

IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH

CP NO.(IB)118/ALD/2017
(Under Section 9 of the
Insolvency and Bankruptcy Code, 2016)

IN THE MATTER OF

M/S Dasaprakash Hotels and Resorts Pvt. Ltd.
F-106 , Windsor Plaza, Sansar Chandra Road,
Jaipur- 302001, Rajasthan

.....Applicant/Operational Creditor

Versus

M/S Kumar Ashiyana Private Limited
Shop No.10, Vibhav Nagar Market,
Agra, Uttar Pradesh – 282001

.....Respondent/Corporate Debtor

Judgment/Order delivered on 28.02.2018

Coram : Hon'ble Shri V. P. Singh, Member (Judicial)

For the Operational Creditor : Shri Nishant Mishra, Advocate
Along with
Shri Tanmay Sadh, Advocate

For the Corporate Debtor : Shri Vinayak Mithal, Advocate
Along with
Shri Swapnil Kumar, Advocate

As per : Hon'ble Shri V.P. Singh, Member Judicial

ORDER

1. The M/S Dasaprakash Hotels and Resorts Pvt. Ltd. (for brevity Operational Creditor) has filed the instant application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code'), read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer for triggering the Corporate



Insolvency Resolution Process in the respect of M/S Kumar Ashiyana Private Limited (for brevity the 'Corporate Debtor').

2. Brief facts of the present case are stated as under:
 - I. Operational Creditor, i.e. M/S Dasaprakash Hotels and Resorts Pvt. Ltd. is engaged in the business of running hotels and have gained considerable expertise in the operation of hotels and generally the object of the company as per the Memorandum of Association, is to purchase, on lease, hire, erect, construct, alter etc., and to carry on business of running hotels.
 - II. As per part IV of the present application the *Total amount of debt*, which the Corporate Debtor is liable to pay to the Operational Creditor is the sum of **40,25,000/- along with interest**. Debt fell due on 19.07.2014.
 - III. That under an agreement dated 04.09.2007, executed between Operational Creditor and Corporate Debtor. Operational creditor advanced a loan of Rs.54,00,000/- to the corporate debtor. Further, in addition to the above loan, the operational creditor had from time to time advanced a further loan of Rs.4,00,000/- to the corporate debtor. Thus, the total loan comes to Rs.58,00,000/-.
 - IV. Further the year 2011-12, corporate debtor adjusted a sum of Rs.2,10,500/- in furtherance of the loan. The remaining amount of Rs.55,89,500/- was still outstanding to be paid by the corporate debtor as the same was evident from the balance sheet of the corporate debtor for the year 2010 and 2011.



- V. A statutory legal notice dated 06.11.2012 under the provisions of the Companies Act, 1956 was then served on the corporate debtor, requesting them to pay the remaining amount, which was replied by corporate debtor admitting the debt.
- VI. In December 2012 operational creditor filed winding up petition against Corporate Debtor before Hon'ble Allahabad High Court (Company Petition No.43 of 2012) under Section 433 and 434 and 439 of the Companies Act, 1956. During the pendency of the petition above, compromise agreement dated 19.07.2014 was executed between them, wherein both the parties agreed to the following terms and conditions:
- a. As full and final settlement of the dispute, corporate debtor will pay amount of Rs.35,00,000/- to operational creditor within a period of 14 months from the date of agreement;
 - b. Corporate debtor will further pay an amount of Rs.5,25,000/- towards the cost of the generator purchased by the operational creditor for future use and this amount will also be payable within a period of 14 months from the date of the compromise, agreement;
 - c. In respect of both the aforesaid amounts, corporate debtor will hand over undated cheques No.199560 & 199561 for amounts of Rs.35,00,000/- and Rs.5,25,000/- respectively towards payment of the settlement amount;
 - d. In case, corporate debtor fails to pay the aforesaid amounts of Rs.35,00,000/- and Rs.5,25,000/- within a period of one year, then CORPORATE DEBTOR shall also be liable for payment of interest @ 12% on the entire amount from the date of agreement till the date of actual payment.
- VII. That the settlement deed dated 19.07.2014 was after that placed before the Hon'ble High Court and the winding up petition was dismissed as infructuous vide order dated 07.08.2014.



VIII. Further, the corporate debtor failed to honour the compromise agreement also, and no payments were made by the corporate debtor to an operational creditor under the compromise agreement. Therefore, operational creditor sent a demand notice dated 25.05.2017 through registered post to the corporate debtor under the provisions of Insolvency and Bankruptcy Code, 2016, for the payment of the total default amount of Rs.40,25,000/- along with interest.

IX. **After the service of demand notice on the corporate debtor, the corporate debtor has neither repaid the amount of debt and interest nor responded to the demand notice, and therefore the amount of debt is still pending.**

3. Without going into the details of the case, the moot point of the discussion is maintainability of the present petition on the following grounds:

- i. "Whether the present applicant is coming under the definition of the Operational Creditor or not?"*
- ii. "Whether a violation of the Agreement can be treated as operational debt or not?"*

4. During the course of Argument Counsel for the Applicant / Operational Creditor stated that they are falling under the definition of the operational Creditor as their claim is in respect of provisions of goods and service and further placed reliance upon Section 5(21) **stating their debt is in respect of the repayment of dues arising under any law.**

5. On the other side Counsel for the Corporate Debtor rebutted his arguments stating that they are not coming within the definition of the Operational Creditor rather they fall within the category of the "Financial Creditor" as



in the part IV of the application they (operational Creditor) themselves mentioned *“That to an agreement dated 04.09.2007 executed between Operational Creditor and Corporate Debtor, Operational Creditor advanced a loan of Rs.54,00,000 /- to the Corporate Debtor. Further, in addition to the above loan, Operational Creditor has from time to time advanced a further loan of Rs.4,00,000/- to the Corporate Debtor. Thus total loans Come to Rs.58,00,000.*

6. The term “Operational Creditor is defined in Section 5(20) For the sake connivance it is reproduced herein below:

5(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;

Further the term “operational debt” is defined under Section 5 (21) of the Code. Which states as under:

5 (21) "**operational debt**" means a claim in respect of the provision of goods or services including employment or 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;

Further Section 8(1) of the Insolvency & Bankruptcy Code states as under:

8. Insolvency resolution by the operational creditor.

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

By going through the definition of “Operational Creditor”, It is clear that “Operation Creditor is someone from whom debts have arisen from following category of dues: **1. Goods or Services 2. Employment 3. Dues**



which are payable under any Law/ Statute to Government (Central or State) or dues from the local authority.

The distinction between a financial creditor and operational creditor has been drawn by the Bankruptcy Law Reforms Committee in para 5.2.1 of its final report. It states:

Here, the Code differentiates between financial creditors and operational creditors. Financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or a debt security. Operational creditors are those whose liability from the entity comes from a transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by the car mechanic and who gets paid only after the spark plugs are sold is an operational creditor. Similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease. The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt.

By perusal of the present petition and agreement in question dated 04.09.2007, it appears that Agreement between M/S Kumar Ashiyana Private Limited and M/S Dasaprakash Hotels and Resorts Pvt. Ltd. was made in Agra. Further in part IV of the present application Applicant has stated details of transactions on account of which debt fell due is non-payment of loan amount by the Corporate Debtor.

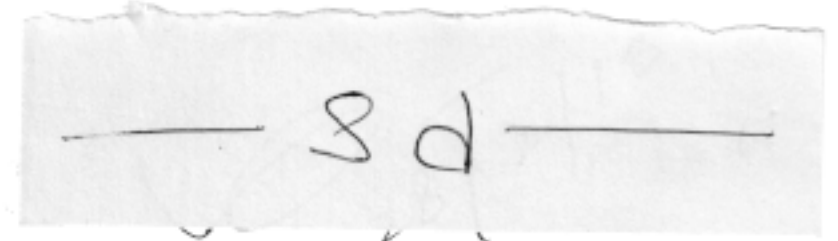
As purpose behind the filing of the present petition is default occurred due to non-payment of loan advanced under an agreement dated 04.09.2007 and applicant under the present case is not falling under the definition of the Operational Creditor and the due amount also does not fall



under the definition of operational debt therefore petition U/S 9 under I&B Code is not maintainable and deserves to be dismissed.

ORDER

This petition is rejected at threshold being not maintainable U/S 9 of the I & B Code and accordingly disposed of. However, it is to be made clear that the above order will not be a rider in filing fresh petition under appropriate provision of I & B Code or under any of applicable provision of law.



**V.P. Singh,
Member (Judicial)**

Date : 28.02.2018

Typed by:
Aparna Trivedi
(*Law Research Associate*)