



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER
SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

In CP No. (IB) 224/9/JPR/2019

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

IN THE MATTER OF:

Mr. SUDARSHAN LODHA,
No. 2, Gopal Menon Street,
Near Doveton Playground,
Choolai, Chennai, Tamil Nadu-600112

...Applicant / Operational Creditor

VERSUS

M/S Grexter Housing Solutions Private Limited
Flat no. 401, Gokul Apartment,
Kanti Chand Road, Bani Park,
Jaipur, Rajasthan-302016

...Respondent/Corporate Debtor

For the Applicant : Mr. Harsh Gattani, Adv.
Mr. Naresh Kumar Sejvani, Adv.

For the Respondent : Mr. Nikhil Yadav, Adv.

Order Pronounced on: 04.11.2022



ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This Application is filed by Mr. Sudarshan Lodha ('Operational Creditor' / 'Applicant') seeking to initiate the Corporate Insolvency Resolution Process ('CIRP') of M/S Grexter Housing Solutions Private Limited ('Corporate Debtor' / 'Respondent'), under Section 9 of the Insolvency and Bankruptcy Code 2016 ('IBC' / 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules').
2. The Corporate Debtor was incorporated under the Companies Act, 2013 on 10.12.2015 holding CIN: U74930KA2015PTC128733, and engaged in the business of providing rental accommodation for stay wherein Mr. Pratul Gupta, hereinafter referred to as 'Director 1' and Mr. Nikhil Dosi, hereinafter referred to as 'Director 2' of the Corporate Debtor Company. The Corporate Debtor has an Authorised Share Capital of Rs. 10,00,000/- (Rs. Ten Lakh Only) and a Paid-Up Share Capital of the Corporate Debtor was 1,53,000/- (Rs. One Lakh Fifty-Three Thousand Only).
3. However, the Registered Office of the Corporate Debtor got changed on 27.08.2019 from Flat No. 401, Gokul Apartment, Kanti Chand Road, Bani Park, Jaipur, Rajasthan-302016 to L-364, Ground Floor, HSR Layout Sector VI (Agara) Extension, Bangalore, Karnataka-560102 and the same came to the notice of the Registrar of Companies, Bangalore on 14.10.2019.



4. The Applicant has filed the present Application under Section 9 of IBC, 2016 alleging the following set of facts:

- a. The Applicant was approached by the directors of the Corporate Debtor Company through Mr. Rohit Bafna to seek investment services in the Corporate Debtor Company. As the Corporate Debtor is a start-up Company and was in need of funds thus the Applicant agreed to provide investment services.
- b. The Applicant entered into an arrangement in the month of September 2018 with the Corporate Debtor wherein the Applicant had provided the investment banking service i.e. fundraising in the Corporate Debtor Company along with Mr. Rohit Bafna.
- c. It is stated by the Applicant that for the entire transaction and fundraising process the Corporate Debtor was to be charged 3% of the total fund raised as a success fee of the fundraising. Such professional fee was explicitly agreed by Director 1 *vide* E-mail dated 27.09.2018. The copy of the Email dated 27.09.2018 is annexed with the petition as Annexure – 3.
- d. Further, the professional fee of the Applicant was fixed at the rate of 3% wherein further breakage of the share for the Applicant was 2% and the balance of 1 % was the share of Mr. Rohit Bafna.



- e. Thereafter, the Corporate Debtor raised an investment of Rs. 7,50,00,000/- (Rupees Seven Crore Fifty Lakhs Only) in the month of December 2018 on the account of services provided by the Applicant.
- f. Pursuant to the terms of the arrangement between the parties the Corporate Debtor is liable to pay an alleged amount of Rs. 15,00,000/- i.e., 2% of the total investment raised (Rs. Fifteen Lakhs Only) in lieu of the professional services provided by the Applicant.
- g. The Applicant submitted that an invoice for said alleged amount has been raised on 12.03.2019 and the same was mailed to the Corporate Debtor *vide* E-mail dated 03.05.2019. Subsequently, the Applicant repetitively reminded the Corporate Debtor to make the payment against the due invoice.
- h. Since the Corporate Debtor failed to clear the dues, the Applicant issued a Demand Notice under Section 8 of the code dated 25.05.2019 whereby the Corporate Debtor was requested to make the payment of Rs. 15,00,000/- (Rs. Fifteen Lakh Only) including the interest, calculated @18% per annum, payable from the due date till the date of issuance of the Demand Notice.
- i. The Applicant submitted that the aforesaid Demand Notice was received by the Corporate Debtor on 01.06.2019, however, no response has been received by the Applicant towards the Demand Notice.



- j. Accordingly, a sum of Rs. 15,00,000/- (Rs. Fifteen Lakh Only) as per the invoice dated 12.03.2019 along with interest @18% per annum is due. Therefore, the Aggregate sum of Rs. 15,45,900/- (Rs. Fifteen Lakh Forty-Five Thousand Nine Hundred Only) along with the interest is pending till date, the details of which are enumerated in Part-IV of the Application:

Part IV
PARTICULARS OF OPERATIONAL DEBT

1.	Total amount of debt, Details of transactions on account of which debt fell due, and the date from which such debt fell due.	Rs.15,45,900/- (Rs. Fifteen Lakh Forty-Five Thousand Nine Hundred Only)	
		<i>Particulars</i>	<i>Amount (in Rs)</i>
		Outstanding Invoice dated 12.03.2019	Rs. 15,00,000/-
		Interest due @ 18% (till 25.05.2019)	Rs. 45,900/-
		Total:	15,45,900/-
2.	Amount claimed to be in default and the date on which the default occurred	Rs.15,45,900/- (Rs. Fifteen Lakh Forty-Five Thousand Nine Hundred Only) Date of default:12.03.2019	

5. The Respondent, in its reply filed vide Diary No. 2884/2019 dated 09.12.2019 has submitted the following:

- a. The Corporate Debtor submitted that one Venture Catalysts Private Limited ('Venture Catalysts') has helped the Corporate Debtor to



introduce to potential investors to invest Rs. 7,50,00,000/- (Rs. Seven Crore Fifty Lakhs) in the Corporate Debtor Company. Additionally, the Corporate Debtor contended that the Venture Catalysts was engaged in said transaction professionally hence, the Corporate Debtor paid a sum of Rs. 7,77,600/- (Rs. Seven Lakh Seventy-Seven Thousand Six Hundred Only) and issued 317 shares of the Corporate Debtor Company to the Venture Catalysts.

- b. Further it is pertinent to note that the Applicant was engaged as legal counsel on the retainership basis by the Corporate Debtor wherein the Applicant's alleged claim of 2% commission of the total Investment i.e., Rs. 15,00,000/- (Rs. Fifteen Lakh Only) is false as the Corporate Debtor contended that the Venture Catalysts is the one who has assisted to raise the Investment in Corporate Debtor Company.
- c. The Corporate Debtor also mentions that the Applicant in the entire Application emphasized on the E-mail dated 27.09.2018 which says that the Corporate Debtor will give a fee of 3% of the Investment amount after signing the Shareholders Agreement ('SHA'), however, no record has been placed by the Applicant that in what manner the aid has been provided to the Corporate Debtor in fundraising.
- d. The Corporate Debtor further contents that the Applicant does not fall under the definition of the Operational Creditor. For a debt to become an Operational Debt, has to be in respect of goods and services



including employment whereas in the present Application the service against which the alleged claim was made by the Applicant is provided by the Venture Catalysts instead of Applicant.

- e. The Corporate Debtor has relied upon the judgment of the Hon'ble Supreme Court in *Innoventive Industries Ltd. Vs ICICI Bank & Ors. Civil Appeal Nos. 8337-8338 OF 2017 dated 31.07.2017* to support its contention and submit that the Applicant does not fall within the ambit of the definition of Operational Creditor as defined under Section 5(21) of IBC, 2016.
- f. Further, the Corporate Debtor submits that the E-mail dated 27.09.2018 on which the Applicant relied was not even addressed to the Applicant however the said mail was addressed to Mr. Rohit Bafna who is an employee with the Venture Catalysts.
6. The Applicant filed its rejoinder *vide* Diary No. 2134/2021 dated 20.10.2021 and has submitted the following:
- a. The Applicant contended that the Corporate Debtor has not even replied to the Demand notice which signifies that the Corporate Debtor neither raised any dispute nor disputed the alleged due and payable amount prior to issuance of the Demand Notice.
- b. It is submitted by the Applicant that a resolution has been passed on dated 05.12.2018 wherein the Corporate Debtor transferred 317 equity



shares to the Venture Catalysts in terms to fulfil the condition precedent for signing the Share Subscription & Shareholder Agreement (SSSA).

- c. Further, the Applicant has made various telephone conferences, email conversations, and what's up introduction groups in order to aim potential investors for the Corporate Debtor eventually, the funding has been secured from the Venture Catalysts by the Corporate Debtor.
- d. The Applicant further submits that the retainership agreement to provide legal services was terminated *vide* letter 15.10.2018 and the scope of the said agreement was excluded from the fundraising since the said agreement was beyond the scope of services which are provided by the Applicant now.

Additionally, the Applicant while submitting the rejoinder has relied on the following set of Judgements:

- I. *Mobilox Innovations Pvt. Ltd. vs Kirusa Software Pvt. Ltd. Civil Appeal No. 9405 OF 2017 dated 21.09.2017*
- II. *AVON Capital Vs Tattva & Mittal Lifespaces Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 256 of 2017 dated 09.08.2018*

7. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, reply, rejoinder, and all the documents enclosed with the Application.
8. The Registered Office of the Corporate Debtor was situated in Jaipur, at the time of filing the Application however it has changed to Bangalore, Karnataka



therefore, Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this matter is within the purview of Laws of Limitation, as the date of default mentioned in part IV is 12.03.2019 and the Application has been filed before this Adjudicating Authority on 22.08.2019, hence the period of three years after the default occurred had not been exhausted at the time of filing of this Application. Therefore, the present Application has been filed within the prescribed period of limitation.

9. Before we delve into the facts of the case, it is pertinent to mention that the alleged claim of the Applicant does not fall within the definition of Operational Debt as defined under Section 5(21) of the IBC, 2016, '(21) *"operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.*'
10. In the present case it is apparent from the records that the Corporate Debtor did not receive any kind of service from the Applicant with respect to the disputed matter moreover there is no shred of evidence on record to establish that any service related to investment banking was provided by the Applicant to the Corporate Debtor.
11. The Hon'ble Supreme Court, in the matter of '*Mobilox Innovative Private Limited v. Kirusa Software Private Limited*' (*supra*), held as follows:



“25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

12. Bare perusal of the definition of Operational Debt under the aforementioned provision of law inclines that for a debt to become an Operational Debt should be in respect of goods and services including employment whereas in the present Application the service against which the alleged claim was made by the Applicant is not even conferred by the Applicant.

13. The definition of ‘Claim’, ‘Debt’, and ‘Operational Creditor’ under the code are reproduced hereunder:



“Section 3(6) Claim means-(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.”

“Section 3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.”

“Section 4(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.”

14. The Hon’ble Supreme Court, in the matter of *‘Innoventive Industries Ltd. Vs ICICI Bank & Ors. Civil Appeal Nos. 8337-8338 OF 2017 dated 31.07.2017* held as follows:

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to



mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.”

15. In order to trigger the provisions of the IBC on the basis of Section 9, it is necessary for the Operational Creditor, to show that there is an outstanding operational debt and to the said debt, default has been made however the Applicant has failed to show any arrangement between the parties and evidently made a claim without any supporting documents.
16. Further considering the facts of the present Application there is no evidence to prove that the Applicant was hired by the Corporate Debtor for the aforementioned service whereas the Applicant was hired as a legal counsel on retainership basis by the Corporate Debtor. In order to do that, the Applicant used to offer professional services in the capacity of a legal professional to the Corporate Debtor.



17. The Applicant fails to establish or show any evidence of his engagement or employment by the Corporate Debtor. Hence, the alleged claim against which the invoice has been raised by the Applicant cannot fall under the head of Operational Debt in the code. As the Corporate Debtor never approached the Applicant for providing alleged services therefore the Adjudicating Authority is of the opinion that there is no relationship between the parties which proves that the Applicant is an Operational Creditor to the Corporate Debtor.
18. Therefore, it is evident from the aforesaid facts and on perusal of the record, the claim of the Applicant does not fall within the definition of '*Operational Debt*' as defined under Section 5(21) of IBC.
19. Accordingly, CP No. IB-224/9/JPR/2019 is dismissed.

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**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

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**PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER**