

IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

CP (IB) No. 115/CTB/2019

INSOLVENCY AND BANKRUPTCY CODE, 2016;

and

In the Matter of:

Section 9 (1) of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

and

In the Matter of:

1. Santosh Kumar Mishra, Proprietor, (died), M/s Gaja Laxmi Construction
2. Gangotri Mishra, W/o Late Santosh Kumar Mishra, aged about 43 years, residing at Plot No: 3650/6776, Palasuni, Bhubaneswar, Khurda, Odisha.
3. Miss Saswatika Mishra, aged about 14 years (Daughter)
4. Master Saswat Mishra, aged about 11 years (Son)
(Petitioners 3 and 4 are minors represented by their mother/natural guardian 2nd petitioner)

(Petitioners 2 to 4 are brought on record as Legal Representatives of deceased first Petitioner Santosh Kumar Mishra as per the order dated 10.08.2021 passed in IA (IB) No. 68/CB/2021)

... Applicant/ Operational Creditor

versus

In the Matter of:

Baibhav Properties Private Limited, having its registered office at Plot No. 717, BJP Nagar, Bhubaneswar- 751 014, Odisha;

...Respondent/Corporate Debtor

Order reserved on: 10.11.2021

Order pronounced on: 30.11.2021

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Coram:

Shri P. Mohan Raj : Member (Judicial)
Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing)

For the Petitioner Mr. Arabinda Acharya, CS

ORDER

Per P. Mohan Raj, Member (Judicial)

1. This application has been filed by Gaja Laxmi Construction as an Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy Code, 2016 (Application to Adjudicating Authority) seeking to initiate Corporate Insolvency and Bankruptcy Resolution Process rules, 2016 (CIRP against M/s. Baibhav Properties Private Limited, a company registered under the provision of Companies Act, 1956.

2. The brief contention of the petitioner averments are as follows: -

The applicant/Operational Creditor is a proprietorship concern engaged in business of civil construction and other construction works. The civil work was executed by the applicant for the corporate debtor at D-30 BJP Nagar & construction work of city office BJP Nagar, compound wall work at Lingipur and some other works. For the works carried out by the applicant to the respondent applicant raised 23 number of tax invoices and claimed a total sum of Rs.

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3,41,95,626.00/- The respondent/ Corporate Debtor paid sum of Rs. 2,47,17,671.00/- after deducting a sum of Rs. 6,03,997.00/- towards TDS and leaving a sum of Rs. 88,73,958.00/- as due. The respondent demanded due amount by sending e-mails dated 25.01.2017, 07.02.2017, 12.04.2017, 04.05.2017, 31.05.2017, 19.06.2017, 01.07.2017 and 17.07.2017 for all these correspondences the respondent/Corporate Debtor not responded. The last payment was made by the respondent on 06.10.2016. The applicant sent statutory demand notice dated 25.07.2019. The same was delivered on 03.07.2019, the respondent/corporate debtor sent his reply on 27.07.2019, in which, the respondent denies his liability to pay Rs. 88,73,958.00/- instead admitted his liability to the extent of Rs. 17,44,194/- . The said admitted amount also not yet paid by the respondent/ Corporate debtor till date. Hence, the petition.

The brief contentions of the reply: -

The applicant is a sole proprietorship concern as such petition filed under Section 9 of Insolvency and Bankruptcy Code, 2016 is not maintainable. Under Section 3 (23) of Insolvency and Bankruptcy Code, 2016 "person" is defined but the proprietorship concern is not included, therein further under Section 2 (f) IBC of course, the proprietorship concern is mentioned but the said provision is not yet notified/given an effect. In the statutory forms-3 demand notice dated 31.07.2019, the Company Secretary has not mentioned his position. This is in violation of Section 8 of IBC, 2016 and in consequence the notice is invalid. The application is not maintainable as there is disputes exist regarding the quality of good supplied and non-compliance of taxation and labour statutes compliance. The applicant has

not served the tax invoices and also not mentioned VAT No. GST No; service Tax No. and etc., The documents are fabricated for the purpose of case. There is no amount or debt is due and payable by the Corporate Debtor. Hence, petition is to be dismissed.

The points for consideration are:

- 1) Whether the Application filed as such is valid?
- 2) Is there any debt amount due and payable by corporate debtor?
- 3) Whether CIRP to be initiated against the corporate debtor?

Point No.1

3. On the respondent side taken a plea that the application filed by the proprietary concern is not maintainable since proprietary concern has no separate legal entity. Further it is stated that the word person is defined in Section 3 (23) of IBC there the proprietary concern is not mentioned hence the application filed by the proprietary concern is not maintainable. The Apex court while referring Order XXX CPC in Rasiklal Manickchand Dhariwal vs M/s. M. S. S. Food Products <https://indiankanoon.org/doc/1699212224/> observed in para 63 as follows:

“63. The above description of the plaintiff in the plaint at best may be called to be not in proper order inasmuch as the name of Nilesh Vadhwani must have preceded the business name in the cause title. This is not an illegality which goes to the root of the matter.”

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4. Even though in section 3 (23) proprietary concern is not specifically listed, as "Person" but in section 2(f) proprietary concern is shown as the person to whom the Insolvency and Bankruptcy code is applicable.

5. The NCLT Delhi held in R.G. Steel vs Berry Auto Ancillaries(P) Ltd held that sole proprietary concern is not entitled to initiate CIRP on its own, but in subsequent citation Neeta Saha vs Ram Niwas Gupta held that sole proprietary concern can file and initiate CIRP proceedings. Amaravati NCLT also taken the similar view in Vani Biochem vs Vaayucon Greentech Pvt Ltd. In these circumstances it concluded that the Application filed by sole proprietary concern through its proprietor is valid.

PointNo.2

6. The operational creditor claims due of Rs.88,73,958.00/- towards the principal and a sum of Rs.51,48,156.00 being an interest at 18% totalling a sum of Rs.1,40,22,114.00/- for the construction works carried on by him for the corporate debtor in different places. The operational creditor raised claim by 23 tax invoices for a sum of Rs.3,41,95,626/- out of which after deducting a sum of Rs.6,03,997 towards TDS for entire claim amount, corporate debtor paid a sum of Rs.2,47,17,671/- leaving balance amount of Rs.88,73,958/- as due. The last payment of Rs.10,00,000/- was made by the corporate debtor on 06.10.2016. On the respondent side denies the liability and stated that tax invoices not properly served upon them. The operational creditor sent statutory section 8 IBC notice dated 25.07.2019 claiming the due amount of Rs.88,73,958/-the said notice was

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received by the corporate debtor and responded by reply dated 07.08.2019 there he admitted his liability only to the extent of Rs.17,44,194/.

7. On the corporate debtor side argued that since the Company secretary who is appearing on behalf of operational creditor failed to mention his position in the demand notice sent under section 8 the notice is defective it leads to fatal to the claim of applicant. In the demand notice covering letter dated 25.07.2019 it is clearly mentioned that notice is sent on behalf of our client Gaja Lakshmi construction, now it is settled after the pronouncement of Apex court citation Macquarie Bank Limited vs Shilpi Cable Technologies Ltd on 15 December, 2017 that Lawyers, Chartered Accountants and company secretaries can act on behalf of the operational creditors. Further form No. 3 and 4 were signed by the applicant himself. When the corporate debtor alleged that the demand notice is defective but he has not shown the reason how he was prejudiced or suffered, so in the absence of any prejudice caused to him his vague and bald contention that the demand notice is defective cannot be conceded.

8. On the corporate debtor side, it is also argued that the claim made by the operational creditor is not correct, there is no debt or interest payable by corporate debtor, operational debt does not carry any interest. It is also stated that in the absence of services of any work order and tax invoices the operational creditor claim is unsustainable. Further it is stated that the work carried out by the operational creditor is defective hence he is not entitling for the payment. On perusal of demand notice sent by the operational creditor shows that along with

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notice he also sent several bills containing particulars of place of work, nature of work carried out and amount due. These letters were sent on various dates when the amount fall due for the work done. For all these bills the corporate debtor not raised any objection either questioning the nature of work carried out or the quantum of amount mentioned therein. In first time the corporate debtor raised some issues in his reply notice dated 07.08.2019. There he admitted deduction of tax for entire bill amount but he stated that it was wrongly done. The vital point in the reply is the corporate debtor without any ambiguity admitted that a sum of Rs.17,44,194/- is due as on 06.10.2016 and expressed that he is ready and willingness to pay the said amount. The corporate debtor not paid the said admitted amount till date. When the corporate debtor manifestly and crystal clearly admitted his liability to pay an amount of Rs.17,44,194/- to operational creditor more than threshold amount as on the date of filing this application, in such a circumstances the applicant's prayer needs to be allowed. In a similar situation the appeal dismissed by NCLAT-Delhi, in P. Vijayakumar vs Priya Trading Co, confirming the order of NCLT-Hyderabad admitting the petition under section 9 of IBC Application is upheld by Apex court. Thus, this point is answered in favour of the applicant.

Point No.3

9. In view of the answers arrived to the points No.1&2 we are of opinion that the application filed by operational Creditor, is required to be admitted under section 9 (5) of the Insolvency and Bankruptcy Code 2016 and Corporate Insolvency Resolution Process to be initiated in relation to the corporate debtor.

The operational creditor originally suggested the of Mr. Debadatta Mohapatra as Interim resolution professional since he died pending this petition, on the operational creditor side suggested to appoint Mr. Suryakanta Satpathy as interim resolution professional, the same is accepted.

- (i) The application filed by the Operational Creditor under Section 8 and 9 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Insolvency Resolution Process against **Baibhav Properties Private Limited**. Moratorium Order is passed for a public announcement as stated in Sec.13 of the IBC, 2016.
- (ii) Moratorium Order is passed for a public announcement as stated in Sec. 13 of the IBC, 2016. The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in Clause (b) of sub-Section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- (iii) Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - 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;

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- 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 (54 of 2002);
- d) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (iv) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.
- (v) 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.
- (vi) The order of moratorium shall commence from the date of admission till the completion of the Corporate Insolvency Resolution Process. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- (vii) Necessary public announcement as per Sec.15 of the IBC, 2016 may be made by the Resolution Professional upon receipt of the copy of this order.

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- (viii) Mr. Suryakanta Satpathy MMS Chambers, Room No. 1-2, 4A, House Street, Kolkata-700 003 Council (Practice) & Insolvency as Interim Resolution Professional registered with the ICSI Insolvency Professionals Agency having Registered Address House No. 31, Canal Linking Road, Ravi Nagar, Raipur, Chhattisgarh ,492001 and **his Registration No. IBBI/IPA-001/IP-P00598/2017-2018/11050** and email **Id: - Suryakantasatapathy@yahoo.co.in**. The Interim Resolution Professional ascertain the particulars of Creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.
- (ix) We direct the Operational Creditor to deposit a sum of Rs. One Lakh with Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Debtor) Regulations, 2016. The needful shall be done within three days from the date of receipt of this Order by the Operational Creditor. The amount, however, is subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Operational Creditor.
- (x) Directions are also issued to the ex-management to provide all documents in their possession and furnish every information in their knowledge within a period of one week from the date of admission of the petition to the IRP, otherwise coercive steps to follow.

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- xi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

Registry is hereby directed to communicate the order under Section 9 (5) (i) of the I.B. Code, 2016 to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional by Speed Post as well as through E-mail. The copy of the order to be forwarded to ROC, Odisha.

Interim Resolution Professional to file 1st Progress Report on
05.01.2022

List the matter on **05.01.2022**

Let the certified copy of the order be issued upon compliance with requisite formalities.

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Satya Ranjan Prasad
Member (Technical)

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P. Mohan Raj
Member (Judicial)

Signed on this the 30th day of November, 2021.