

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

CP No. 1488/IBC/NCLT/MB/MAH/2017

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of

M/s. Substantia Capital Services LLP
(Formerly known as M/s. Substantia Capital Services Private Limited)

..... Operational Creditor
(Petitioner / Applicant)

v.

M/s. Neelkanth Realtors Private Limited

..... Corporate Debtor
(Respondent)

Order Pronounced on : 31.08.2018

Coram :

Hon'ble M. K. Shrawat, Member (J)

For the Petitioner :

Mr. Ajy Kumar, Advocate i/b. MZM Legal – Advocate for the Petitioner / Applicant.

For the Respondent :

Mr. Rashmin Khandekar, Advocate a/w. Ms. Chaitrika Patki, Advocate i/b. Vidhii Partners – Advocates for the Respondent / Debtor.

Per: M. K. Shrawat, Member (J)

ORDER

1. The Petitioner / Applicant viz. 'M/s. Substantia Capital Services LLP' (hereinafter as **Operational Creditor**) has furnished Form No. 5 under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "Operational Creditor" on 17.10.2017 by invoking the provisions of Section 9 of the Insolvency and Bankruptcy Code (hereinafter as **the Code**).
2. In the requisite Form, under the Head "Particulars of Corporate Debtor" the description of the debtor is stated as, 'M/s. Neelkanth Realtors Private Limited'

(hereinafter as **Debtor**) having registered address at, Neelkanth Heights, Pokhran Road No. 2, Thane (W), Maharashtra – 400602.

3. Further under the Head “Particulars of Operational Debt” the total amount in default is stated as ₹ 1,29,37,500/- with further Interest thereon at the rate of 18 % p.a.

Background of the Case :

4. The Operational Creditor is an incorporated LLP engaged in the business of providing financial services. And the Debtor is engaged in business of real estate.
5. Pursuant to the discussions between the representatives of the Operational Creditor and the Debtor, the Operational Creditor was engaged by the Debtor vide an appointment letter dated 10.11.2014 to render Financial Advisory services. Pursuant to this Appointment Letter the Operational Creditor had agreed to procure finance for Debtor.
6. Vide the said appointment letter it was agreed that the Debtor will pay and discharge the Operational Creditor with Professional fees of 1.5 %, plus service tax as applicable, of the total amount that Operational Creditor would procure for Debtor.
7. As per the statements of the Operational Creditor, due to his efforts the Debtor had received a sanction letter for financial support aggregating ₹ 75,00,000/- from the Edelweiss.
8. Pursuant to the same the Operational Creditor has raised an Invoice bearing no. SCSPL/002:16-17 dated 25.04.2016 for an amount of ₹ 1,29,37,500/- being the Professional Fees as agreed.
9. Thereafter the Operational Creditor has time and again followed-up for the payment of the outstanding amount however, the Debtor has not paid the same. Consequently, the Operational Creditor has issued a Demand Notice U/s. 8 of the Code dated 12.06.2017 and thereafter has filed this Petition / Application under provisions of S. 9 of the Code.

Submissions by the Operational Creditor :

10. The Learned Advocate for the Operational Creditor has submitted that, pursuant to the appointment letter the Operational Creditor has duly rendered his services and duly raised Invoice for the same. Copy of the Invoice is annexed with the Petition / Application.

11. It is further submitted that because of the efforts of the Operational Creditor the Debtor has received a Financial Assistance from Edelweiss vide a letter dated 28.07.2015 bearing no. ECLF/RE/1314.
12. It is further stated that after the sanction of the assistance the Operational Creditor has raised an Invoice bearing no. SCSPL/002:16-17 dated 25.04.2016 for an amount of ₹ 1,29,37,500/-. It is also stated that the said Invoice has been duly received by the Debtor however, the Debtor has not paid the amount.
13. It is further stated that, since the payment was not forthcoming the Operational Creditor has time and again requested the Debtor to make the payment however the Debtor has neglected to make the same.
14. It is also stated that the Operational Creditor has initially preferred a Petition / Application under the provisions of the Code bearing no. CP No. 1022/IBC/NCLT/MB/MAH/ 2017 which was filed on behalf of the earlier name of the Operational Creditor i.e. M/s. Substantia Capital Services Private Limited. However, subsequently it was withdrawn by the Operational Creditor.
15. Thereafter after issuance of fresh Demand Notice dated 12.06.2017 the Operational Creditor has filed this Petition / Application. It is stated that the said notice has been duly received by the Debtor and on 23.06.2017 the Debtor has replied to the same. However, in the reply the Debtor has sought to raise a false dispute pertains to claimed amount.

Submissions by the Debtor :

16. The Learned Advocate for the Debtor has vehemently argued that despite the raising of 'notice of dispute' the Operational Creditor has filed the Petition / Application U/s. 9 of the Code hence, it is not maintainable.
17. It is further stated that the Debtor has duly replied the Demand Notice issued by the Operational Creditor well within the stipulated time under the Code i.e. within 10 days.
18. It is further submitted that pursuant to the Appointment Letter the Operational Creditor was required to complete his job within the stipulated time however, the same has not been done by the Operational Creditor.
19. It is also stated that one of the Director of the Operation Creditor, in or about July, 2015, had informed the Debtor that the Operational Creditor is not able to conclude the financial arrangement with any of the institutions and therefore the sanction given

by the Edelweiss is not on the instance of the Operational Creditor. However, the Debtor had made effort to get the said sanction. And consequently the Invoice raised by the Debtor is false.

20. It is further stated that, since the Operational Creditor has already filed an Insolvency Petition / Application pertains to the same claimed amount this Petition / Application is hit by the *Res – Judicata*. The Learned Advocate has also pointed out the fact that the earlier Petition / Application filed by the Operational Creditor i.e. CP 1022/2017 has not been withdrawn but on the other hand it was 'Dismissed for non-prosecution' vide an order dated 13.06.2017. To that effect the Order of the concerned Court i.e. Court Room no. 1 of this very Tribunal which is annexed to the written submissions filed by the Operational Creditor itself. In light of this argument the Learned Advocate has pleaded that since in the said order there is no liberty to the Operational Creditor to file a fresh proceedings this Petition / Application does not survive.
21. It is also pleaded that, the Operational Creditor has never appeared in the said matter before Court Room No. 1 despite of the reminders sent by the Debtor. It is also pleaded that the Demand Notice dated 12.06.2017 is issued by the Operational Creditor despite the earlier Petition / Application was pending for adjudication. In light of this fact the Demand Notice of 12.06.2017 is null and void and therefore also this Petition / Application be Dismissed with costs.

Findings :

22. I have gone through the submissions made by both the parties and also examined the pleadings on record. While going through the pleadings it has come to the notice that the Debtor had replied to the Demand Notice issued by the Operational Creditor within the stipulated time. The claim was strongly contested.
23. Further on perusal of the record it is noticed that there is no Order by the Court Room No. 1 of this Tribunal in CP 1022/2017 which reflects that the said Petition has been withdrawn with a liberty to file a fresh proceeding.
24. That, the Operational Creditor has also **failed** to demonstrate that he has taken effort for the order of withdrawal by Court Room No. 1. It is also noticed that Operational Creditor has **failed** to demonstrate that the sanction given by the Edelweiss is at the instance of the Operational Creditor. The sanction letter also does not reflect the name of the Operational Creditor. It is also noticed that the submission of the Debtor regard to the inability of the Operational Creditor in performing his duties remained uncontravened.

25. It is also noticed that, the abovementioned fact has been brought to the notice of the Operational Creditor by the Debtor in the reply to the Demand Notice itself. And therefore it can be carved out that there is an 'existence of Dispute' in this case.
26. It is further noticed that the Operational Creditor before getting a proper Order in the earlier Petition / Application has issued a fresh Demand Notice and therefore the same has not survives in the eyes of Law. And since the Demand Notice which is an essential criterion for the filing of Petition / Application U/s. 9 is bad in Law therefore this Petition / Application deserves **Rejection** not only on this ground but also on the ground of the 'existence of Dispute'.
27. Before coming to the final conclusion it is worth to place reliance on the decision cited by the Learned Advocate of the Debtor decided by the Hon'ble Supreme Court of India in the case of *Mobilox Innovations Private Limited v. Kirusa Software Private Limited [(2017) 4 ComplJ 255 (SC)]* dated 21.09.2017 which is reproduced as follows :

" 40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

28. Hence, after careful perusal of the submissions made by the Learned Advocate for the Debtor in my opinion the Dispute raised by him is not a hypothetical or illusory; but it is a pre-existed real dispute between the Operational Creditor and the Debtor. It is

worth to place on record that the Operational Creditor had knowledge of this Dispute. Hence, my conscientious view is that this Petition / Application is **not fit** for commencement of CIRP. If the remedy in any other law is available to the Operational Creditor the same can be availed, however, as far as the Insolvency Code is concerned the scope of 'admission' of a claim is limited one. Any observation, legal or factual, shall not prejudiced the rights of the Operational Creditor, if to be exercised under any other Law.

29. For the reasons cited above this Petition / Application is **Dismissed**. However, in the facts and circumstances of the case there is no order as to cost.

30. Ordered Accordingly. To be consigned to Records.

Dated : 31.08.2018

SD/-
M. K. SHRAWAT
MEMBER (JUDICIAL)

Avinash