

[2020] 115 taxmann.com 275 (NCLT - Ahd.)[17-02-2020]

**IBC : Proprietary concern is not a person entitled to file CIRP application under Act, as operational creditor**

**IBC : Where e-mails confirmed that corporate debtors repeatedly complained about supply of defective and inferior goods and requested for repair or replacement, but no satisfactory reply was received from operational creditor, there was a pre-existing dispute and CIRP would not be maintainable**

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[2020] 115 taxmann.com 275 (NCLT - Ahd.)

**NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD BENCH**

**Wind Water System**

**v.**

**Narendra Emporis Ltd.**

MS. MANORAMA KUMARI, JUDICIAL MEMBER  
AND CHOCKALINGAM THIRUNAVUKKARASU, TECHNICAL MEMBER  
C.P. NO. (I.B.) 338/9/NCLT/AHM/ 2019  
FEBRUARY 17, 2020

**I Section 3(23), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Person - Whether a proprietary concern is not a 'person' for purpose of filing CIR application under section 9; hence, CIRP application filed in name of proprietary concern would not be maintainable - Held, yes [Para 17]**

**II Section 5(6), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Dispute - Operational creditor supplied to corporate debtor plant and machinery for humidification plant - Corporate debtor did not clear outstanding dues claiming that various complaints were made that machinery supplied by operational creditor were defective and inferior in quality; and that repeated requests for repairs/replacement were not considered by operational creditor - Corporate debtor placed on record copy of e-mails - Whether since exchange of e-mails clearly established that there was pre-existing dispute prior to issuance of demand notice, CIRP application filed would not be maintainable - Held, yes [Para 20]**

**Pratik Thakkar, Adv. for the Petitioner. Dhruv Desai for the Respondent.**

## **ORDER**

**Ms. Manorama Kumari, Judicial Member.** - The instant application is filed by M/s. Wind Water System showing itself as a proprietorship concern filed application under section 9 of The insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code"] read with Rule 6 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 [hereinafter referred to as "the Rules"], as operational creditor/applicant.

**2.** The respondent/corporate debtor is a company registered under the Companies Act, incorporated on 15-5-1997 having identification No. U17119GJ1997PTC032339 and having registered office at Astron Chowk, Rajkot, Gujarat State. Authorised share capital of the respondent company is Rs. 15,00,00,000/- and paid-up share capital is Rs. 7,83,03,730/-. The respondent company is engaged in manufacturing, supplying and exporting of grey fabrics, knitted fabrics and cotton yarn.

3. The applicant/operational creditor company is engaged in the business of supply and manufacture of waste collecting systems, centrifugal fans, compactor, textile air engineering projects on turnkey basis, dust collectors, bale press systems, chiller, refrigerator plants, piping, ducting, false ceiling and insulation.

4. The applicant/operational creditor has stated that the respondent company approached the petitioner and requested to provide automated control system, centrifugal fan and gear box for humidification plant. Pursuant thereto, the operational creditor had supplied the materials as per the requirement and the same has been accepted by the respondent company with no dispute and demur.

5. The petitioner has further stated that for certain supplies made to the corporate debtor company, invoice No. 12 dated 18-8-2015, invoice No. 5 dated 10-6-2016 and invoice No. 15 dated 21-11-2016 totalling to principal amount of Rs. 4,46,250/- plus interest of Rs. 1,83,977/-remains outstanding and payable by the respondent. That, the petitioner used to maintain a running account for the goods supplied to the respondent company from time to time.

6. It is further stated by the operational creditor that the respondent company had assured and acknowledged all the invoices raised and had promised to release the payment as per the terms and conditions of the order. However, the respondent company has miserably failed to clear the admitted and undisputed amount.

7. It is further stated by the operational creditor that having failed to get the undisputed operational debt, the petitioner was compelled to issue demand notice under section 8 of the I & B Code on 15-2-2019 calling upon the respondent company to release dues aggregating to Rs. 6,30,227/-(Rupees six lacs thirty thousand two hundred twenty-seven only) within ten days on receipt of notice.

8. It is further stated by the petitioner that in its reply dated 16-3-2019 the respondent company tried to create dispute for the first time based on false and frivolous technical grounds.

9. In support of its claim, the operational creditor has annexed to the application, copy of all relevant documents like copy of invoices, demand notice, affidavit in support of the application, proof of service, computation showing the details of outstanding, e-mail communication, ledger account maintained by the operational creditor *etc.*

10. The respondent/corporate debtor filed affidavit in reply *inter alia* raising various objections. That, the first and foremost objection raised by the corporate debtor is regarding the pre-existing dispute.

11. The corporate debtor has stated that after commissioning of the automation control system for humidification plant, the respondent on various occasions made complaints and raised concern *via.* telephonic calls, meetings and e-mails that the goods/machinery supplied by the petitioner were of defective and inferior quality. That, the respondent had made repeated requests for repairs/replacements of the said plant and other allied machineries supplied by the petitioner, however, the petitioner failed to provide satisfactory reply.

### *Findings*

12. Notwithstanding above as those are the statements/pleadings of the parties in support of their claim, before proceeding further it is necessary to deal with the legal issue *i.e.* whether any proprietorship firm claiming to be operational creditor can file a proceeding/suit as it is not legal entity in the eye of law. A proprietor ordinarily means a person who carries on trade or business in a name other than his name. The law on this aspect is fairly well settled. No suit can be instituted by a sole proprietorship firm in its own name unless there are specific amendments stating that proprietorship sues through its proprietor. It has been recognised in number of decisions that a proprietorship concern unlike a company or a partnership is not a legal entity and therefore any proceeding initiated by it would be a nullity. On this count alone the application is bad and is not maintainable.

13. On perusal of the records it is found that the instant application is filed by/in the name of M/s. Wind Water System as operational creditor. Even in part I of form 5 name of the operational creditor is shown/written as M/s. *Wind Water System.*

14. In this regard it is pertinent to refer some of the important decisions which are as under:

In *Miraj Advertising Corpn. v. Vishaka Engineering* 115 [2004] DLT 471 it is held that

"A proprietorship firm has no legal entity like registered firm. A suit cannot be initiated in the name of an unregistered proprietorship firm and the said suit is to be instituted in the name of proprietor"

**15.** Thus, a proprietorship firm is not a legal entity - it is only the proprietor of the firm who is a legal entity and as such the petition should have been filed by the sole proprietor in his name on behalf of his sole proprietorship firm.

**16.** Section 3 of sub-section (23) speaks about the definition of a person which read as under: —

"person" includes;

- (a) An individual;
- (b) A Hindu undivided family;
- (c) A company;
- (d) A trust;
- (e) A partnership;
- (f) A limited liability partnership and
- (g) Any other entity established under a statute, and includes a person resident outside India

**17.** On perusal of the definition it is clear that "person" must fall on the above category(s). In the case on hand, the petition is filed in the name of *M/s. Wind Water System*, a proprietary concern as operational creditor, who is not a "person" for the purpose of filing the application u/s. 9 of the I & B Code. Hence, on this ground itself the application is not maintainable.

**18.** It is also the duty of the Adjudicating Authority to dispose of cases "*jus dicers*", in accordance with law as it is and not "*jus dare*" in accordance with law as it should be.

**19.** Apart from the above, the respondent has also raised some objections with regard to the maintainability of the application. The first and foremost legal contention raised by the respondent is that prior to issuance of demand notice on 7-3-2019, the respondent had made number of complaints and had raised concern about the quality of machinery supplied by the petitioner. In support of such claim, the respondent has placed on record copy of the e-mails sent by the corporate debtor between 25th April 2015 and 13th December, 2016. That copy of such complaints/e-mails are annexed to the reply at page Nos. 41-48.

**20.** It is also a matter of record that the respondent had made complaints with regard to the quality of the machinery supplied by the petitioner and the respondent has placed on record copy of the e-mails exchanged between the two parties clearly establishes that there is/was pre-existing dispute before issuance of the demand notice. Thus the application is also not maintainable on account of pre-existing dispute which was raised prior to the issuance of demand notice.

**21.** Under the facts and circumstances as discussed in sequel herein above, the application, so filed by the applicant is not maintainable and is bad in law as well as in facts.

**22.** However, this will not stand in the way of the Petitioner invoking the appropriate forum seeking to enforce its claim as against the Respondent, as this petition has been dismissed on the issue of maintainability taking into consideration of the provision of IB Code, 2016. The observations made by us on any other aspect would not constitute an expression of opinion on the merit of controversy.