

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

CP No. 1244/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. Property Solutions (India) Private Limited

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

V.

M/s. Calsoft Private Limited

..... Corporate Debtor
(Respondent)

Order delivered on : 06.11.2017

Coram :

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

Hon'ble Bhaskara Pantula Mohan, Member (J)

For the Petitioner :

Mr. Ashish Kamat, Counsel a/w. Mohan G. Salion, Advocate i/b. MGS Legal – Advocates for the Petitioner/Operational Creditor

For the Respondent :

Ms. Prachi Wazalwar, Advocate a/w. Mr. Navneet Wazalwar, Advocate – Advocates for the Respondent/Debtor.

Per: Bhaskara Pantula Mohan, Member (J)

ORDER

1. M/s. Property Solutions (India) Private Limited (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 27th July, 2017 by invoking the provisions of Section 9 of the Insolvency and Bankruptcy Code (hereinafter as **Code**).



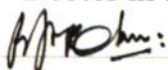
2. In the requisite Form, under the Head "Particulars of Corporate Debtor" the description of the debtor is stated as, M/s. Calsoft Private Limited (hereinafter as **Debtor**) having registered address at, Calsoft IT Park, Ground Floor, S. No. 320/1/c, Bavdhan, Near DSK Toyota Showroom, Mulshi, Pune, Maharashtra - 411021.
3. Further under the Head "Particulars of Operational Debt" the total amount in default is stated to be ₹ 26,25,029/-. Along with interest @ 21% p.a. on Principal Sum of ₹ 64,04,299/- and other costs, excluding Taxes as may be applicable.

4. Brief Background :

- 4.1. The Operational Creditor is engaged in the business of providing service relating to facility management and contracting service.
- 4.2. On 16.09.2013, pursuant to a bid issued by the Debtor, based on quotation submitted by the Operational Creditor, two work orders being Admin/Bawdhan/017A/2013-14 and Admin/Bawdhan/017B/2013-2014 were awarded to the Operational Creditor by the Debtor. The value of work orders were ₹ 1,76,79,134/- and 4,42,612/- respectively.
- 4.3. Pursuant to said work orders, the Operational Creditor has carried out the work as per the terms and conditions of the said work orders. And subsequently based upon the work carried out by the Operational Creditor, the Debtor has made two advance payments.
- 4.4. But there was delay in making of those payments and hence, there were differences between the parties. But after the Mutual Consultation it was decided that, the Operational Creditor will discontinue the work under the said work orders and shall raise invoices for the work carried out till that date.
- 4.5. Based on which the Operational Creditor had raised final invoice amounting to ₹ 92,45,020/- on 28.07.2014.
- 4.6. The said invoice is based on the work done by the Operational Creditor and the said amount was duly certified by the Project Management Consultant which was appointed by the Debtor.

5. Submissions by the Operational Creditor :

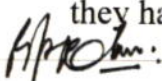
- 5.1. The Learned Counsel for the Operational Creditor submits that, out of total amount of ₹ 92,45,020/- a total advance amount of ₹ 28,40,721/- was paid by the Debtor in two slots on 08.11.2013 and 21.03.2014 respectively.



- 5.2. Further that, there is part payment by the side of the Debtor of ₹ 37,79,270/- as against the balance amount of ₹ 64,04,299/- on 30.03.2015. This shows that, the Debtor has acknowledged the Debt.
- 5.3. However, thereafter, despite repeated reminders and several visits by the officials of the Operational Creditor to the office of the Debtor, the Debtor neglected to clear the balance payment of ₹ 26,25,029/- or part thereof.
- 5.4. It is also stated that, the Operational Creditor on 14.05.2015 issued as letter to the Debtor demanding the balance payment and till that letter the Debtor had never raised any issue regarding the balance amount payable to the Operational Creditor.
- 5.5. Further that, subsequently on 28.05.2015 the Debtor has replied to the letter of the Operational Creditor and therein raised unjustified, frivolous and incorrect grounds with an intention to avoid making payment to the Operational Creditor.
- 5.6. Further it is submitted that, on 08.08.2016 the Operational Creditor thorough its Advocate issued a Notice demanding the Balance Amount of ₹ 26,25,029/- but the Debtor has neglected the said notice and not paid the money.
- 5.7. Further that, the Operational Creditor through its Advocate, on 28.04.2017 issued a Demand Notice under Section 8 of the Code demanding the balance amount of ₹ 26,25,029/- from the Debtor.
- 5.8. It is stated that, to the said Notice there was no reply from the side of the Debtor within prescribed period i.e. 10 days, hence, after expiry of the said period the Operational Creditor preferred an application to this Bench.

6. Submissions by the Debtor :

- 6.1. The Learned Counsel for the Debtor has submitted that, the Operational Creditor suppressed a material fact that, the payment of ₹ 37,79,270/- made by the Debtor towards Operational Creditor is not a part payment but a full and final payment towards the outstanding amount on Invoices raised by the Operational Creditor.
- 6.2. It is further submitted that, the Operational Creditor has confirmed this amicable settlement over telephone and thereafter the amount had been transferred.
- 6.3. It also submitted that, the Operational Creditor has also suppressed the fact that, they have never completed the work as per the work orders issued by the Debtor



and hence the work done by the Operational Creditor is not worth to the amount which is claimed by the Operational Creditor.

- 6.4. Further that, the Notice issued by the Operational Creditor is mere a legal notice and not a Demand Notice under S. 8 of the Code as the said notice is issued by the Advocate for the Operational Creditor, whereas, the requirement of the Code is that, the said notice is to be issued by the Operational Creditor itself. Rule 5, Form – 3 and Form – 4 under the Rules also says so. Further, the Hon'ble NCLAT in its various judgements held that, the Demand Notice issued by the Lawyer/Advocate cannot be termed as Demand Notice under the Code.

7. Findings :

- 7.1. We have examined the facts and circumstances of this case and we come to conclusion that, it is established by the Operational Creditor that the nature of Debt is an "Operational Debt" as defined under section 5 (21) of the Definitions under the Code.
- 7.2. That, the Operational Creditor also established the "Default" under S. 3 (12) of the Code on the part of the Debtor.
- 7.3. Further, we have perused the Notice by the Operational Creditor stated to be Demand Notice under S. 8 (2) of the Code. We have also perused the Authorities cited by the Learned Counsel of the Debtor. The Hon'ble NCLAT in, "*Macquarie Bank Ltd. v. Uttam Galva Metallics Ltd.*" [Company Appeal (AT) Insol No. 96 of 2017] held that, quote, "*as the notice has been given by an advocate/lawyer and there is nothing on the record to suggest that the lawyer was authorized by the appellant, and as there is nothing on the record to suggest that the said lawyer/advocate hold any position with or in relation to the appellant company, we hold that the notice issued by the advocate/lawyer on behalf of the appellant cannot be treated as notice under Section 8 of the I & B Code*" unquote.
- 7.4. Further we have also perused the decision given by the Hon'ble NCLAT in "*Uttam Galva Steels Ltd. v. DF Deutsche Forfait AG and Anr.*" [Company Appeal AT (Insolvency) 39 of 2017] wherein it was held that, quote, "*In the present case as an advocate/lawyer has given notice and there is nothing on record to suggest that the lawer has been authorized by 'Board of Directors' of the Respondent – 'DF Deutsche Forfait AG' and there is nothing on record to suggest that the lawyer hold any position with or in relation with the*



Respondents, we hold that the notice issued by the lawyer on behalf of the Respondents cannot be treated as a notice under section 8 of the I&B Code and for that the petition under section 9 at the instance of the Respondents against the Appellant was not maintainable” unquote.

7.5. We have also perused the Rule 5 of the Rules and also Form – 3 and Form – 4 under the Code. And from bare perusal we come to know that, the Rule 5 mandates the ‘Operational Creditor’ to deliver the ‘Corporate Debtor’ either the Demand Notice in Form – 3 or a copy of an invoice attached with a notice in Form – 4. If we read the Rule 5 with the Form – 3 or Form – 4, it is clear that, the person authorized to give notice under S. 8 of the Code is that person who is authorized to act on behalf of the operational creditor.

7.6. In this case, admittedly the notice U/s. 8 of the Code is issued by the Advocate for the Operational Creditor and there is nothing on record to show that the Advocate who had issued a Notice under S. 8 of the Code is authorized by the Operational Creditor to act on its behalf. From perusal of the two decisions of Hon’ble NCLAT (*Supra*) and from perusal of the Rule 5 of the Rules and Form – 3 and Form – 4 under the Code, though the equity of the matter lies with the Operational Creditor. However, this Petition/Application under S. 9 of the Code deserves **Rejection** as the defect in this Petition/Application is not curable defect and time cannot be granted as per the Proviso of S. 9 (5) of the Code which provides 7 days’ Notice for Removal of defect. Nevertheless the said defect makes the very Petition/Application as incomplete that too a ground for rejection under The Code. Needless to mention that, the Operational Creditor can issue a Fresh Demand Notice as per the Provisions of the Code and thereafter can approach to the Tribunal again.

7.7. Hence, this Petition/Application is accordingly **Dismissed**. However, in the facts and circumstances of the case there is no order as to cost.

8. Ordered Accordingly. To be consigned to Records.

Sd/-

BHASKARA PANTULA MOHAN
MEMBER (JUDICIAL)

Sd/-

M. K. SHRAWAT
MEMBER (JUDICIAL)

Dated : 6th November, 2017