IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
AT NEW DELHI

Company Petition no. (IB)-113(ND)/2017

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Mr. Sanjeev Jain .....Operational Creditor

Versus

M/S Eternity Infracon Pvt. Ltd. ...Corporate Debtor

Judgement delivered on: 12/07/2017

CORAM:

MS. INA MALHOTRA, MEMBER (JUDICIAL)

MR. S.K.MOHAPATRA, MEMBER (TECHNICAL)

For Operational Creditor: Akashdeep Kakkar, Advocate,

For Corporate Debtor: None

Per: S. K. Mohapatra, Member (Technical)

ORDER

(Reserved on 06.07.2017)

1. 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) Rule, 2016 (for brevity 'the rule') for initiation of Corporate Insolvency process in respect of the Corporate Debtor.

2. It is pertinent to mention here that notice was deemed served on the Respondent Corporate Debtor as is evident from the affidavit of Proof of Service dated 29.06.2017 and the order dated 5.7.2017 passed by this tribunal. However no one appeared on behalf of Respondent Corporate debtor.

3. It is the case of the applicant that the corporate debtor 'Eternity Infracon Pvt. Ltd.' a company incorporated under the provisions of The Companies Act, 1956, in November, 2013through its director proposed to the applicant to invest an amount of Rs. 18,00,000/- (Rupees Eighteen Lacs Only) (approximately) in its under-

construction commercial space namely, "The CRESCENT" (IT/ITES/Commercial Project) at Greater Noida,(U.P). In lieu of the aforesaid investment, the Corporate Debtor proposed to book a commercial space for the Applicant in the aforesaid Project and promised him to facilitate in selling the said space with an assured appreciated/escalated price/return. Applicant agreed to the terms of investment proposed and invested an amount of Rs. 17,47,955/- (Rupees Seventeen Lacs Forty Seven Thousand Nine Hundred and Fifty Five Only) vide cheque no. 000017 dated 21.01.2014 drawn on HDFC Bank in the name of the Corporate Debtor.

4. However the Corporate Debtor in contrast to its commitment neither completed the construction nor could make an appreciated/escalated price/return upon the aforesaid investment of Rs. 17,47,955 (Rupees Seventeen Lacs Forty Seven Thousand Nine Hundred and Fifty Five Only), as agreed. Consequently the applicant, through his financial consultant, Mr. Sharan Verma requested the Corporate Debtor to refund the aforesaid amount along with interest forthwith.

5. It is stated that the Corporate Debtor further offered to buy-back the aforesaid booked space at an escalated price. However, instead of

refunding the principal amount, the Corporate Debtor paid only the escalated/ appreciated price upon the aforesaid investment to the Applicant and once again sought an additional investment of an amount of Rs. 25,00,000/-(Rupees Twenty Five Lacs) from the Applicant in the aforesaid project on the pretext that it would refund the initial investment of Rs. 17,47,955 (Rupees Seventeen Lacs Forty Seven Thousand Nine Hundred and Fifty Five Only) shortly. The Corporate Debtor assured to pay an interest at the rate of 37.33%p.a. on the amount of Rs. 25,00,000/-(Rupees Twenty Five Lacs).

6. The Applicant further invested an additional amount of Rs. 25,00,000/-(Rupees Twenty Five Lacs) vide Cheque No. 0026, dated 01.05.2014, drawn on HDFC Bank in the Corporate Debtor. A Buy Back Agreement dated 02.05.2014, *inter alia*, recording the aforesaid terms was also executed between the Corporate Debtor and the Applicant. The Corporate Debtor upon the Applicant's continuous requests, issued a cheque no.00191 dated 11.06.2014 for an amount of Rs. 17,47,955 (Rupees Seventeen Lacs Forty Seven Thousand Nine Hundred and Fifty Five Only) towards the initial principal amount due, which was dishonoured upon presentation and the same was returned with remarks "Insufficient Funds" on 12.06.2014.

7. Subsequently upon repeated requests, the corporate debtor promised to refund the entire amount of Rs. 42,47,955/- (Rupees Forty Two Lakhs Forty Seven Thousand Nine Hundred and Fifty Five Only) i.e. Rs.25,00,000/-(Rupees twenty Five Lakhs Only) plus Rs. 17,47,955 (Rupees Seventeen Lacs Forty Seven Thousand Nine Hundred and Fifty Five Only),along with interest @37.33% annually. Accordingly, the corporate debtor paid the interest on the aforesaid amounts separately from July, 2014 till September, 2014. However, in October, 2014 onwards, the corporate debtor stopped paying the interest.

8. It is further submitted that the Applicant both verbally in meetings through its financial consultant, as well as by repeated text messages, requested the Corporate Debtor to make the payment immediately. It is submitted that despite repeated reminders and requests vide emails the Corporate Debtor miserably failed to discharge its obligation. Indeed, the Corporate Debtor vide various emails falsely and fraudulently assured the Applicant that it would make the payment. Consequently, the Applicant, through its counsel sent separate demand notices dated 02.09.2016 and 03.09.2016 and demanded the aforesaid amounts of Rs.25,00,000/-(Rupees twenty Five Lacs only) and Rs.

17,47,95 (Rupees Seventeen Lacs Forty Seven Thousand Nine Hundred and Fifty Five Only) along with interest. However, the Corporate Debtor, despite receipt of the aforesaid notices failed and neglected to discharge its liability.

9. Applicant, through its counsel sent demand notice dated 22.03.2017 under section 8 of Insolvency and bankruptcy Code, 2016, requesting the Corporate Debtor to unconditionally repay the unpaid operational debt in full within ten days from the receipt of the said demand notice, but to no benefit. The Applicant, once again, vide email dated 13.04.2017 served the aforesaid demand notice. However, no reply has been sent by the Corporate Debtor and corporate debtor failed to make any payment to the Applicant. Accordingly applicant has prayed for initiation of corporate insolvency resolution process in respect of the Corporate Debtor under the Code.

10. Application for initiation of corporate insolvency process by *operational creditor*, who claims to have not received the unpaid *operational debt*, is dealt with under Section 9 of the Code. Subject to other conditions Sub-Section (5)(i)(b) of Section 9 of the Code provides that if there is no repayment of the unpaid operational debt the application under Section 9 can be admitted. Similarly the

application under Section 9 shall be rejected under Sub-Section (5)(ii)(b) if there has been repayment of the unpaid operational debt. An application under Section 9 of the Code can be filed only by an 'Operational Creditor' in respect of the 'operational debt'. Therefore a perusal of Section 9 of the Code would show that in order to maintain an application as an 'Operational Creditor' the applicant has to satisfy the requirements of Section 5(20) and (21) of the Code.

11. The aforesaid expressions have been defined in section 5(20) & (21) of the code respectively which envisages that:

"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".

12. From the perusal of the aforesaid definition of 'Operational Debt' it is clear 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. Therefore, the present claim of investments cannot be considered as an 'operational debt' under the Code.

13. 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 'Operational Debt' is owed and whose liability from the entity comes from a transaction on operations. The applicant in the present case has invested money and admittedly has neither supplied any goods nor has rendered any service etc. as defined in section 5(21) of the code and as his claim does not fall within purview of operational debt, he cannot acquire the status of an 'Operational Creditor'.

14. According to section 9(1) a petition like the one in hand could be maintained only by an 'Operational Creditor' against the 'Corporate Debtor'. In other words in case the applicant does not fall within the definition of 'Operational creditor', his present application filed under section 9 for initiation of Corporate Insolvency process in respect of Corporate Debtor shall not be maintainable. Therefore once the applicant is not an 'Operational Creditor' and his claimed dues not being 'operational debt', the present petition filed under section 9 of the Code for initiation of Corporate Insolvency Resolution Process is not maintainable.

15. Ld. Counsel for the applicant before conclusion of the final arguments submitted that the applicant may be treated as a 'financial creditor' and leave may be granted under the Inherent Powers of the Tribunal to allow the applicant to file application under section 7 of the code in place and instead of the present application. It was emphasized that there has been clear admitted default by respondent corporate debtor and therefore is a fit case to use inherent power provided under Rule 11 of the NCLT Rules, 2016 to advance justice. The Ld. Counsel also relied upon the order passed by Hon'ble High Court of Delhi in the matter of *Suman Kundra Vs. Sanjeev Kundra*, Mat. Appeal No. 32/2009, in which a Divorce Petition wrongfully filed under the Hindu Marriage Act, were allowed to be treated as petition under the Special Marriage Act, 1954.

16. It is seen that the facts of the aforesaid case, which was long pending for more than a decade, was clearly distinguishable. However, in the case in hand time is the essence of the Code. The Code prescribes stipulated time frame to be followed at every relevant stage of the resolution proceeding. Besides the insolvency resolution process has serious civil consequences, which suggests for a cautious approach strictly in accordance with the procedure prescribed by the Code.

17. It is also pertinent to state here that the provisions and scope of Section 9 including the applicable rules, forms and procedure are totally distinct and separate from that of Section 7 of the code. There is no provision in the code to convert a Section 9 application into a Section 7 application as prayed. On the contrary the Code provides that applications filed under section 7, 9 or 10, as the case may be should either be admitted or rejected in accordance with respective provisions. When the language of the code is clear and explicit the adjudicating authority has to give effect to it by adhering to the statutory requirements in toto. The provisions must be strictly followed substantially as well as procedurally.

18. In the case of State of U.P. Vs. Babu Ram Upadhyay, AIR 1961 SC 751, Hon'ble Apex Court has held that, *"when a statute requires a thing to be done in a particular manner, it can only be done in that manner or not at all. All other methods are forbidden"*.

19. Equity has no place when law is clear. Inherent Power of court are exercised in advancing ends of justice but subject to the condition that exercise of such power is not in conflict with the expressed provisions of the statute. As per the statutory requirement of the code the present application is either to be admitted or rejected within the time frame prescribed.

20. It is however made clear that in the present application filed under Section 9 of the Code neither there is any scope nor we have examined as to whether the applicant falls within the ambit of 'Financial Creditor'. Accordingly, leave is granted to the applicant to move under appropriate provisions of the Code, if so advised.

21. In view of the discussions made above, once it is held that the applicant is not an 'Operational Creditor' and the debt in question not being 'operational debt', the present petition filed under Section 9 of the Code for initiation of corporate insolvency resolution Process is not maintainable and therefore rejected.

Serve copy of the order to the parties and consign the case records to record room.

Sd/-

(S.K Mohapatra)
Member (Technical)

Sd/-

(Ina Malhotra)
Member (Judicial)