

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

CP (IB) No.1224/MB-IV/2022

Under Section 9 of the IBC, 2016

In the matter of

FLOURISH CAPITAL AND
MANAGEMENT CONSULTING
PRIVATE LIMITED

[CIN: U65191DL2015PTC280744]

...Operational Creditor

v/s.

NATIONAL COMMODITIES
MANAGEMENT SERVICES LIMITED

[CIN: U74140MH2004PLC148859]

...Corporate Debtor

Order Delivered on: 04.07.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Operational Creditor:

None

For the Corporate Debtor:

Mr. Sandesh Shukla a/w Mihir Mody,
Ld. Counsel.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by Flourish Capital and Management Consulting Private Limited (“the Operational Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of National Commodities Management Services Limited, the Corporate Debtor.

1.1. The Company Petition is filed on 18/10/2022 claiming an amount of Rs. 10,57,80,000/- which includes the advance amount of Rs. 6,15,00,000/- (Rupees Six Crore and Fifteen Lakhs Only) and interest @18% per annum from 21.05.2018 to 21.05.2022 i.e., Rs. 4,42,80,000/- (Rupees Four Crore Forty-Two Lakhs Eighty Thousand Only in default. It is stated in the Part IV of the petition that “*The date on which the debt fell due was when 15 months got over from the date of the Indemnity Agreement executed between the Operational Creditor and NCML KB limited i.e. 18.10.2019. Thereafter, the Corporate Debtor vide email dated 26.07.2020 has duly acknowledged the receipt of the aforesaid advance payments made by the Operational Creditor*”.

2. The Applicant/ Operational Creditor states that one NCML KB limited, the subsidiary Company of the Corporate Debtor, approached the Operational Creditor expressing its desire to acquire land at Village Sondihra, Aanchal/Tehsil Bhabhua, District Kaimur, Bihar.

2.1. The Operational Creditor purchased the said land on behalf of NCML KB Limited and it was mutually agreed between the Parties that the Operational

Creditor shall be paid a brokerage fee and in addition to the brokerage all the expenses incurred for aggregating the land.

2.2. Further, the aforesaid land acquired needed to undergo certain activities such as (a) Land levelling, (b) Stone removing, (c) GEO Technical Survey, (d) TSR Preparation, (e) Grass Cutting, (f) CLU, (g) Others, for which the NCML KB Limited represented that it shall get the same done through the Corporate Debtor, its holding company. Additionally, an agreement was also executed between NCML KB Limited and Operational Creditor on 18.07.2018 wherein it was agreed that NCML KB Limited will indemnify the Operational Creditor for all the payments made by the Operational Creditor. It was assured and represented by the Corporate Debtor that the entire work as mentioned in the indemnity agreement shall be completed within a period of 15 months of the indemnity agreement. Thus, the work was to be completed by October 2019 and the indemnity agreement is valid till 31.03.2024.

2.3. Accordingly, the Operational Creditor paid a sum of Rs. 6,15,00,000/- (Rupees Six Crore and Fifteen Lakhs Only) to the Corporate Debtor from 21.05.2018 to 30.08.2018 as advance for the activities mentioned above. Since 2019, the representatives of the Operational Creditor on several occasions requested the representatives of the Corporate Debtor vide various email correspondence to provide proof of services and invoices performed by the Corporate Debtor. However, the Corporate Debtor has failed to provide any proof of the services.

2.4. On 26-07-2020, the Corporate Debtor duly acknowledged the receipt of the aforesaid advance payments made by the Operational Creditor for the services and stated that - "*These payments were made against the services taken from NCML*". Pertinently, despite the admission of the advance amount, the

Corporate Debtor defaulted in rendering services and refunding the amount to the Operational Creditor.

2.5. The Operational Creditor was compelled to send a demand notice dated 22.08.2022 under Section 8 of the Code, calling upon the Corporate Debtor to unconditionally repay the unpaid operational debt (in default) within 10 days. The Corporate Debtor vide reply dated 03.09.2022, replied to the aforesaid Demand Notice dated 22.08.2022 wherein the Corporate Debtor has fabricated, false and concocted story with ulterior motives to bypass its liability towards the advance money transferred by the Operational Creditor. The Corporate Debtor wrongfully and maliciously contended that it had received the payments purportedly for reserving the requisite space for the Operational Creditor.

2.6. The Operational Creditor vide reply dated 19.09.2022 responded to the reply dated 03.09.2022 made by the Corporate Debtor stating that the Operational Creditor Company is in the business of wealth management and consulting business which includes but not limited to financial advisory, real estate advisory, and neither in need of nor ever availed of any warehouse space. The Operational Creditor has put the Corporate Debtor under strict proof of evidence for the baseless allegations made in the reply dated 03.09.2022. The Corporate Debtor vide reply dated 07.10.2022, denied the contents of reply dated 19.09.2022 and relied on its reply dated 03.09.2022.

3. The Corporate Debtor vide its reply dated 16.06.2023 submits that the Corporate Debtor has no privity with either of the said parties for the purported transaction; the Corporate Debtor denies that he was required to provide any services to the Operational Creditor in reference to transaction with NCML

KB; the Operational Creditor has deliberately tried to drag the Corporate Debtor when the Corporate Debtor is neither a Corporate Debtor nor is any Operational debt owed by the Corporate Debtor to the Operational Creditor.

Findings

4. This bench has carefully gone through the documents and pleadings available on record and considered the arguments of both the sides.

4.1. This Bench is of considered view that the, Operational Creditor has placed on an email communication dated 26.07.2020 in which the Corporate Debtor duly acknowledged the receipt of the aforesaid advance payments made by the Operational Creditor for the services and stated that - "*These payments were made against the services taken from NCML*", however, it is the case of Corporate Debtor that it is holding company of NCML KB Limited, with whom the Petitioner had entered into an agreement and paid the amount claimed as due from the Corporate Debtor. The Corporate Debtor has denied having received any amount from the petitioner or being obligated to render any services to the petitioner in relation to petitioners' transactions with its subsidiary company i.e. NCML KB limited. The Applicant/ Operational Creditor has relied on the indemnity bond dated 18.07.2018, however, this bench finds that the said bond was execute between NCML KB Private Limited and the Operational Creditor. Further, a letter dated 16.03.2021 from the Operational Creditor, which is a demand notice for refund of advance of Rs. 6.15 Crores stating to have been paid to NCML KB Private Limited and the said demand notice has been addressed to the managing director NCML KB Private Limited. Further, on perusal of bank statement placed on record in evidence of disbursement of the amount, this bench finds that it is not clear from the said statement whether

these amounts were paid to Corporate Debtor. This bench finds that it is not clear from the email communications if these communications were on behalf of the Corporate Debtor or its subsidiary.

4.2. The Corporate Debtor has submitted that the payment from the Operational Creditor was received against their invoices for storage reservations charges at their pune, warehouse recoverable from the Operational Creditor. It is seen from the records that the operational Creditor has not disputed such claim of the Corporate Debtor. Further, it is also noticed that the Operational Creditor has been asking for the invoices over emails and the person representing NCML had claimed having provided the invoices. It is not clear to the bench which communication pertains to which transactions and on whose behalf.

4.3. In view of the above finding, this bench is of the considered view that the Operational Creditor has failed to demonstrate that the Corporate Debtor was under the obligation in respect of the claim which can be said due to be due from it. No evidence has been placed on record to prove that the amount in question was refundable by the Corporate Debtor in case of failure on the part of its subsidiary company to provide services. Since there was no obligation or a liability on the Corporate Debtor, this bench finds it difficult to conclude that the default can be said to have occurred on the part of the Corporate Debtor in the absence of any such obligation.

4.4. In view of the above discussion, this bench finds no merit in the contention of the Petitioner there exists a debt and default in payment thereof qua Corporate Debtor.

ORDER

5. The petition bearing CP (IB) No.1224/MB-IV/2022 filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by Flourish Capital and Management Consulting Private Limited (“the Operational Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of National Commodities management Services Limited, the Corporate Debtor is **Dismissed.**
6. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)
04.07.2023.

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)