

In the National Company Law Tribunal
Mumbai Bench

CP No. 37/I&BP/NCLT/MB/MAH/2017
Under Section 9 of the Insolvency & Bankruptcy Code, 2016

In the matter of
Mr. Ravindra Gopal, Proprietor of AVON CAPITAL
Versus
M/s. Tattva & Mittal Lifespaces Pvt. Ltd.

Judgment delivered on 11.07.2017

Coram :

1. Shri M.K. Shrawat, Member (Judicial).
2. Dr. Ashok Kumar Mishra, Member (Technical)

For the Petitioner : Mr. Akhil Sarathy, i/b Thodur Law Associates
For the Respondents : (1) Mr. Aditya Thakkar &
(2) Mr. Ranjit Shetty, i/b Argus Partners

Per Shri M.K. Shrawat, Member (Judicial).

JUDGMENT

1. This Petition has been moved by the "**Operational Creditor**" viz. Mr. Ravindra Gopal on 09th March 2017 on Form No.5 under section 9 of the Insolvency & Bankruptcy Code 2016 (in short "The Code" hereinafter), to be read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016 for alleged outstanding debt of ₹89,05,400 to be paid by the "**Operational Debtor**" M/s. Tattva & Mittal Life Spaces Pvt. Ltd. to initiate Corporate Insolvency Resolution Process under The Code.
2. Before we proceed to decide the merits of the case it is worth to place on record that when the matter was listed on 17th April 2017, the Operational Debtor had raised the issue of maintainability on the ground that the amount in question being a "disputed amount", hence out of the purview of the provisions of section 9 of The Code. On this legal question claims and counter-claims were made by the respective sides supported by the judgments of different Benches of NCLT. As a consequence, when the decisions of the different Benches are expressing divergent views, this Bench had referred the matter to the Hon'ble President for constitution of a larger Special Bench. However, later on it was found that this very legal issue of "Dispute" is *subjudice* before the respected NCLAT, Delhi Bench and some of the cited decisions are challenged before the Appellate Authority, hence matter was adjourned awaiting the decision of the Hon'ble Appellate Authority. Now few decisions on the said controversy have been pronounced by NCLAT so it is appropriate to finalise this Petition. Herein below now proceed to discuss the merits of the case and thereafter deal with the legal question raised, in the light of the judgments now in hand pronounced by the Hon'ble Appellate Authority.

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3. **Facts of the case**, in short, are that the Petitioner, a professional, is a Proprietor of Avon Capital Services, engaged in providing Financial & Management Services to arrange Corporate Finance or Investment Bankers. The Respondent Debtor is in the business of real estate, working as Builders and Developers of building construction projects. On 07th January, 2016, as claimed by the Petitioner, an Agreement/Engagement letter was executed engaging him for Advisory and Capital Raising Services. The Company had appointed Avon Capital as an exclusive advisor to assist in the introduction of one or more financial strategic partners to the company. In the said Engagement Letter, a schedule was made on the basis of which the fees was to be charged by the Petitioner for the services rendered. It is claimed before us that a retainer fees of ₹5 lakhs was also fixed, payable in advance on 1st of every quarter for a period of one year. The Petitioner had issued an invoice on 1st February 2016 towards professional fees for an amount of ₹5,72,500 for the quarter beginning from 1st February, 2016. Admitted position is that the Petitioner was paid a sum of ₹5,15,250 by way of Cheque on 1st March 2016 drawn on ICICI Bank after deducting TDS of ₹57,250. Thereafter, on 01-05-2016 Petitioner issued another invoice dated 1st May, 2016 for professional fees for the quarter beginning from 01-05-2016 for an amount of ₹5,72,500. On 25-07-2016. It is alleged that a term sheet was executed between the Respondent Company and a Financer viz. Milestone Capital Advisors Limited. Again on 01-08-2016 an invoice for retainer fees was raised of ₹5,75,500. Further, on 01-08-2016, the Petitioner has charged appointment fees of ₹3,45,000 pertaining to the alleged introduction of financer i.e. Milestone Capital Advisors. The Petitioner had received an email on 14-09-2016 instructing therein an accountant Mr. Vinayak to settle the dues. Side-by-side the Respondent Company had terminated the services of Mr. Ravindra Gopal, (Petitioner). On 27-09-2016 the Petitioner issued a professional fee invoice as drop dead fees for an amount of ₹74,12,900. On 14-01-2017 Petitioner issued Form No.3, a notice of demand for payment under The Code demanding the payment of ₹89,05,400. The Petitioner has alleged that even on service of Form No.3 (Demand Notice) the Respondent had not paid the outstanding debt, hence this Petition.

3.1. The documents annexed have also been examined. As prescribed under section 8 of The Code, the Creditor had delivered a Demand Notice on Form No.3 under Rule 5 of Adjudicating Authority Rules, 2016. The Petition contains list of unpaid invoices. The impugned "Engagement Letter" dated 07-01-2016 is also on record. An unsigned letter of 25th July, 2016 is also annexed, stated to be from the side of an investor proposing an investment of ₹30 crores for two residential projects developed by M/s. Tattva Mittal Group (Respondent). However, it is pointed out that the said letter was not written to the respondent i.e. Tattva & Mittal Lifespace Pvt limited, but the term sheet was executed between Tattva & Mittal Corporation

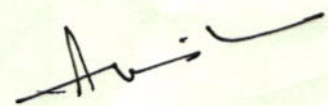
Pvt. Ltd. The proposed Investment Amount by the investor was claimed to be ₹30 crores in the said company. The compilation has contained a letter of 14-09-2016 through which it was intimated that the Petitioner was retained for the said last month and informed that his service was not needed any more. It was intimated that for the fourth quarter the petitioner is not retained for the services. It was also intimated that if and when any of the leads viz. Milestone or SICOM would be closed, the commission would be calculated.

4. **Claim of the Petitioner (Creditor) :-**

Learned Representative of the Petitioner Mr. Akhil Sarathy has pleaded that the Petitioner is a professionally qualified person working as a Proprietor of Avon Capital Services, which is a financial and management services entity to arrange Corporate Finance or Investment Banking. The Petitioner was appointed on 07th January 2016 as an "exclusive advisor" to identify and find out financial partner. The claim of the Petitioner is that a term sheet dated 25-07-2016 was executed between the Respondent company and Milestone Capital Advisors Limited. The Petitioner was, therefore, successful in identifying a financial partner. For each quarter the Petitioner had issued various invoices. The Petitioner has also claimed professional fees vide invoice dated 27-09-2016 for an amount of ₹74,12,900. Instead of making any payment, Petitioner received email dated 14-09-2016 instructing an accountant Mr. Vinayak to settle the dues of the Petitioner, however, at the same time simultaneously terminated the services of Mr. Ravindra Gopal, (Petitioner). The Petitioner issued a statutory demand notice on 16th November, 2016 under the old provisions of sections 434(a) of Companies Act, 1956. He has pleaded that the Respondent in the said email had accepted the services rendered by the Petitioner. Thereafter, on commencement of The Code notice was served on 28-12-2016 and also a demand notice with invoices was served on 14-01-2017 under section 8 of The code demanding unpaid "**operational debt**". So far there was no dispute but by way of "purported" notice of dispute dated 25th January, 2017, the Respondent had for the first time raised a "purported" dispute which was never raised in the past. When the four invoices were raised in the year 2016, no objection or dispute was raised. The dispute now raised is nothing but an after-thought. He has argued that in terms of the provisions of section 8(2)(a) there was no existence of a dispute or pendency of any suit or existence of arbitration proceedings before the receipt of notice of demand prescribed under section 8(1) of The Code. In support Learned A.R. has also referred the definition of "dispute" as defined under section 5(6) of The Code. The Petitioner has placed reliance on the following decisions:-

- (a) Essar Projects India Ltd. Vs. MCL Global Steel Pvt. Ltd. bearing C.P. No.20/I &BP/NCLT/MAH/2017 Order dated 06.03.2017;

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(b) Kirusa Softwares Pvt. Ltd. Vs. Mobilox Innovations Pvt. Ltd. (Company Appeal (AT) (Insolvency) 6 of 2017 Order dated 24.05.2017.

5. Denial by Respondent (Debtor):-

Learned Counsel Mr. Aditya Thakkar has opened his argument by stating that on 25-01-2017 the Demand Notice was disputed. The said dispute letter or Notice of Dispute was duly received by the Petitioner. At the outset he has raised question that why the said notice of dispute dated 25-01-2017 was not disclosed by the Petitioner. The Respondent has objected that the Petitioner had completely failed to introduce even one financial partner. In the said letter of dispute, it was alleged that the Petitioner was having lack of experience. In spite of no services, professional fees for quarter starting from 1st February 2016 and ending on 30th April 2016 was duly paid. The claim regarding M/s. Milestone was denied. No work was done and no term sheet was signed. Learned Representative has pleaded that the Petitioner should be put to the strict proof of discharging primary onus.

- 5.1. According to Learned Advocate, in a situation when the Petitioner had concealed the presence of Notice of Dispute (25-01-2017) hence for concealing a fact wilfully should lead to a punishment prescribed under section 76 of the IBC. Arguments such as presentation of a claim through unclean hand and suppression of fact have also been raised.
- 5.2. The next objection of the Respondent is that the Petitioner had deliberately delayed the proceedings and hence after the expiry of the mandatory period of 14 days the Petition is automatically not maintainable. A reliance has been placed for the legal proposition laid down in J.J. Plastalloy Vs. Miltech Industries Pvt. Ltd (MA No. 48/2016 in CP No. 04/I&BP/NCLT/MB/MAH/2017).
- 5.3. The third objection is that the Respondent has established the fact that there was a "dispute" existed since inception when the invoices were raised. The Petitioner was asked not to continue with the retainerhip and communicated that in the absence of any work done the Petitioner is not entitled for any fees. Reliance was placed on the decision of Kirusa Softwares Pvt. Ltd. Vs. Mobilox Innovations Pvt. Ltd. order 27-01-2017 (CP No. 02/I&BP/NCLT/MAH/2017). Learned Counsel has further pleaded that the definition of "dispute" is held as not an exhaustive definition. In support few orders were relied upon viz. **(A)** Order dated 01/03/2017 passed in M/s. One Coat Plaster Vs. M/s. Ambience Pvt. Ltd; **(B)** Order dated 02/03/2017 passed in Philips India Ltd. Vs. Goodwill Hospital and Research Centre Ltd.; **(C)** Order dated 24/03/2017 passed in Annapurna Infrastructure Pvt. Ltd. & Ors. Vs. Soril Infra Resources Ltd.. These judgments of the Coordinate Bench are, in a way, binding in nature, hence required to be followed. The Petitioner had not

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rendered any service, therefore, the Letter of Engagement was terminated on 14-09-2016. There was no admission of liability on the part of the Respondent.

6. **REJOINDER BY THE PETITIONER**

The purported notice of dispute dated 25-01-2017 was nothing but an after-thought for unnecessarily raising alleged dispute, pleaded by Learned Representative. When the invoices were raised then at that point of time no such dispute was ever raised. The dispute should be an existing dispute when the claim was made. At that time the Respondent had not disputed the demand raised through invoices. Rather, the admitted factual position is that against one invoice the Respondent had paid one quarter fees to the Petitioner. This payment thus itself proved that the services were rendered and the liability of quarterly payment as a retainership fees was duly acknowledged by the Respondent. On 16-11-2016 the petitioner had issued a letter/claim of outstanding due through his Counsel wherein it was stated that based upon the assurances made by the Respondent, the Petitioner had continuously made efforts to identify as well as to find out the financial partner. The signing of term sheet by Milestone Advisors on one side and acceptance by the Respondent made it clear that by the persistent efforts of the Petitioner the said party had agreed for the finance arrangement.

7. **SUR-REJOINDER BY THE RESPONDENT**

Learned Counsel has pleaded that the **definition "dispute" is an illustrative definition and not an exhaustive definition.** The Petitioner had totally failed in introducing a single party for investment. He had not done any work assigned to him hence the objections were raised at that very point of time. It is incorrect to argue that the Respondent had accepted the liability. Rather the Respondent had cancelled the retainership due to non-performance by the Petitioner. The "dispute" was duly communicated to the Petitioner at that very point of time. Reliance on two decisions was reiterated viz. Kisura Software Vs. Mobilox Innovations (*supra*) and MCL Global Vs. Essar Projects (*supra*).

7.1. Again it is pleaded that the prescribed period of 14 days had already lapsed therefore, the Petition is not maintainable unless and until time is extended by recording reasons in writing as held in the case of JK Jute Mills Company Vs. Surendra Trading Company (Company Appeal No. (AT) 06 of 2017) order dated 1st May 2017.

7.2. Further raised an issue that the status of the petitioner is not established as an Operational Creditor because neither goods were supplied nor services were rendered.

8. **JUDGMENT**

On hearing the submissions of both the sides as well as on perusal of the Petition under consideration few questions are required to be answered formulated as under:-

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1. Whether the status of the Petitioner is within the ambits of the definition of "Operational Creditor", being a professional, defined under section 5(20) and section 5(21) of The Code ?
2. Whether the Petition is maintainable under the facts and circumstances of the case even after a lapse of the prescribed period of 14 days under section 9(5) of The Code ?
3. Whether under the facts and circumstances there was an existence of "dispute" defined under section 5(6) of The Code ?

8.1. To answer the **first question**, we have examined the definition of **"Operational Debt"** of The Code which prescribes that a claim is to be in respect of the provisions of goods or **services**. In this case, an unchallenged fact is that the Petitioner is a professional rendering services of arranging Corporate Finance and Investment Banking. Even the Respondent had engaged the Petitioner in that capacity only. Hence qualifies as **"Operational Creditor" i.e. a person to whom an "Operational Debt" is owed for rendering professional services**. This is duly buttressed by a view already taken by this Bench in the case of Mr. Sanjaya Kumar Ruia Vs. Magna Opus Hospitality Private Limited Order dated 12th April, 2017 (CP No.65/I&BP/NCLT/MB/MAH/2017 wherein after taking into consideration the term "Services" it was held as under:-

"6. The Operational Creditor has stated that being a Chartered Accountant he had provided Professional Services and the impugned amount outstanding against the "Operational Debtor" is in the nature of "Professional Fees". The first question which is raised during the course of hearing is whether the 'Professional Services' shall fall under the definition of "Operational Debt" as defined u/s 5(21) of the I & BP Code. The definition is as under :-

" (21) "Operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, as State Government or any local authority."

*7. Thus the Definition of "Operational Debt" means a claim in respect of the provision of goods or "services" including employment or a debt in respect of repayment of dues arising under any Law. The term used in this definition **"Services"** has not been defined under this Code. However, the expression "Service" as per Blacks Law Dictionary is, **"the act of doing something useful for a person or company, usually for a fees"**. Another meaning as per the Dictionary is, "an intangible commodity in the form of human effort, such as labour, skill or advice". Likewise, meaning of "Service Charge" as per the Dictionary is a Charge assessed for performing a service. If we examine the expression "service" in other provisions of an Act, namely Section 2 in the Consumer Protection*

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*Act, 1986, then it means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge. **This term "service" has also been defined that any activity carried out by a person for another, for consideration.***

8. Without going much in detail as also keeping brevity in mind I hereby hold that a Professional Service provided by a Chartered Accountant definitely fall under the expression "Services" as incorporated in the definition of "Operational Debt" U/s 5(21) of the Code. **Once it is hereby held that the impugned debt falls within the ambits of "Operational Debt" hence to be adjudicated under the provisions of Section 8 and Section 9 of the Code."**

- 8.2. As a result, the Petitioner in question definitely qualifies as "Operational Creditor".
- 8.3. To Answer the **second** question, reliance is placed on the decision of respected NCLAT pronounced in the case of JK Jute Mills Company Limited Vs. M/s. Surendra Trading Company (Company Appeal (AT) No.09 of 2017 Order dated 1st May 2017 arising out of order of NCLT, Allahabad Bench in CP No.19/ALD/2017 dated 09th March 2017 wherein it was finally held that the mandate of sub section (5) of section 9 is procedural in nature, a tool aid in expeditious dispensation of justice. Therefore, "directory" only. Otherwise also considering the facts and circumstances of the case as narrated in the foregoing paragraphs, this Bench had proposed a reference for setting up a Larger Bench which took some time awaiting decision of NCLAT on the controversy of the term "Dispute". Hence the delay cannot be attributed to the Petitioner. We therefore hold that merely on this technical ground alone this Petition need not be discarded at the threshold.
- 8.4. To answer the **third** question, we have thoroughly examined the merits of the case. As discussed above, the Petitioner was engaged in the capacity of a professional to render certain services as agreed upon. The Petitioner was therefore assigned to introduce a Corporate Financers as a financial/strategic partners to the Respondent Company. The Company was exploring the options for raising the funds including private equity, unsecured loans etc. hence professional services of a Financial Consultant was necessitated. The terms of the remuneration were also depending upon the introduction of the investor and signing of the term sheet by the investors. Therefore, the Petitioner was under strict obligation to conclusively demonstrate the nature of services actually rendered in the

benefit of the Respondent Company. What we have noticed from the documents annexed that the Petitioner has only submitted the letter of assignment i.e. "Engagement Letter" dated 07-01-2016 and thereafter the issuance of invoices and finally notice for the recovery. The evidences such as the work done by the professional or any due diligence report submitted to the Respondent Company are missing in this case. The Petitioner has not filed a single evidence to demonstrate that by his effort a Corporate Financer has factually invested in the Respondent Company. The invoices are therefore not indicating the raising of bill vis-à-vis fund raising, but simply demanding quarterly retainership fees. The professional fees invoice dated 27-09-2016 of ₹74,12,900 do not describe the services rendered and the funds arranged but merely referred clause 4, para 2 of the engagement agreement dated 07-01-2016. On the contrary, in the said letter under the head 'remuneration', the fees to be payable was only on introduction and execution of term sheet from the investor/lender. The "success fees" was also to be calculated partly (25%) on signing of MOU with any of the investors and balance (75%) *pro rata* at each disbursement. There is no evidence placed from the side of the Petitioner that the disbursement of the impugned 30 Cr in reality had taken place. One more doubt has also been raised that the invoices were not directly raised in the name of the Respondent Company. Another doubt about the authenticity of the supposed claim was that the impugned Term-Sheet was unsigned from the side of the so-called Investor. Because of all these reasons discussed hereinabove it appears that the Respondent Company was not satisfied with the performance of the professional so engaged. As a result, through a letter of 14-09-2016 the retainership of the Petitioner was cancelled. The Respondent Company vide "Notice of Dispute" dated 25-01-2017 had categorically raised the objection by disputing the very basis of the claim. It was bluntly conveyed to the Petitioner that no work had been done under the Agreement. The claim was therefore totally denied. It is hereby held that we are unable to record our satisfaction that there was an existence of debt at all.

- 8.5. Considering the factual matrix of the case as discussed in the foregoing paragraph this is not a case of raising of the dispute after the initiation of insolvency proceedings. This is a clear-cut case of existence of a dispute since raising of the alleged invoices. In the case of Kirusa Software Pvt. Ltd. Vs. Mobilox Innovations (*supra*) the interpretation of **the term 'Dispute' is exhaustively discussed by the Hon'ble NCLAT Bench, New Delhi and held that the definition is illustrative and not exhaustive.** A dispute is to be raised by the Corporate Debtor with sufficient particulars

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and material. Prima facie the Respondent has successfully demonstrated through sufficient material the absence of any liability toward the Petitioner since inception. So, it was held that the provisions of section 9(5) prohibits the Adjudicating Authority from proceeding further, if there is a genuine dispute raised. This is not a case where we can say that the Respondent Company had given a colour of a genuine dispute or the dispute is illusory. In addition to the placing reliance on the above decision, we further place reliance on the decision of M/s. MCL Global Steel Private Limited Vs. Essar Projects (India) Limited (*supra*). As a result, it is hereby concluded that due to two reasons first, existence of pretentious claim, and second, an existence of the 'Dispute' the Petition in question is not maintainable.

- 8.6. Before we part with, a gist is hereby drawn from the foregoing discussion that in a case where there is an existence of *bona fide* dispute the Petitioner Creditor cannot be regarded as a legitimate Creditor under the Insolvency Code so as to commence the Insolvency Process. A *bona fide* dispute implies the existence of a substantial ground for the dispute raised. Where it is found that a debt on which a Petition is founded is a hotly contested debt and also doubtful, then the IB Code prohibits to entertain such a Petition. Naturally it is expected to go into the causes of refusal to pay the outstanding debt before coming to that conclusion, and also at what point of time a "Dispute" had been raised is an important factor; as we have noticed in this case that since inception when the invoices were raised the Respondent had objected. Likewise, it is also expected to ascertain that the refusal to pay the debt is genuinely supported by a reasonable cause and a reasonable dispute. In the "definition" Section 5(6)(b) the term "Dispute" also relate to the quality of service provided. In this case our finding is that no effective or beneficial service was rendered, what to say about quality of service. If the claim of the outstanding debt is casual or the dispute is apparent, then there ought to be an endeavour to ascertain whether the Company sought to be put under Insolvency Resolution is proper or not. Resultantly, we hereby conclude that the Petition in question deserves to be **dismissed**. To be consigned to records. We order accordingly.

Sd/-

DR. ASHOK KUMAR MISHRA
Member (Technical)

Sd/-

M.K. SHRAWAT
Member (Judicial)

Date : 11.07.2017

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