

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

T.C.P. (IB)377(MB)/2017

Under section 9 of the IBC, 2016

In the matter of
Gammon India Ltd.

....Petitioner

v/s.

Neelkanth Mansions and
Infrastructure Pvt. Ltd.

....Corporate Debtor

Order delivered on 29.08.2018

Coram: Hon'ble Shri. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Shri. Ravikumar Duraisamy, Member (Technical)

For the Petitioner : 1. Mr. Shyam Kapadia, Counsel
2. Mr. Durgaprasad Poojari, Counsel
i/b PDS Legal

For the Respondent : 1. Mr. Gaurav Joshi, Sr. Counsel
2. Mr. Ashish Kamath, Counsel
3. Mr. Murtuza Federal, Adv.
4. Ms. Anuja Abhyankar, Adv.
i/b M/s. Federal and Rashmikant.

Per B.S.V. Prakash Kumar, Member (Judicial)

ORDER

Order dictated in the open court on 23.08.2018

It is a Company Petition filed by Operational Creditor namely; Gammon India Ltd. against the Corporate Debtor u/s 433(e)&(f) and 434 of Companies Act, 1956 for winding up of this company on the ground that this Corporate Debtor defaulted in making repayment of ₹54,86,09,635 with interest @15% p.a. as on 15.08.2016 till its realisation.

2. Since winding up jurisdiction, owing to the arrival of IBC, 2016, has been transferred from the Hon'ble High Court of Bombay to NCLT Mumbai, this matter has also been transferred from the Hon'ble High Court of Bombay to this Bench, accordingly, this Petitioner along with the transferred Company Petition filed Form-5 u/s 9 of the Insolvency and Bankruptcy Code 2016 (Code) for initiation of Corporate Insolvency Resolution Process (CIRP) as enunciated under this Code.

Historical Facts:

3. The Petitioner states that by an agreement dated 17.06.2005 they entered into partnership to be known as M/s. Gammon Neelkanth Realty Corporation (GNRC) between this Corporate Debtor and two other entities namely M/s. Neelkanth Realtors Pvt. Ltd. and Gammon Housing and Estates Developers Ltd. (this company belongs to the petitioner - Gammon India Ltd.). Subsequently, a contract was entered between the Partnership firm and Gammon Neelkanth Realty Corporation - (GNRC) and petitioner herein for completing construction of seven (7) residential buildings with facilities and amenities (being Phase-I of the 'Neelkanth Kingdom Project' of GNRC) for a tender price of ₹88.75 crores stating completion date as 31.12.2007, thereafter on 23.04.2008, another supplementary agreement was entered into mentioning that the petitioner completed work of the value of only ₹29,76,08,230, subsequent thereto, on 01.04.2009 another supplementary agreement was arrived at determining increase of rates mentioning the timeline of 12 months within which that work should be completed. While this work was in progress, this Corporate Debtor filed Suit No. 830/2010 on 17.03.2010 before Hon'ble High Court of Bombay against various persons including this petitioner as Defendant-10 seeking relief against the petitioner in respect to 22 flats wrongly transferred by Treetop (the company belonging to the Petitioner).

4. During the suit was pending, these three partners i.e. Corporate Debtor and other two partners including the company belonging to the petitioner on 2/18.7.2011 entered into Consent Terms with a covenant that balance work to be executed is podium, club house, swimming pool, etc. valued at ₹41.49 crores, but according to the Corporate Debtor, the petitioner could not construct club house and swimming pool. Despite supplementary agreement entered into from time to time, the Corporate Debtor further submits, this petitioner abandoned the work incomplete.

5. In the backdrop of these historical facts, the Petitioner, having filed this Company Petition before Hon'ble High Court of Bombay u/s 443 r/w 434 of the Companies Act, on 27.09.2016 this case being transferred to this Bench, we have taken up this matter for hearing.

6. Against this background, the Corporate Debtor has placed dates of events disclosing that this petitioner on 29.05.2014 called upon this Corporate Debtor as well as other partners (Treetop and NRPL) to pay an amount of ₹30 crores with compounding interest, upon which, this Corporate Debtor on 23.06.2014 replied denying the claim mentioned in the notice dated 29.05.2014 referring to the discussion in the joint meeting held on 13.06.2014 where Mr. Abhijit Rajan (promoter of the Petitioner) as a representative of the Treetop (belonging to the Petitioner) and the petitioner side had agreed to withdraw the said letter dated 29.5.2014, thereafter when they again sent a letter on 08.08.2014 requesting the Debtor side to refrain from making incorrect statements, the Corporate Debtor replied to the same on 28.08.2014 disputing the claim as well as requesting the Petitioner side to discontinue sending further correspondence. But whereas, the Petitioner, despite the Corporate Debtor side requested not to make any further correspondence, issued their purported "final bill settlement" for ₹50.43 crores to the partnership firm (GNRC).

7. Upon which the Corporate Debtor Counsel submits that issual of second notice after a lapse of two years will disclose the dishonest and wrongful character of the petitioner herein because this petitioner left the work site two years before issual of this notice.

8. The Counsel appearing on behalf of the Corporate Debtor further states that this purported final bill for ₹50.43 crores has not disclosed supporting documents substantiating the amount mentioned in the said bill and also does not mention the work done to which the bill is raised.

9. He further submits that on 14.03.2015, the firm replied to the alleged final bill stating that this petitioner has started working in the site since January 2013, for this Petitioner did not carry out the work in satisfactory manner, this firm was compelled to take charge of the incomplete work. In addition to this, the Counsel further submits that various complaints have been received from the customer for inferior work carried out by the petitioner. In view of the same, the Counsel submits that this Corporate Debtor disputed every notice as well as bills sent by this petitioner to the Corporate Debtor stating that this petitioner abandoned the work before completion of it, thereafter, this firm compelled to take charge of that work and that this petitioner did not attend to the quality disputes raised by this partnership firm against the petitioner. The Counsel further says that keeping all these things behind the Petitioner back, the petitioner issued winding up notice on 31.12.2015 claiming payment of ₹45.57 crores along with interest.

10. To which, the Corporate Debtor replied on 01.02.2016 denying the liability on various grounds stating as under:

- (i) Claims made by Petitioner are wholly misconceived;
- (ii) Treetop a partner of GNRC is admittedly a company owned and controlled by Gammon India's Chairman and Managing Director, Mr. Abhijit Rajan;

- (iii) On proper taking of accounts and considering all material facts, it shows that monies are due and owing by the Petitioner;
- (iv) Balance works as per the consent terms still remain incomplete;
- (v) Complaints have been received from purchasers for shoddy work;
- (vi) Petitioner has inflated bills;
- (vii) Petitioner abandoned the site in January, 2013;
- (viii) Petitioner has taken payments exceeding ₹86 crores despite balance work pending and the estimate for it was only ₹41.49 crores.

Soon after receipt of the reply to notice, the petitioner filed the winding up petition as mentioned above.

11. On hearing both sides, now the point for consideration is as to ***whether this petition is maintainable as stated by the Petitioner's counsel or not.***

12. On perusal of the facts of the case, it appears that this work agreement has entered into between this petitioner and the partnership firm floated by the associate company of the petitioners, this Corporate Debtor and another partner. Now this petitioner has filed this Company Petition against this Corporate Debtor, which is one of the partners of that partnership firm.

13. If you read the Insolvency and Bankruptcy Code, it is apparent that this Code has been divided into two parts; one part is to be dealt with by this Adjudicating Authority i.e. NCLT and another part is to be dealt with by the Debt Recovery Tribunal (DRT). In the cases where Corporate Debtor is directly under obligation as per the agreement entered, those cases fall before this Adjudicating Authority, as to cases in between the creditors are individuals or partnership firms, they fall within the jurisdiction of

DRT. Of course, till date, the jurisdiction given to DRT has not been notified.

14. When this Bench has put it to the counsel of the Petitioner as to how this Bench will get subject matter jurisdiction to deal with this case, when the agreement has been entered in between the petitioner and partnership firm, the Petitioner's Counsel has argued that since the partners in this partnership firm are the companies and they being jointly and severally liable to the obligations of the firm, the petitioner is entitled to proceed against those companies before this Bench by invoking jurisdiction under Part II of this Code.

15. To which, the counsel on behalf of the Corporate Debtor has submitted that this Tribunal is conferred with jurisdiction under this Code to squarely deal with the jurisdiction conferred upon it, not like a regular Court, which is entitled to exercise jurisdiction unless it is barred by the statute as mentioned under Section 9 of CPC.

16. He further submits that even under CPC also, if at all any creditor wants to proceed against partnership firm, he has to array those partners as Respondents representing on behalf of the firm. He submits that the concept of joint and several liability will not allow this petitioner to invoke Part II of this Code, because specific and exclusive jurisdiction has been conferred upon DRT under Part III of the Code to adjudicate the cases where the debtor is an individual or a partnership firm. To fortify this argument, the Counsel appearing on behalf of the Corporate Debtor has taken us to section 78, 79(18), 95(1)(2) and 179 of the Code, which are as follows:

"78. This Part shall apply to matters relating to fresh start, insolvency and bankruptcy of individuals and partnership firms where the amount of the default is not less than one thousand rupees.

Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one lakh rupees.”

“79(18) ‘partnership debt’ means a debt for which all the partners in a firm are jointly liable.”

“95(1)&(2) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority

A creditor may apply in relation to any partnership debt owed to him for initiating an insolvency resolution process against –

- (i) Any one or more partners of the firm; or
- (ii) The firm.

Where an application has been made against one partner in a firm,..... Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.”

“179 Subject to the provisions of section 60 for personal guarantor of corporate debtor, the Adjudicating Authority, in relation to insolvency matters of individuals and firms shall be the **Debt Recovery Tribunal (DRT)** having territorial jurisdiction over the place.....

The Debt Recovery Tribunal shall,entertain or dispose of –

- (a) Any suit or proceeding by or against the individual debtor;
- (b) Any claim made by or against the individual debtor;
- (c) Any question of priorities or any other question whether of law or facts, arising out of or in relation to insolvency and bankruptcy of the individual debtor or firm under this Code.

17. Upon reading these provisions, it is evident that Legislator has carved out u/s 179 jurisdiction to proceed against individuals and partnership firms lies with DRT. By reading clause 18 of section 79(2) of the Code, it is evident that when it is a partnership debt, it has been categorically mentioned that all the partners in a firm are jointly liable. If you go by this definition, as to partnership debt is concerned, we have doubts whether creditor can proceed against one of the partners by invoking the concept of joint and several liability. Moreover, this is the jurisdiction given to DRT, therefore, we are of the view that we need not delve on it except saying jurisdiction is given to DRT, not to NCLT.

18. On perusal of the Sec. 95(1)(2), it is evident that it has been further clarified that a creditor, basing on joint and several liability concept, can proceed against the partners of the firm before DRT, therefore, this provision makes it further clear that whenever it is a partnership debt, jurisdiction lies with DRT but not with this Adjudicating Authority falling under Part II of the Code.

19. In section 60(2)(3), it has been carved out with jurisdiction upon this Adjudicating Authority to deal with corporate insolvency process against a personal guarantor in the case where Corporate Insolvency is admitted against the principal borrower.

20. In view of these provisions, though this Corporate Debtor is a company, since the core agreement is in between a partnership firm and the Petitioner herein, we are of the view that jurisdiction lies with DRT but not with this Bench to deal with this debt either under operational debt or financial debt as mentioned under Part II of the Code. May be, it is true that Part-III has not been notified till date but it does not mean that this Bench will get jurisdiction to deal with the debt that fall under Part-III because Tribunals are limited to deal with issues to the extent of jurisdiction conferred upon it.

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21. Since this Bench is of the view that this Company Petition is not maintainable for want of jurisdiction to deal with liability against a partnership, this Company Petition is dismissed solely on the ground aforesaid without getting into other disputes such as barred by limitation and existence of dispute.

22. Accordingly, this Company Petition is hereby **dismissed** as misconceived.

SD/-

**RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)**

SD/-

**B.S.V. PRAKASH KUMAR
MEMBER (JUDICIAL)**