

(IB)-89(PB)/2017

v.
Kanak Resource Management Limited Respondent

Judgement delivered on 25.09.2017

Coram:

CHIEF JUSTICE M.M.KUMAR
Hon'ble President

Ms. Deepa Krishan
Hon'ble Member (T)

For the Operational Creditor: Mr. Amit Agarwal, Mr. Tejaswita & Mr. Mohit Negi, Advocates

For the Respondent : Mr. Piyush Joshi & Mr. Kaustav
Som, Advocates

CHIEF JUSTICE (RETD.) M.M. KUMAR, HON'BLE PRESIDENT

JUDGMENT

This is an application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity ‘the Code’) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The petitioner claims that it

is an 'Operational Creditor' and the respondent is a 'Corporate Debtor'.

2. The Corporate Debtor 'M/s. Kanak Resource Management Limited' has been incorporated on 26.11.2017. Its CIN number is U74140DL2007PLC170750. Its authorized share capital is 15,00,00,000/- and paid up share capital is Rs. 12,85,80,000/- and it is based at 4th Floor, Gopal Das Bhawan, 28 Barakhamba Road, New Delhi-110001.

3. The case of the 'Operational Creditor' is that it has entered into a Consultancy Agreement with 'Corporate Debtor' on 01.07.2015 for a period of three years which is valid upto 30.06.2018. It is for providing management consultancy services to 'Corporate Debtor'. As per the terms of the aforesaid consultancy agreement, 'Operational Creditor' has provided the services to the 'Corporate Debtor'. A copy of the consultancy agreement has been placed on record (Annexure-1). Pursuant to clause 5 of the aforesaid consultancy agreement, 'Corporate Debtor' has agreed to pay the 'Operational Creditor' remuneration against the consultancy services which reads as under:-

“3.1 The compensation of Rs. 54,00,000/- per annum to be broken down into a monthly payment of Rs. 4,50,000/- per month.

3.2 Performance related pay limited to 2% (two percent) of the profit after tax at the end of the financial year.”

In addition to above ‘Operational Creditor’ is also entitled to get the benefits under the Group Insurance Scheme of the Company. As per the terms set out in the aforesaid agreement, ‘Operational Creditor’ raised timely bills on monthly basis for the management consultancy services, which ‘Corporate Debtor’ never disputed. As per the ‘Operational Creditor’ till 30.05.2016 payment was made by the ‘Corporate Debtor’ but thereafter ‘Corporate Debtor’ failed to make the payment.

4. The details of the unpaid bills are as under:-

S. No.	Date of Bill	Period	Amount (Rs.)
1	01.07.2016	01.06.2016 to 30.06.2016	4,50,000

2	01.08.2016	01.07.2016 to 31.07.2016	4,50,000
3	31.08.2016	01.08.2016 to 31.08.2016	4,50,000
4	30.09.2016	01.09.2016 to 30.09.2016	4,50,000
5	31.10.2016	01.10.2016 to 31.10.2016	4,50,000
6	30.11.2016	01.11.2016 to 30.11.2016	4,50,000
7	31.12.2016	01.12.2016 to 31.12.2016	4,50,000
8	01.02.2017	01.01.2017 to 31.01.2017	4,50,000
9	01.03.2017	01.02.2017 to 28.02.2017	4,50,000

Copies of the invoices demanding payment have also been placed on record (Annexure-2).



5. 'Operational Creditor' further claims that as per the agreed terms, Operational Creditor is also entitled to receive 2% (two percent) of the profit of the financial year 2015-16, amounting to Rs. 9,64,324/-. 'Operational Creditor' has further asserted that in aforesaid circumstances 'Corporate Debtor' is under obligation to make the payment of above outstanding amount alongwith interest @ 18% till the realization of the payment. A copy of statement of account has also been placed on record (Annexure-4). Another table showing the monthly remuneration due plus 2% of the profit for the financial year 2015-16 as well as interest @ 18% per annum, is also projected in the application which is as under:-

Particulars	Amount (Rs.)
1. Monthly remuneration due	40,50,000/-
2. 2% of the profit (Rs. 4,82,16,196/- as on 31.03.2016)	9,64,324/-
3. Interest @ 18% per annum	3,87,649/-
Total	54,01,973/-

6. The total amount of debt claimed by the 'Operational Creditor' is Rs. 54,01,973/- in respect of all such bill mentioned in the aforesaid table.

7. The 'Operational Creditor' had sent a demand notice in respect of unpaid 'operational debt' which is dated 20.03.2017. The demand notice has been duly served as per the admission of the Corporate Debtor. A copy of the demand notice and postal receipt have also been placed on record (Annexure-3).

8. The 'Operational Creditor' has proposed the name of Mr. Deepak Arora, 23 Ka 4, Jyoti Nagar, Near Vidhan Sabha, Jaipur-302005. His registration number is IBBI/IPA-IP/00032/2016-17/1049. A written communication dated 27.04.2017 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has also been placed on record (Annexure-6). There are necessary disclosures made by Mr. Deepak Arora as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.



9. The 'Corporate Debtor' after service appeared before this Tribunal and filed the short affidavit in reply to the petition alongwith a copy of the reply (Annexure-I) dated 29.04.2017 to the demand notice sent by the Operational Creditor. The Corporate Debtor has averred that the communication of demand notice (Annexure-3) sent by the Operational Creditor cannot be said to be a valid demand notice under Section 8 of the Code, 2016. Further the status of the Operational Creditor is also questioned by the Corporate Debtor asserting that no operational debt is owed to Operational Creditor. The Corporate Debtor has placed reliance on Clause 5(e) of the Consultancy Agreement which is to the effect that Corporate Debtor would be under obligation to make a payment only in respect of monthly invoice 'duly approved by the Managing Director of the Corporate Debtor and since none of the invoices as described by the Operational Debtor have been duly approved by the Managing Director of the Corporate Debtor, no obligation is cast on the Corporate Debtor to make any payment to the Operational Creditor. Moreover, Corporate Debtor also raised dispute by asserting that no service has been taken by him nor any services been provided by the Operational Creditor for the period to which the invoices relate.

10. In light of direction issued by this Tribunal, Corporate Debtor has also filed correspondences exchanged between the Operational Creditor and Corporate Debtor in 2015, since around the time when the consultancy agreement between both of them dated 01.07.2015 came into force (Annexure-I (Colly)). The Corporate Debtor has also filed correspondence exchanged between both of them after June, 2016 being the time period when disputes arose between the Operational Creditor and Corporate Debtor relating to the consultancy agreement and other related matters (Annexure-II (Colly)).

11. We have heard learned counsel for the parties and have perused the various affidavits and the pleadings with their able assistance. The Corporate Debtor has raised the issue that the Operational Creditor has not issued a notice under Section 8 of the Code, 2016 validly because the communication should have been issued by the Operational Creditor in respect of an operational debt which is in default. The Operational Creditor and operational debt are defined by Section 5 (20) & (21) of the Code and the same is set out below:-

Section 5 (20) & (21)

(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;

(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.

Operational Creditor is a person to whom operational debt is owed and includes any person to whom such debt has been assigned or transferred. The definition of Operational Creditor is not exhaustive but illustrative and is capable of covering those heads which are not specifically mentioned in the definition. The definition of operational debt postulates that it is a claim in respect of the provision of 'goods' or 'services' including employment etc. It is not denied by the Corporate Debtor that the petitioner has rendered management consultancy services to it in pursuance of a consultancy agreement dated 01.07.2015.

Therefore, it has to be assumed that the Operational Creditor has provided consultancy services to the Corporate Debtor in accordance with the terms of agreement. There is default in making the payment. It cannot thus be concluded that the petitioner is not an Operational Creditor or that the default is not in respect of an operational debt.

12. The argument with regard to demand notice issued under Section 8 of the Code has also not impressed us as the same is without substance. Demand notice under Section 8 of the Code (Annexure-3) was issued on a proper proforma furnished under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. In the reply to the demand notice the amount has been disputed. It has been argued that the approval from the Managing Director in relation to monthly invoices was necessary before it becomes payable. On behalf of the Operational Creditor it was argued that as per the practice in the past no such approval by the Managing Director has ever been considered necessary not it has ever been insisted in respect of the payments made.

←

13. It was then submitted that from June, 2016 Operational Creditor ceased to give any work and they were discussing full and final settlement. According to the learned counsel there is no consultancy provided by the Operational Creditor to the Corporate Debtor and therefore, no payment is due. In that regard, our attention has been drawn to terms of consultancy agreement. A reference to clauses 2, 5, 9 & 11 has been made which are as under:-

“2. Functions

The Consultant shall be designated as “Advisor” in Kanak Resources Management Limited, a subsidiary of IL&FS Environmental Infrastructure & Services Limited (IEISL), based at Delhi. The Consultant is subject to the direction and supervision of the Chairman of the Company and shall provide services for various mandates of Kanak Resources Management Limited during the contract period. The responsibilities of the Consultant are enumerated below:-

a)



- b)
 - c) Be responsible for business development including sourcing of projects from municipalities, townships, special areas, etc. at remunerative rates
-
- d) To assist in creating a long term business plan for the Company over a five years horizon
 - e) Responsible for increasing the Company's profitability and cash flow.
 - f)
 - g)

5. **Remuneration**

- a) The Consultant shall be paid the total compensation as mentioned below
 - i. The compensation of Rs. 54,00,000/- (Rs. Fifty Four Lakhs only) per annum would be broken down into a monthly



payment of Rs. 4,50,000/- on the basis of services provided by the Consultant.

- ii. In addition to monthly payment (mentioned above in point i), the Consultant shall be paid performance related pay limited to 2% (two percent) of the profit after tax at the end of financial year.

- b)
- c)
- d)
- e) The Company will make the payment on the Consultant submitting a monthly invoice duly approved by Managing Director.

9. **Non-compete & Non-solicitation Obligation**

The Consultant shall not directly or indirectly in any geographic area or market where the Company or any of the sister concerns or subsidiaries are conducting any business until

 _____

one year from the date of Termination of this agreement

- either on his/her own or on behalf of any person, firm, or corporation in any way, directly or indirectly deal with, solicit, divert, or take away any existing customer of the Company
- induce any employee of the Company or any of the related concerns/associates to terminate his/her engagement/employment with the Company.

11. Notice Period & Termination


Either party shall have the right to terminate this agreement at any time before its expiry by giving three months' notice in writing. In the event of termination, the Consultant shall be entitled to receive his/her dues up to the date of which his/her services is terminated. The Consultant shall handover to the Company all documents, electronic files, passwords, records, company



property and assets like Laptop, data card, pen drive, mobile, simcard, camera etc relating to his/her assignment with the Company, as is in his/her possession, before the last day in service. The Consultant shall not attempt to make, retain or delete copies by any means what so ever of any data, information, know-how or records of the Company.

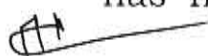
In the event of gross indiscipline, violation of service code of conduct or non-conformity to organizational policies and rules & regulations as framed/applicable from time to time, the organization can terminate the consultancy in a single day's notice and in this case the Consultant are not entitled to seek any due/compensation from the Company."

A perusal of the aforesaid provision would show that the Operational Creditor was subject to direction and supervision of the Chairman of the company. They were to provide services for various mandates of the Corporate Debtor. They were responsible



for business development, creating a long term business plan for the Company and were also responsible for increasing the Company's profitability and cash flow. As per clause 5 they were to be paid a sum of Rs. 54,00,000/- per annum which worked out to be a monthly payment of Rs. 4,50,000/- on the basis of services provided by it. The consultant/Operational Creditor was also to be paid performance related payment limited to 2% of the profit after tax at the end of the financial year. There is nothing in the agreement which would show that the remuneration payable to the Operational Creditor was variable or dependent on the order to be placed by Corporate Debtor. It is fixed amount payable monthly. It is not a piece work contract as per the language used. The dispute sought to be raised is illusory and imaginary as there is no evidence shown from any past payment that the amount paid monthly varied. Therefore, we do not feel persuaded to accept the submissions of the learned counsel for the Corporate Debtor.


14. It is evident that Corporate Debtor has committed default and the amount @ Rs. 4,50,000/- plus 2% of the profit after tax has not been paid since 01.06.2016. The invoices have been



raised (Annexure-2 (Colly) and there is default committed within the meaning of Section 3 (12) read with Section 4 and Section 9 (1) of the Code, 2016. The notice under Section 8 of the Code has been duly served. Even the bank statement (Annexure-4 and 5) have been filed to satisfy the requirement of Section 9 (3) (c) of the Code.

15. The Operational Creditor has also proposed the name of Interim Insolvency Professional namely Mr. Deepak Arora, 23 Ka 4, Jyoti Nagar, Near Vidhan Sabha, Jaipur-302005, email-aroracs1@gmail.com, who has made declaration in accordance with the provisions of Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

16. As a sequel to the above discussion, this petition is admitted and Mr. Deepak Arora is appointed as an Interim Resolution Professional. His registration number is IBBI/IPA-IP/00032/2016-17/1049.

17. In pursuance of Section 13 (2) of Code, we direct that  Interim Insolvency Resolution Professional shall immediately

make public announcement with regard to admission of this application under Section 7 of the Code. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of imposition of the moratorium resulting from the provisions of Section 14 (1) (a), (b), (c) & (d) would thus be that the following prohibitions come in operation:

- “(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;
- (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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;



- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.”

18. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or to the supply of the essential goods or services to the Corporate Debtor which may be specified. Such supply is not to be terminated or suspended or interrupted during the moratorium period.

19. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices available in the discipline of Insolvency even borrowing from others jurisdiction provided such practices are suitable to the conditions of this Country. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and

cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. In case there is any violation the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order.

20. We specifically direct the Interim Resolution Professional to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

21. The Petition is disposed of in the above terms.

Sd-

(CHIEF JUSTICE M.M. KUMAR)
PRESIDENT

Sd-

(DEEPA KRISHAN)
MEMBER (TECHNICAL)

25.09.2017
VINEET

Pronounced today under Rule 151 of the NCLT Rules 2016 as Hon'ble Ms. Deepa Krishan is not holding Court today.

Sd-

(CHIEF JUSTICE M.M. KUMAR)
PRESIDENT
25.09.2017