

THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH, MUMBAI

C.P. NO.65/ I & BP/NCLT/MB/MAH/2017

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
COMPANY PETITION NO.65/ I & BP/NCLT/MB/MAH/2017**

**APPLICATION BY OPERATIONAL CREDITOR TO INITIATE CORPORATE
INSOLVENCY RESOLUTION PROCESS UNDER THE CODE**

(Under rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority)

Rules,2016).

CORAM:

SHRI M.K. SHRAWAT
MEMBER (JUDICIAL)

Mr. SANJAYA KUMAR RUIA

Sanjay Ruia & Associates
B-3/1/1:3, Sector-2, Vashi
Navi Mumbai - 400073

).....Petitioner.

Versus

M/s. MAGNA OPUS HOSPITALITY PRIVATE LIMITED,
A-415/415, 2nd Floor, Vashi Plaza, Sector-17,
Vashi, Navi Mumbai – 400 703.

)Respondent.

PRESENT ON BEHALF OF THE PARTIES

FOR THE PETITIONER

Mr. Sanjaya Kumar Ruia along with Mr.Harem P. Shah for Petitioner.

ORDER

**Date of Hearing : 11TH April, 2017
Date of Pronouncement: 12th April, 2017.**

1. This Petition has been filed by the Petitioner on 27th of March, 2017 under the provisions of Insolvency and Bankruptcy Code, 2016 in the capacity of "Operational Creditor".
2. The Petitioner has affirmed through an Affidavit dated 29th March, 2017 that M/s. Magna Opus Hospitality Private Limited is a "Corporate Debtor/Operational Debtor" who had defaulted in payment of Professional Services of Rs. 2,29,345/-

and also defaulted in payment of Advisory Services Charges of Rs. 38,44,389/-. In this Affidavit the Petitioner has affirmed that he had tried to serve the Petition (Form No. 5) to the Operational Debtor on 21st March, 2007. Through the said Affidavit it is stated that the Petitioner tried to serve by hand but the Directors of the Operational Debtor refused to take the delivery. The Petitioner has also attempted to serve the Petition through "Registered Post", details are as under:-

- a. *Vide Postal Receipt No. EM722428095IN dated 22/03/2017 to Magna opus Hospitality Private Limited, A-415/417, Vashi Plaza, Sector-17, Vashi, Navi Mumbai – 400703.*
- b. *Vide Postal Receipt No. EM72242808IIN dated 22/03/2017 to Mr. Rohit Prem Chhabra at 802/6, Sagar Darshan, Sector-19, Nerul, Navi Mumbai – 400706.*
- c. *Vide Postal Receipt No. EM722427965IN dated 22/03/2017 to Mrs. Rajani Rohit Chhabra at 802/6 Sagar Darshan, Sector-19, Nerul, Navi Mumbai –400706.*

3. The Postal Department has returned the Registered Post Letters with the remark "Refused". The Petitioner in the said Affidavit has also informed that a Criminal Case No. 9033/2016 u/s 138 of the Negotiable Instruments Act was filed before the Hon'ble Magistrate J.M.F.C., C.B.D. Belapur, Navi Mumbai on 3rd March, 2017. The Petitioner has also sent information through e-mail as detailed below :-

"11. I have also send a copy of the email from my mail address casanjayruia@gmail.com to Rohit.chhabra@holidaykitty.com, Rohit.chhabra@magnaopus.com

Rajani.chhabra@holidaykitty.com on 31st March,2017. The copy of the email sent to the directors of Magna Opus Hospitality Private Limited is enclosed with the affidavit."

4. When the matter was posted for hearing on 31st of March, 2017 before this Bench, it was directed to serve Notice by any permissible mode of service i.e. either by hand, Speed Post/ Registered Post intimating the next date of hearing i.e. 11.04.2017. The Petitioner has made compliance as intimated below :-

"8. As per the direction of the Hon'ble Bench during the last hearing on 31st March,2017, I have again dispatched the copy of the Cover Letter as final bearing on 11/04/2017 before the Bench with copies of Demand Notice in Form 3 and Form 4 of NCLT and the copy of Petition in Form 5 along with the annexure through Speed Post Registered Letter on 1st April,2017 vide receipt and the speed post track report is attached with the affidavit."

5. Under the circumstances when the "Operational Debtor" had chosen not to defend by not responding any of the Notices it is hereby held that he had nothing to say in defence.
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 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.**

9. Prima Facie the documents attached with the Petition have demonstrated that, the Petitioner has audited the accounts of the Debtor Company. In addition to the said Professional Service my attention is drawn on a Mandate Letter dated 7th July, 2017 for assigning Advisory Services by the "Debtor Company" namely Magna Opus Hospitality Private Limited, Vashi, Navi Mumbai referred as "Sponsor" of One Part and Sanjay Ruia and Associates on the Other Part as "Advisor". The said Mandate Letter has referred that "Sponsor" intended to raise approximately Indian Rupees 1400/- Lakhs and for that purpose and intends to appoint the Petitioner for Advisory Services and for providing assistance in Fund raising. The claim of the Petitioner is that, a Credit Facility from Bank of India, Belapur Branch has been duly assisted and thereupon Business Loan was sanctioned by sanctioning Credit Facility of Rs. 8,19,70,000/- (Rupees Eight Crores Nineteen Lakhs Seventy Thousand only). Thereupon the Petitioner had raised Invoice/Debit Note which is the subject matter of this Petition.
10. In the light of the above factual matrix it is hereby held that there is an **existence of "debt" as defined under Section 3(11) of the Code**, means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Further it is held that **"default" exists as defined under section 3(12) of the Code means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.**
11. Once it is established as per the foregoing paragraphs that there was an existence of 'Default' then the provisions of Section 8 of the Code shall come into operation. It is prescribed that an Operational Creditor on occurrence of a default deliver a **Demand Notice** of unpaid Operational Debt or copy of an Invoice demanding payment of the amount involved in the default to the Corporate Debtor as prescribed. Although in **Sub-section (2) of Section 8** a Corporate Debtor is authorized to establish the **existence of a dispute** within a period of 10 days on the receipt of the Demand Notice, but in the present case the "Operational Debtor" had not responded at all. Due to this reason the provisions of Section 9 of the Code shall come into operation.
12. As per the provisions of Section 9(1) of the Code after the expiry of the period of 10 days, from the date of delivery of the Demand Notice if the Operational Creditor does not receive payment from the Corporate Debtor and there is no **Notice of Dispute** then the Adjudicating Authority shall initiate Corporate Insolvency

Resolution Process. This Section further prescribes [vide Section 9(4)] that an Operational Creditor initiating a Corporate Insolvency Resolution Process under the Section may propose an **Insolvency Professional** to act as **Interim Resolution Professional**. The Petitioner has intimated the name of C.A. Mr. Sushil Kumar Gupta, I-A, Ground Floor, Ramchandra Niwas, Plot No. 21-22, Sector 12-A, Opp. Kalash Udyan, Koparkhairane, Navi Mumbai-400 709, casusilgupta@gmail.com IBBI/IPA-001/IP-00469/2016-17/1624 who has given his consent along with the Certificate that there is no Disciplinary Proceedings against him. Mr. Sushil kumar Gupta, CA is hereby appointed as an "Interim Resolution Professional" to initiate the Insolvency Resolution Process.

13. As a consequence, once the process has been initiated, the provisions of **Moratorium** as prescribed under **Section 14 of the Code** shall be operative henceforth with effect from 11.04.2017 shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.
14. That as prescribed under **Section 13 of the Code** on declaration of Moratorium the next step of **Public Announcement** of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the Petitioner immediately as specified.
15. That the Interim Resolution Professional shall perform the duties as assigned under Section 18 of the Code and inform the progress of the Resolution Plan and the compliance of the directions of this Order on 20th July 2017 to this Bench.
16. The Petition is "**Admitted**" and disposed of on the terms directed hereinabove.

Date: 12th April, 2017.

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