

NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

C.P NO. (IB)-10(PB)/2017
CA NO.

CORAM:


PRESENT: CHIEF JUSTICE M. M. KUMAR
Hon'ble President

SH. R.VARADHARAJAN
Hon'ble Member (J)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF PRINCIPAL BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 20.02.2017

NAME OF THE COMPANY: Col. Vinod Awasthy
Vs
AMR Infrastructures Ltd.

SECTION OF THE COMPANIES ACT: U/s 9 Insolvency Bankruptcy Code 2016

S.NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE
1.	C.S Parasher	Advocate	Col. Vinod Awasthy (Applicant)	} 
2.	Mohit Kumar	Advocate	do	

ORDER

1. This is an application filed under section 9 of Insolvency and Bankruptcy Code 2016 (for brevity 'the Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule 2016 (for brevity 'the Rule') with a prayer for initiation of Corporate Insolvency Resolution process in respect of Respondent Company.

2. In order to put the controversy in its proper perspective few material facts may first be noticed. The respondent company has been incorporated on 15.06.2006 with ROC UP & Uttaranchal, Kanpur. The petitioner booked a flat for a total consideration of Rs.19,80,000/- in the project known as i-Homes which was to be completed by December 2013 and paid advance amount of Rs.9,87,284/-. On 18.10.2011 a MOU was executed between the Petitioner and Respondent Company.

It is also asserted that in accordance with the provisions of the MOU Respondent



Company had undertaken to pay a sum of Rs.9,050/- every month w.e.f. 15.11.2011 to the Petitioner as 'assured return' till the date of possession on the amount of Rs.9,87,284/- which was advance amount paid. The Respondent paid the assured return upto December 2013 but failed to pay the same thereafter despite repeated request by the petitioner which resulted in demand of the refund of the entire booking amount.

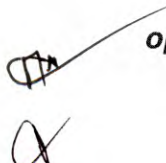
3. On 28.3.2014 an allotment agreement was signed stipulating that possession of fully furnished flat would be handed over by December 2014, however no possession given till date. On 26.9.2016 a notice under section 433 etc of Companies Act, 1956 was duly served at the registered office of the Respondent Company calling upon it to pay due and admitted amount of Rs.12,76,884/- along with interest within 21 days. On 25.1.2017 statutory notice under the Code was issued which has been duly served on the Respondent.

4. It is on the aforesaid facts and circumstances that we have been called upon to consider whether the Petitioner could be regarded as an 'Operational Creditor' within the meaning of section 9 read with section 5(7) & (8) of the Code.

5. It is pertinent to mention that against the Respondent Company namely M/s AMR Infrastructures Ltd. C.P No.(ISB)-03(PB)/2017 titled as Nikhil Mehta & Sons (HUF) & Ors. v. M/s AMR Infrastructures Ltd. was filed by invoking section 7 of the Code which was dismissed on 23.1.2017 by this Bench

6. We have heard learned counsel for the Petitioner at length and have not been able to persuade ourselves to accept the submissions to initiate Corporate Insolvency Resolution Process. It would be profitable to read relevant provisions of section 9 of the Code in order to understand the *locus standi* of the Petitioner to maintain this petition:

Application for initiation of corporate insolvency resolution process by operational creditor.



9. (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2).....

(3).....

(4).....

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

7. A perusal of section 9 of the code would show that in order to maintain an application as an 'Operational Creditor' the Petitioner has to satisfy the requirements of section 5(20) and (21) of the Code. According to section 9(1) a petition like the one in hand could be maintained only by an 'Operational Creditor' against the

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'Corporate Debtor. The aforesaid expression has been defined in section 5(20) & (21) which would also be attracted and applicable. Section 5 (20) & (21) of the code read thus:

"5. In this Part, unless the context otherwise requires,—

(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;"

8. It is evident from the perusal of the aforesaid definition of 'Operational Debt' that it is a claim in respect of provision of goods or services including dues on account of employment or a debt in respect of repayment of dues arising under any law for the time being in force and payable to Centre or State Government or local authority. It is thus clear that debt may arise out of provision of goods or services or dues arising out of employment or dues arising under any law for time being in force and payable to the Centre/State Government. The framer of the Code have also defined the expression 'Financial Debt' in section 5(8) to mean a debt which is disbursed against the consideration of time value of money. However the framer of the Code has not included in the expression 'Operation Debt' as any debt other than the 'Financial Debt'. It is thus confined to aforesaid four categories like goods, services, employment and Government dues. In the present case the debt has not arisen out of the provisions of goods or services. The debt has also not arisen out of employment or the dues which are payable under the statute to the Centre/State Government or local body. The refund sought to be recovered is necessarily associated with the delivery of the possession of immovable property which has been delayed.






9. The next question is whether the Petitioner could be regarded as an 'Operational Creditor' within the meaning of section 5(20). The 'Operational Creditors' are those persons to whom the 'Corporate Debt' is owed and whose liability from the entity comes from a transaction on operations. The final report of the Committee in para 5.2.1 defines 'Operational Creditor' like the wholesale vendor of spare parts whose spark plugs are kept in inventory by Car Mechanic and who gets paid only after spark plugs are sold to acquire the status of 'Operational Creditor' so and so forth. The Petitioner in the present case has neither supplied any goods nor has rendered any service to acquire the status of an 'Operational Creditor'.

10. We are further of the view that given the time line in the code it is not possible to construe section 9 read with section 5(20) & (21) of the Code so widely to include within its scope even the cases where dues are on account of advance made to purchase the flat or a commercial site from a construction company like the Respondent in the present case especially when the Petitioner has remedy available under the Consumer Protection Act and the General Law of the land. Therefore we are not inclined to admit the petition.

11. Like wise we have decided the case of Sajive Kanwar v. AMR Infrastructure C.P. No.(ISB)-03(PB)/2017 on 16.2.2017 which has also discussed the possibility of treating a person like the petitioner as an "Operational Creditor". In para 6 to 10 we have expressed the following view:-

"6. From a bare perusal of Section 9 (1) of IBC (Supra) it becomes evident that a cause of action to an 'Operational Creditor' to file an application before NCLT would arise if after 10 days notice given by him to the 'Operational Debtor', the 'Operational Creditor' does not receive any payment from such a debtor or a corporate debtor or in the alternative he does not receive a notice of dispute. He must also satisfy the Tribunal about demand notice issued to the Operational Debtor/Corporate Debtor and is also requires to fulfill all other requirements of Section 9(3) of IBC.



7. In order to fall within the four corners of 'Operational Creditor' as per Section 9 of the IBC it must be shown that he is a person to whom an 'Operational Debt' is owned or it is legally assigned/transferred as is patent from a bare perusal of Section 5 (20) of IBC. The expression 'Operational Debt' has been defined by Section 5 (21) of IBC and it must fulfill following substantive elements namely :

- (a) Debt arising out of provisions of goods; or
- (b) services; or
- (c) out of employment.

It also covers dues arising under any law for the time being in force and payable to the Central or State Government or local authority. It is doubtful whether it would include all debts other than 'Financial Debt' because we do not find any such 'Legislative intendment' from the Part II of IBC which deals with 'Insolvency and Liquidation for Corporate Persons'

8. Learned counsel for the petitioner has argued that the expression 'Corporate Debtor' means a person who owes a debt to any person as per Section 3(5) of IBC. It is further emphasized that the expression '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. However Part II specifically deals with "Insolvency resolution and Liquidation' and it has its own definition enumerated in Section 5 of IBC as is discussed in the preceding para. Therefore the definition as enumerated in section 5 of IBC are to apply the expressions used in sections 7 and 9 of IBC and therefore, the expression used in section 3 of IBC cannot be exclusively read to interpret various words used in section 5 of IBC. Therefore we find no merit in the aforesaid submission.

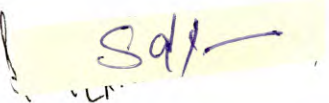
9. Therefore the argument of the petitioner to treat this petition as the one under section 9 of IBC is also without substance and we reject the same.

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10. *For the reasons stated above this petition fails and the same is dismissed. Keeping in view the tenderness of the provisions of IBC we refrain from burdening the petitioner with cost. Before parting we make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy as we have refrained from entertaining the application at the initial stage itself when the Respondents have not entered appearance and are not present before us. Therefore the right of the Applicants before any other forum shall not be prejudiced on account of dismissal of instant application."*
12. As a sequel to above discussion this petition fails and the same is dismissed.


(CHIEF JUSTICE M.M. KUMAR)

PRESIDENT



(R. VARADHARAJAN)

MEMBER (J)

Dated: 20.2.2017

(VS)