

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT) (Insolvency) No. 321 of 2020

IN THE MATTER OF:

**Neeta Saha, Member of Suspended
Board of Palm Developers Pvt. Ltd.**
R/o G-22,
Sector 27 Noida, Gautam Budha Nagar,
U.P.

...Appellant

Vs

**1. Mr. Ram Niwas Gupta
(Proprietor of Ram Niwas Gupta & sons)**
Z-115/1, Loha Mandi,
Naraina,
New Delhi – 110 028

**(Original
Operational
Creditor)**

2. Palm Developers Pvt. Ltd.
Plot No. 1, Ground Floor, Kilkori,
Maharani Bagh,
New Delhi -110 065
Represented by Interim Resolution
Professional Mr. Manoj Kumar Singh

**(Corporate
Debtor)**

.. Respondents

Present:

**For Appellant: Mr. Sai Deepak, Mr. Rajesh P. Ms. Ananya
Kuthiala, Mr. Ankit Tripathi, Advocates**

**For Respondents: Ms. Kapil Rustagi, Advocate for Respondent No. 1
Mr. Abhijeet Sinha, Mr. Raghevendra Bajaj and
Ms. Pratishtha Vij, Advocate for Caveater/
Abhinav Mukherji.**

**Mr. Raghavendra M. Bajaj, Mr. Agnish Aditya and
Mr. Saikat Sarkar, Advocates for Financial
Creditors**

O R D E R

25.02.2020 Heard Advocate Mr. Sai Deepak for the Appellant. Respondent No. 1 filed Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short '**IBC**') in the name of Proprietorship Mr. Ram Niwas Gupta & Sons.

When the Application was filed, it is stated that a settlement took place between the Corporate Debtor -M/s Palm Developers Pvt. Ltd. and the Operational Creditor. The Application was earlier disposed of as withdrawn with liberty granted to the Operational Creditor to seek restoration of the petition in case any of the cheques issued is dishonoured.

2. This happened on 04.06.2019. There is no dispute that later on as post-dated cheques were dishonoured, the Operational Creditor filed the Application under Rule 11 of NCLT Rules, 2016 seeking restoration and the Application was restored and the matter was then heard between the parties.

3. Learned Counsel for the Appellant states that cheques were issued for Rs. 1,18,00,554/- and the dishonoured cheque was for Rs. 78,000/-.

4. It appears that after the Application was restored, the parties were heard. The Corporate Debtor took up a defence that the Application was filed in the name of sole proprietorship firm and it was not a legal entity under the definition of “person” under Section 3(23) of IBC. It was also claimed that the Operational Creditor had added interest which was not stipulated in the agreement. The Adjudicating Authority, after hearing the parties, has admitted the Application under Section 9 of IBC and against the said admission, present Appeal has been filed.

5. In this Appeal, learned Counsel for the Appellant is submitting that the judgment was reserved on 20.01.2020 and the Respondent No. 1 amended the Memo of Parties on 22.01.2020. The argument of the learned Counsel is that the Proprietorship is not a legal person and thus Application under Section 9 of IBC

could not have been maintained. According to the learned Counsel, the Tribunal had no jurisdiction because of the filing of the Application by entity which is not “person” under the law.

6. Learned Counsel for the Respondent No. 1 is submitting that there was no defect in the Application filed as the copy of the Application under Section 9 of IBC shows that it was not an Application which was filed merely in the name of Proprietorship but it was stated that the Proprietorship is through Proprietor and the name of the Proprietor was added. It is also stated that even if it was to be stated that there was any defect same was allowed to be cured by the Adjudicating Authority and thus objection does not survive.

7. Learned Counsel for the Appellant refers to a judgment in the matter of **“R.G. Steels Vs. Berry Auto Ancillaries (P) Ltd.”** passed by National Company Law Tribunal, New Delhi, Court No. III in IB-722/ND/2019 to submit that in that matter when the petition was filed by Sole Proprietorship concern it was not held to be a person and the petition was dismissed.

8. Learned Counsel for the Respondent No. 1 is further submitting that there was provision of interest. He refers to the Settlement Agreement which was entered during the pendency of the Application, a copy of which is at Annexure-A3 (at pages 427 & 428) to state that there was specific agreement which recorded that the amount crystalized included interest payable and due till 04.06.2018 on delayed outstanding payment.

9. Learned Counsel for Appellant claims that this agreement was made after the withdrawal of the petition and before the Application for restoration under Rule 11 of NCLT Rules, 2016 of the earlier Application was filed.

10. Learned Counsel for the Appellant further states that there are further talks with the Respondent No. 1 to settle the matter. Learned Counsel is thus requesting that time may be given to settle the payment.

11. It appears that 'Committee of Creditors' (in short '**CoC**') has already been constituted and the CoC is set to have its first meeting to-morrow i.e. on 26.02.2020. Some Financial Creditors, who are part of CoC, are present through their Counsel raising objection that when the CoC is constituted, the only recourse available is Section 12A of IBC.

12. Nothing is shown to us from the records to claim that there was pre-existing dispute.

13. The Adjudicating Authority in paragraph-11 of the Impugned observed as under:

...

"11. The Corporate Debtor in its reply filed on 25.11.2019 has raised objection with regard to the maintainability of the present Petition on the ground that the Petition has been filed by Sole Proprietorship Firm, which is not a legal entity and is not covered under the definition of Person, under Section 3(23) of the IBC, 2016. The Petitioner, in response,

has filed an Amended Memo of Parties on 22.01.2020 for curing this technical defect. The same is taken on record.”

...

14. Even the judgment shows the name of Respondent No. 1 as the Operational Creditor in his personal name. The Adjudicating Authority in effect has allowed the defects to be cured. The objection on this count does not survive. We also note that Section 2 of IBC provides that the provisions of the Code apply, inter alia, to “proprietorship firms”. Further the definition of “person” in Section 3(23) of IBC is inclusive definition.

15. The Adjudicating Authority has further observed in paragraphs 13, 14 and 15 of the Impugned Order as under:

...

“13. The Corporate Debtor has, however, admitted its liability and averred in its reply dated 25.11.2019 the following:

“17. That the Respondent Company is looking forward to get new projects and more business opportunities, therefore, in coming few months the Respondent would be able make the entire outstanding payment to the Applicant herein. It is pertinent to mention that the Respondent has the intention to clear the outstanding amounts from April, 2020 onwards”

16. After hearing submissions of both the Parties, this Bench is of the view that the Corporate Debtor had clearly acknowledged its liability (a) by entering into the settlement agreement dated 01.08.2019, and (b) in its reply dated 25.11.2019 wherein, the Corporate Debtor has clearly expressed its intention to clear the outstanding dues of the Operational Creditor from April, 2020 onwards. Further, the dishonoring of cheque dated 31.08.2019 bearing No. 218403, issued at the time of settlement amounts to default on the part of Corporate Debtor. The plea raised by the Corporate Debtor regarding the interest component added to the claim amount does not merit consideration as the default of principal amount itself is above Rs. 1,00,000.”

17. In the given facts and circumstances, the present petition being complete and establishing the default in payment of the Operational Debt beyond doubt, the Operational Creditor is entitled to claim its dues. The amount of default being above Rs. 1,00,000/- for the unpaid invoice, the petition is admitted in terms of Section 9(5) of the IBC and accordingly, moratorium is declared in terms of Section 14 of the Code. “

18. Considering the above, we do not find that there is any substance or merit in this Appeal.

19. For the above reasons, we decline to admit the Appeal.

The Appeal is disposed of. No orders as to cost.

[Justice A.I.S. Cheema]
Member (Judicial)

[Justice Anant Bijay Singh]
Member (Judicial)

(Kanthi Narahari)
Member(Technical)

Akc/Mn