

NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

CP(IB) No. 202/KB/2018

In the matter of:

Sanjay Stores, 231, Maharshi Debendra Road, Kolkata- 700 007

..Operational Creditor

Versus

M/s. Cookme(Spice) Pvt. Ltd., 38, KK Tagore Street, Kolkata – 700
007

.. Corporate Debtor

Coram: Shri Jinan K.R., Member(Judicial)

Shri Harish Chander Suri, Member(Technical)

For the Corporate Debtor:

1. Mr. Sayantan Bose, Advocate
2. Ms. Madhurima Das, Advocate

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For the Operational Creditor:

1. Mr. David Mantosh, Advocate
2. Ms. Smruti Rekha Das, Advocate

Date of Pronouncement of the Order : 25th November, 2019

ORDER

Per Shri Jinan KR, Member(Judicial)

1. This is an Application filed by Sanjay Stores, a Proprietary concern, under Section 9 of the Insolvency & Bankruptcy Code, 2016, read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for initiating Corporate Insolvency Resolution process (in short CIRP), as against M/s. Cookme(Spice) Pvt. Ltd., /Corporate Debtor, alleging that the Corporate Debtor committed default in payment of Rs. 61,86,420/- (Rupees Sixty one Lakh Eighty six thousand four hundred twenty only), as the amount due, out of delivery of spices, by the Operational Creditor to the Corporate Debtor.

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2. The brief averments, for the consideration of this Application, is the following:

The Operational Creditor/Sanjay Stores, filed this Application represented by an Advocate, Smt. Smruti Rekha Das. It is submitted that as per the transaction detailed in the ledger extract, Annexure-A, the Operational Creditor supplied and delivered goods to the Corporate Debtor, respective to the invoices referred to in the ledger extract, believing that the Corporate Debtor would pay the amount as demanded, as per the ledger entry relating to the transaction in between the Operational Creditor and the Corporate Debtor. The Corporate Debtor has issued a simultaneous payment by way of cheques. The Corporate Debtor used to pay adhoc amounts and the list of adhoc payments made by the Corporate Debtor to the Operational Creditor, is shown in Annexure E. The balance outstanding operational debt due, is Rs. 61,86,421=75(Rupees Sixty one Lakh eighty six thousand four hundred twenty one and paise seventy five only). Despite repeated demands the corporate debtors has not paid the amount.

The Operational Creditor, thereby issued a demand notice under Section 8(1) of the Code. The Corporate Debtor has received the demand notice and replied contending untenable contentions. The Operational Creditor, in the demand notice, omitted to mention the date of issuance of demand notice and the date of issuance of the demand notice was intimated by way of a separate notice and that notice was also received by the Corporate Debtor and acknowledged receipt of the said notice. The operational creditor



informed that the demand notice was issued on 05-04-2017. The Corporate Debtor also admitted the receipt of the demand notice in its reply dated 07-07-2017. However, in the reply affidavit, in regard to receipt of the demand notice, the Corporate Debtor has mentioned that the demand notice issued by the Operational Creditor was received by it on 06-04-2017. A reply was sent on 07-07-2017 and according to the Operational Creditor, it is ante dated. Upon the above said contentions, the Operational Creditor prays for passing an order of admission.

3. This Application was originally considered by Bench-II of this Tribunal. The Corporate Debtor being called absent was declared ex parte vide Order dated 27-09-2018. The application was heard and an order of admission was passed under Section 9 of the Code. The ex parte Order of admission was challenged by the Corporate Debtor and vide Order dated 07-12-2018, the ex parte Order was set aside, upon terms. N It is at this stage this Application came up for reconsideration before this Bench.

4. When this case was again came up for consideration, opportunity also was given to the applicant for filing supplementary affidavit by producing some more documents in addition to the documents produced along with the application. When this case was heard on 21-10-2019, the applicant was unsuccessful to satisfy us as to prove compliance of section 9(3) of the Code. As requested, granted 7 days time to produce documents in compliance of Section 9(3)(b) of the Code and the case was adjourned to 07-11-2019.

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Despite direction, no such affidavit seen filed. So this application is incomplete as per section 9(3) of the Code.

5. The Ld. Counsel, appearing for the Corporate Debtor, objected this Application, mainly on two grounds. Firstly, it contends that the Application, being filed by a Proprietary concern, who has no legal entity and the proprietary concern is represented by an Advocate and not by its sole Proprietor, is not maintainable and liable to be dismissed in limine. Secondly, it contends that there is pre existing dispute regarding the issuance of the invoices and claim of the operational debt by the Operational Creditor and that a criminal proceeding regarding fabrication of invoices has been initiated against the Operational Creditor and a copy of Case No. CN/869 of 2018, filed before the Additional Chief Metropolitan Magistrate, is stressed to prove existence of disputes. As per the said document it is understood that criminal prosecution was initiated as per Sections 418, 465, 468, 469, 471, 506(II), 384/511 of the Indian Penal Code, 1860 and Sections 272/273 of the Indian Penal Code.

6. The maintainability of the Application being mainly challenged on the side of the Corporate Debtor, let us now examine objection regarding the maintainability of the application admittedly filed by a sole proprietary concern. According to the Ld. Counsel for the corporate debtor, a Proprietary concern being not a legal entity cannot be sued in its name and therefore this application is liable to be dismissed.



7. Truly, a Proprietary concern has no legal existence. A Proprietary concern is a fictitious name. It does not have any separate legal entity and having limited liability. It cannot sue in its name. However, a Sole Proprietor, for and on behalf of a Proprietary concern, can file an Application of this nature. It is very strange to take note that the Form 5 annexed with the application has not been filed in the prescribed form. This Form is seen not signed by the Proprietor but by an Advocate, Smt. Smruti Rekha Das. The Sole Proprietor, is one, Mr. Sanjay Deb. The affidavit verifying the contents in the form seen sworn in the name of the Proprietor. Therefore, the Application comes up for consideration is no doubt, filed by a Proprietary concern.

8. The Ld. Counsel for the Corporate Debtor referred to a judgment of NCLT, New Delhi(Court-3) in IB - 722/ND/2019 in **RG Steels Vs. Berrys Auto Ancillaries Pvt. Ltd.** The Hon'ble Tribunal referring to Section 3(23) of the Code comes to a conclusion that a Proprietary concern does not come under the purview of "Person" as defined therein and therefore, filing of an Application by a Proprietary concern, is not maintainable.

9. In view of what is stated above, it is certain that a Proprietary concern cannot sue and cannot be sued in its own name but can be sued and be sued through its sole Proprietor. The instant case being filed by a proprietary concern represented by an advocate, we are of the considered opinion that this application is not maintainable as the applicant doesn't include under the purview of sub-section 23 of Section 3 of the Code. Being found that this Application is not



maintainable, we are not going to decide as to the contentions on the side of the Corporate Debtor that there is pre existing dispute as alleged. In the above said peculiar circumstances, it appears to us that this Application is liable to be dismissed. However, with a liberty to file fresh Application by the Sole Proprietor, if the Applicant desires to do so.

10. Upon the above said liberty, the Application CP(IB) No.202/KB/2018, is dismissed. No order as to costs.



(Harish Chander Suri)
Member(Technical)



(Jinan K.R.)
Member(Judicial)

Signed on this, the 25th day of November, 2019

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