

IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA

Before Shri Madan B. Gosavi, Hon'ble Member (J)

CP (IB) No. 22/KB/2018

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

-And-

In the matter of:

**Impact Event Management**, having its address for correspondence at 11, Old Post Office Street, 3<sup>rd</sup> floor, Opposite Emerald House, Near High Court at Calcutta, Kolkata- 700 001, West Bengal;

... Operational Creditor

-Versus-

In the matter of:

**Garodia Automobiles Private Ltd.**, having its registered office at 94, Hem Chandra Naskar Road, Belegkata, Kolkata- 700 010 West Bengal, CIN : U50102WB2013PTC190718

.... Corporate Debtor

Counsel appeared:

1. Mr.Susanta Dutta, Advocate ] Operational Creditor
2. Mr. Abhik Sarkar, Advocate ]

**Date of Pronouncement of Order: 14.01.2019**

## ORDER

**Impact Event Management** - the Operational Creditor, proprietary concern through its proprietor Mr. Anneshan Mukherjee filed this application under section 9 of the Insolvency & Bankruptcy Code, 2016 (in short, I&B Code) against Garodia Automobiles Private Ltd.- Corporate Debtor to start Corporate Insolvency Resolution Process (in short, "CIRP") of the Corporate Debtor because the Corporate Debtor did not pay total dues of Rs.2,07,315/- (inclusive of interest @18% from April, 2017).

2. The following facts are not in dispute:-

3. The Operational Creditor is the proprietary firm and Mr. Anneshan Mukherjee is its sole proprietor. The firm renders services in event management to its clients. By work order dated 04.02.2016, the Operational Creditor held promotional activities for the product of the Corporate Debtor at Forum Mall, Kolkata and at CII Auto Carnival, Salt Lake, Kolkata. The Corporate Debtor agreed to pay a sum of Rs.1,73,800/- for promotional show at a Forum Mall and Rs.48,000/- for the show at CII Auto Carnival exclusive of the taxes.

4. It is also not in dispute that the Operational Creditor rendered the services. The bill claiming the fees/charges were raised against the Corporate Debtor. It is also not in dispute that towards part payment of the charges, the Corporate Debtor issued two cheques in favour of the Operational Creditor for a sum of Rs.59,851/- and Rs.53,617/- dated 24.10.2016 and 28.10.2016 respectively drawn on Kotak Mahindra Bank Ltd. Upon presentation of both the cheques for encashing, the bank dishonoured the cheques for the reason that payment was stopped by the drawer. Thereafter the Operational Creditor sent

the Corporate Debtor notice of demand of payment under section 8 of I&B Code. Notice was received by the Corporate Debtor. They replied the notice taking the plea that, "**performance of the Operational Creditor at the promotional show was far below standard and was not at all satisfactory.**" Since the Corporate Debtor refused to pay the amount claimed, this application under section 9 is filed against them to start CIRP.

5. Notice of this application was served on the Corporate Debtor. They appeared in the proceeding. They filed affidavit-in-reply. They came out two-fold defences - (i) Operational Creditor is the proprietary concern and it is not juristic person. It cannot sue and be sued in its own name. Hence, the application is not maintainable and (ii) The performance of the Operational Creditor was not at all satisfactory, hence the instruction was given to the bank to stop the payment of the cheques. There is no operational debt due and payable by them for the above reasons. Hence, the application may be rejected.

6. The Operational Creditor filed rejoinder. Both the Ld. Counsels appearing for the parties made oral submissions and also filed notes of argument on record. Apart from making submission on evidence of facts, Ld. Counsel for the Corporate Debtor also relied on the three rulings. They are (i) (1999) 6 Supreme Court Cases 632 in the case of T.K.Lathika-vs- Seth Karsandas Jamnadas, (ii) (2005) SCC Online Del 1392 in case of Svapn Constructions -vs- IDPL Employees Co-Operative Group Housing Society Ltd. & Ors. and (iii) (2018) 1 Supreme Court Cases 353 in the case of Mobilox Innovations Pvt.Ltd.-vs-Kirusa Software Pvt. Ltd.

7. I have gone through the pleadings of the parties, evidence on record and the rulings relied on vis-a-vis the notes of argument of both the Counsels.

8. The first objection raised by the Corporate Debtor is about the maintainability of the application on the ground that the Operational Creditor being a proprietary concern cannot file such application in its own name. It is also submitted that the point of maintainability of the application has to be considered at the first instance, in view of the ruling of the Hon'ble Supreme Court in the case of T.K. Lathika-vs- Seth Karsandas Jamnadas (1999) 6 Supreme Court Cases 632.

9. I have gone through the ruling of the Hon'ble Apex Court, wherein it is held in para 9 that, ***"If the ban contained in the third proviso to section 11(3) of the Act applies, its corollary is that the petition filed by the landlord has to be expelled on the sole ground that the landlord was then not entitled to file it. In such a situation the court should not enter into the merits."***

10. In fact, the ruling is not applicable to the facts in this case because there is no provision in I&B Code alike the provisions in Kerala Buildings (Lease and Rent Control) Act, 1965 restricting this authority on proceeding with merit of the case before considering its maintainability. I&B Code is a special statute enacted with the object to have a resolution of Corporate Debtor in time bound manner and hence the proceeding in two stages, i.e., (i) to decide maintainability and then (ii) to decide merit is not contemplated at all.

11. The Corporate Debtor raised objection about the maintainability of the application on a ground that it is filed by proprietary concern. The Corporate Debtor relied on the Rulings reported in (2005) SCC OnLine Del 1392, wherein it has been held by the Hon'ble Delhi High Court that, ***"Perusal of the petition reveals that petition has been filed in the name of sole proprietorship firm which is not a legal entity through its sole proprietor. A sole***

*proprietorship firm is not a legal entity which can sue in its own name though any two persons claiming or being liable as partners and carrying on business may sue or be sued in the name of firm of which such persons are partners at the time of accruing of cause of action, however under Order XXX of the Code of Civil Procedure and under any other provision of code a person carrying on business in a name other than his can sue in the name other than his. In Miraj Marketing Corporation (supra) relied on by the respondent, it was held that a sole proprietorship firm which is not a legal entity can not Page 0068sue in its own name. In that case, plaintiff was described to be a proprietorship firm represented through a person who had neither signed the plaint nor had signed the power of attorney which was filed in the case and no statement was made in the plaint as to who was the proprietor of the firm. In the case of P.C. Advertising (supra), it was held that the suit filed in the name of proprietorship firm which was neither a registered company nor a joint family nor a partnership firm, in the absence of any prayer to seek amendment to allow the sole proprietor to sue in his name was maintainable.”*

12. In this case, perusal of Part-I of this application clearly shows that the application is filed by one Mr. Annesan Mukherjee, the sole proprietor of the firm. The application is not filed by the firm itself but it is filed by the proprietor for and on behalf of the firm. It is settled law that the proprietary firm cannot sue and be sued in its own name but can sue and be sued through its proprietor. In this case, the proprietor, Mr. Annesan Mukherjee filed the application on behalf of the firm and it is maintainable.

13. The second point raised by the Corporate Debtor questioning the maintainability of this proceeding is that there is a genuine dispute pending about the quality of services rendered by the Operational Creditor. It is their say that the performance of the Operational Creditor at the event was not at all satisfactory. It is not in dispute that the Operational Creditor has held the event for the Corporate Debtor as the work orders. Two questions essentially being raised out of this controversy- (i) whether the services rendered by the Operational Creditor is satisfactory and (ii) whether Corporate Debtor has raised dispute about the services rendered prior to receipt of notice under section 8 of I&B Code?

14. As far as the first point is concerned, the Corporate Debtor did not give any details as to what are the instances on the basis of which they found that the services rendered by the Operational Creditor were not sufficient and satisfactory. In notice reply dated 07.09.2017 (Annexure-J), they did not give any details to point out insufficiency of the services. In reply affidavit running in almost 9 pages, no instances are stated to point out that the services rendered by the Operational Creditor were not upto mark. In short, there is no evidence, much less pleadings of the fact to indicate that the services rendered by the Operational Creditor were insufficient. This takes me to consider next point as to whether such dispute about the insufficiency of the services was in existence prior to receipt of notice under section 8 of I&B Code by the Corporate Debtor. Section 8(2)(a) of the I&B code states that, **“(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor- (2)(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.”**

15. In this case, the Corporate Debtor replied to the notice (Annexure-J). This reply does not indicate existence of any dispute as raised. However, in affidavit of reply, it is stated that this dispute was raised long back by the respondent vide letter dated 06.12.2016. That letter is produced on record as Annexure-IV of affidavit-in-reply.

16. I have gone through the letter also. It is only stated therein, "my client denied the statement that your clients were satisfactorily discharged the performance service". It is not stated anywhere in that reply as to what had prompted the Corporate Debtor to say that Operational Creditor's service performance was not proper. It is easy to anybody to say that the service was insufficient without giving any details, to avoid payment of fees for such service. Such created dispute sans the details thereof cannot be considered by this authority. It has exactly been held by the Hon'ble Supreme Court in the ruling in (2018) 1 Supreme Court Cases 353 in case of Mobilox Innovations (P) Ltd.-vs- Kirusa Software (P) Ltd., wherein it has been held that, "***Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.***"

17. In this case also, though it is stated by the Corporate Debtor that the services rendered by the Operational Creditor were insufficient but they did not give any details to sustain their contention and hence I hold that the dispute, shown to be in existence, appears to be spurious dispute.

18. It is submitted by the Corporate Debtor that the cheques drawn by them in favour of the Operational Creditor were dishonoured due to stop payment instruction and not for any other reasons. Be that as it may, the fact remains on record is that the amount of more than Rs.1 lakh is due and payable by the Corporate Debtor to the Operational Creditor towards services rendered by them and hence in view of section 4 of the I&B Code, this application has to be admitted. It is also submitted by the Corporate Debtor that one Mr. Kejriwal paid Rs.50,000/- to the Operational Creditor but it was paid out of some other transaction. I am not entering into that consideration at all being irrelevant. In view of the facts and evidence on record, I hold that this application to start CIRP of the Corporate Debtor has to be admitted because they made a default in payment of operational debt of more than Rs.1 lakh of the Corporate Debtor.

19. The Operational Creditor has proposed the name of Mr. Sanjay Agarwal, FCA (Mobile No.9830946380/ 9903167554) of "Draupadi Mansion", 3<sup>rd</sup> floor, 11, Brabourne Road, Kolkata- 700 001 having Email id: [sanjaycal@hotmail.com](mailto:sanjaycal@hotmail.com) Registration no.IBBI/IPA-001/RP-P00062/2017-18/10140. A written communication dated 26.10.2017 of Mr.Sanjay Kumar Agarwal, proposed IRP, has been submitted, wherein it has been declared by the proposed IRP that there are no disciplinary proceedings pending against him with the Board or Indian Institute of Insolvency Professionals of ICAI



20 The Operational Creditor also complied the provisions of sections 9(3)(b) and 9(3)(c) of the I&B Code. In view of the facts and evidence on record, I hold that the application requires to be admitted. I pass the following order:

**ORDER**

- (i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process in respect of M/s. M. R. Nirman Private Ltd. Moratorium order is passed for a public announcement as stated in Sec.13 of the IBC, 2016.
- (ii) 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 judgement, 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 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 affect the date of admission till the completion of the Corporate Insolvency Resolution Process.
- vii) 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 Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- viii) 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.

(ix) As the Operational Creditor has proposed the name for the appointment of Interim Resolution Professional (IRP), Mr. Sanjay Agarwal, FCA (Mobile No.9830946380/ 9903167554) of "Draupadi Mansion", 3<sup>rd</sup> floor, 11, Brabourne Road, Kolkata- 700 001 having Email id: [sanjaycal@hotmail.com](mailto:sanjaycal@hotmail.com) Registration no.IBBI/IPA-001/RP-P00062/2017-18/10140 is appointed as the Interim Resolution Professional for Corporate Debtor for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

x) Registry is hereby directed to communicate the order to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional by Speed Post and also by email.

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

List the matter on **04.03.2019** for filing progress report.

Sd/-  
(Madan B. Gosavi)  
Member (J)

*Signed on this, the 14<sup>th</sup> day of January, 2019.*