01.01.2014.

The Operational Creditor submits that various tests including concrete cube test, sand test, brick test were carried out at the time of work execution and the reports of the following were submitted to the Project In-Charge along with a set of checklist of work to be executed at the site. The same was approved by the Project in-charge by signing on it. After execution of the said work, the Operational Creditor raised various R.A. Bills and invoices and received an amount of ₹4,49,85,051 from the Corporate Debtor at various intervals.

3. This Operational Creditor has issued Section 8 notice (Form 3) through registered post on 14.11.2017, which was delivered on 17.11.2017. The Corporate Debtor also replied to the said demand notice on 22.11.2017 and has denied to any amount as claimed in the notice and/or even otherwise is due and payable to operational creditor. The Corporate Debtor referred the joint meeting held on 11.11.2017, where it was held that the nature of work alleged to be done by the operational creditor is under dispute on many counts and as per the

discrepancies found during the joint inspection, operational creditor has to pay a sum of Rs. 2,57,99,586/- towards repair and rectification cost. The Corporate Debtor further mentioned that R.A. Bill no. 7 contends to claim an amount of Rs. 21,53,978/- for a work which is yet to be completed. The Corporate Debtor further raised a preliminary objection on the interest calculated on the dues payable and have mentioned certain deficiencies in the quality and nature of work carried out by the Operational Creditor. The Corporate Debtor has mentioned the following shortcomings:

i) *At many places, soling is not provided below plinth PCC. Direct grid slab PCC done, also thickness of PCC is less than required i.e. average thickness is 30 mm to 60 mm instead of 100 mm required as per drawing and work specifications. This has resulted in settlement of PCC at plinth level at bldgs.*

ii) *Floor slabs casted are not in level and the level difference is up to 60 mm. Due to this finish floor level will be raised by 60 mm which will result into increase the Flooring Work cost.*

iii) *At many places, Columns are eccentric by 20 to 30 mm and beams are not in plumb up to 50 mm. Because of this room dimensions are varying from actual required dimensions as per drawings.*

iv) *Al many places, Toilet Beams casted are of 700 mm depth instead of required Beams depth of 380 mm as per drawing. Due to this it is not possible to provide a full loft as per the drawing.*

v) *At many places, Beam Widths in toilet areas are casted of 230 mm instead of 150 mm as per drawings. This projection of beam by 80 mm in toilet area reduces the dimension of the toilet as per drawings.*

vi) *Required Floor height of 2900 mm from ground floor to first floor is found 50 mm to 100 mm less at various locations.*

vii) *Concrete performance is very poor, beam, column and slabs is porous, honeycomb and bulge concrete at various locations resulting leakages in floor slab and toilet sunken areas. This has resulted in falling of ceiling gypsum at many place at site.*

viii) *Room dimensions are not matching with the dimensions given in the drawings.*

ix) *External plaster thickness is found up to 60 mm in place of average thickness of 20 mm. Due to this External plaster started generating the cracks on surface and it will be the major cause of leakages through external walls of the buildings.*

x) *At many places, internal plaster thickness is found 30 mm to 40 mm instead of 12-15 mm average thickness.*

The Corporate Debtor further referred the work contract and has mentioned that the operational creditor was duty bound to complete the work within 10 months from the date of issue of the work order i.e. 15th September, 2015 but the operational creditor failed to do so and now is liable to pay Rs. 25,000/- per day as penalty.

4. The Corporate Debtor in its written arguments has taken the defense that the applicant is an unregistered partnership firm and it is barred by Section 69(3) of the Partnership Act from maintaining the present Application. The Corporate Debtor further elaborates that section 69(2) declares that ***"No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third***

party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. And Section 69(3) declares that ***the provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract".***

In addition to this, the Corporate Debtor has submitted that the word 'any other proceedings' are not controlled or guided by the words 'a claim of set off' and relied upon ***Jagdish Chandra Gupta Vs. Kajaria Traders (India) Ltd. (AIR 1964 SC 1882)*** wherein an application to enforce an arbitration clause in a partnership agreement was dismissed for the reason that the firm was not registered and because the genesis of the application was to enforce an arbitration clause, i.e. a right arising out of a contract and the **Hon'ble Supreme Court** further held that;

> *"9. In our judgement, the word "other proceeding" in sub-section (3) must receive their full meaning untrammeled by the words "a claim of set-off". The sub-section provides for the application of the provisions of sub-sections (1) and (2) to claims of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in sub-section (3) and sub-section (4)."*

On relying upon the judgement of Hon'ble Supreme Court, the Corporate Debtor has submitted that any other proceeding to enforce a right arising out of a contract and/or whose genesis is founded on a contract is barred at the instance of an unregistered partnership firm under Section 69(3) of the Partnership Act and moreover, applicant himself cited ***"1.) Work Orders 2.) Purchase Orders 3.) Invoices"*** in Part V, column 6 of the application Form. Thus, according to the applicant's own pleadings, the genesis of his claim and right arise under contract and work orders, purchase orders and invoices are all contractual documents. So, the present application which seeks to enforce rights arising out of contracts are 'proceedings' barred under Section 69(3) of the Partnership Act.

The Corporate Debtor has also submitted that it is a pre-existing dispute and the present application has been filed for extraneous considerations and/or to substitute ordinary debt enforcement measures. The contention of the dispute has already been mentioned in para 3. Moreover, the Corporate debtor has submitted that the disputes were raised by the Respondent in a meeting held on 11.11.2017, which was prior to the issuance of Demand Notice.

5. In response to this, the Operational Creditor has also filed rejoinder to reply of the Corporate Debtor and denied all the contentions raised in reply and further submitted that Section 69(2) of the Partnership Act specifically bars the "suit to enforce a right arising from a contract" and the petition filed herein is not a suit enforcing any right arising from a contract. Further submitted that it is well settled legal principle that the petition

for winding up filed by the unregistered firm cannot be construed to be a "suit" within the meaning of Section 69(2) of the Partnership Act and moreover, unregistered partnership firm falls under the definition of an 'Operational Creditor' as defined in Section 5(20) of the Insolvency and Bankruptcy Code, 2016 and hence, there is no bar on unregistered partnership firm to initiate proceedings against the Corporate Debtor.

The Operational Creditor denies the allegations of the Corporate Debtor and has submitted that the sums demanded in the petition are legitimate and no sums have been charged exorbitantly from the Corporate Debtor. The documents evidencing the sums due from the Corporate Debtor have been attached to the application. The Operational Creditor submits that they have adhered to the quality standards and obtained permissions, approvals and check lists from the sole authority i.e. project in charge and also test certificates from the third-party time and again. Further, the operational creditor submits in relation to the issue of delay that they have already communicated a letter dated 26.11.2015, mentioning the issues faced at the site which resulted in delay with the compliance of work schedule. In relation to the penalty charged by the Corporate Debtor of Rs. 25,000/- on delay of work, the Operational Creditor submits that the work was not completed with the time schedule due to payments issue, water shortage issues at site, frequent changes in the drawings etc. on the part of the corporate debtor.

6. Heard the submissions made by the Learned Counsels for the both sides. Now the issues before this bench are;

a.) Whether an unregistered partnership firm can file for CIRP against a Corporate Debtor? And

b.) Whether there is any pre-existing dispute in the present case?

7. In relation to the issue whether an application filed by an unregistered partnership firm is maintainable or not? Firstly, we are incorporating the Section 69 of the Partnership Act,1932, which is as follows:

> *69. Effect of non-registration (1) No suit to enforce a right arising from a contract of or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of firms as a partner in the firm.*
>
> ***(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the person suing are or have been shown in the Register of firm as partners in the firm****.*
>
> ***(3) The provisions of sub section (1) and (2) shall apply also to a claim of Set - off or other proceeding to enforce a right arising from a contract****, but shall not affect –*
>
> *a) The enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm or*
>
> *b) The powers of an official assignee, receiver of Court under the Presidency, Towns Insolvency Act 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.*

In relation to Section 69(2), the issue has been decided by one of the NCLT Bench in the matter of **Shree Dev Chemicals Corporation Vs. Gammon India Limited in CP (IB) No.3637/MB/2018** dated 16.07.2020, wherein the following is held:

> *"10. Section 69(2) of the Indian Partnership Act, 1932, reads as follows:*
>
> *"No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."*
>
> *11. It is clear from the above that the provision would apply only to a 'suit' and not to proceedings. Applications filed under the IBC are not 'suits' but only proceedings, and therefore, we hold that the bar in terms of section 69(2) of the Indian Partnership Act, 1932, would not apply to applications filed under the IBC..."*

Moreover, in relation to Section 69(3) of the Partnership Act, 1932, the Hon'ble Supreme Court in the matter of **Umesh Goel Vs. Himachal Pradesh Cooperative Group Housing Society Ltd. Civil Appeal No. 7916 of 2009** held:

> *"12. The question for our consideration is by virtue of Sub-section (3) whether the expression "other proceedings" contained therein will include Arbitral proceedings and can be equated to a suit filed in a Court and thereby the ban imposed against an unregistered firm can operate in the matter of arbitral proceedings. If Sub-sections (1) and (2) are virtually lifted whole hog and incorporated in Sub-section (3), it must be stated that it is not the mere ban that*

> *is imposed in Sub-sections (1) and (2) that alone is contemplated for the application of Sub-section (3).* ***In other words, when the whole of the ingredients contained in Sub-sections (1) and (2) are wholly incorporated in Sub-section (3), the resultant position would be that the ban can operate in respect of an unregistered firm even relating to a set off or other proceedings only when such claim of set off or other proceedings are intrinsically connected with the suit that is pending in a Court. To put it differently, in order to invoke Sub-section (3) of Section 69 and for the ban to operate either the firm should be an unregistered one or the person who wants to sue should be a partner of an unregistered firm, that its/his endeavour should be to file a suit in a Court, in which event even if it pertains to a claim of set off or in respect of 'other proceedings' connected with any right arising from a contract or conferred by the Partnership Act which is sought to be enforced through a Court by way of a suit then and then alone the said Sub-section can operate to its full extent."***

In view of this Judgement of Hon'ble Supreme Court, we are of the opinion that the ban on unregistered partnership firm in filing "other proceeding" is only when the suit in relation to such proceeding is pending before any Court. It seems that there is no pending suit before any court of law relating to the debt before us. Therefore, in the absence of any pending suit before any Court of law, Section 69(3) of the Partnership Act, 1932 will not come to the aid of the Corporate Debtor in the present case.

8. In relation to the issue of pre-existing dispute, we are of the view that the Corporate debtor has already raised the dispute in a meeting held on 11.11.2017 and the Operational Creditor has sent the demand notice on 14.11.2017. Therefore, the dispute was raised prior to the issuance of Demand Notice and the nature of dispute raised by the Corporate Debtor seems to be genuine. This Bench hereby holds that dispute is in existence between them as on the date of receipt of Section 8 notice by the Corporate Debtor, therefore we hereby dismiss this Company Petition.

Sd/-

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

Sd/-

JUSTICE P.N. DESHMUKH
(MEMBER JUDICIAL)

Arpan, LRA

08.07.2022