

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) 3980/MB/C-IV/2018

Under section 9 of the Insolvency &
Bankruptcy Code, 2016

In the matter of

M/s NN Enterprises

a partnership firm represented by its

Partner, Mr. Afghan Babu Khan

... Operational Creditor

Versus

Relcon Infra Projects Limited

[CIN: U45201MH2006PLC165973]

... Corporate Debtor

Order pronounced on : 01.01.2020

Coram:

Mr. Rajasekhar V.K. : Hon'ble Member (Judicial)
Mr. Ravikumar Duraisamy : Hon'ble Member (Technical)

Appearances:

For the Operational Creditor : Mr Gouresh C Mogre i/b Mr
Chirag Sancheti, Advocate

For the Corporate Debtor : Mr Mahesh Londhe a/w
Darshan Ashar i/b Mr Sanjay
Udeshi & Co, Advocates

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (“**IBC**”) by M/s NN Enterprises (“**the Operational Creditor**”), a partnership firm represented by its Partner, Mr. Afghan Babu Khan seeking to initiate Corporate Insolvency Resolution Process (“**CIRP**”) against Relcon Infra Projects Limited (“**the Corporate Debtor**”).
2. The Corporate Debtor is a public company limited by shares and incorporated on 04.12.2006 under the Companies Act, 1956, with the Registrar of Companies (RoC), Maharashtra, Mumbai. Its CIN is U45201MH2006PLC165973. Its registered office is at C-105, Shyam Kamal Agarwal Market, Vile Parle (East), Mumbai 400 057, within the State of Maharashtra. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed on 16.10.2018 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of ₹32,96,390/- (Rupees thirty-two lakh ninety-six thousand three hundred and ninety only) as principal and ₹11,20,772/- (Rupees eleven lakh twenty thousand seven hundred and seventy-two only) as interest as on 31.03.2017 till 31.08.2018. The Operational Creditor claims that it is entitled to further interest on ₹32,96,390/- from 01.09.2018 till payment.

4. The case of the Operational Creditor is as follows: -

(a) The Operational Creditor is engaged in the activity of manufacturing, selling and supplying Ready Mix Concrete (RMC). The Corporate Debtor placed an order for supply of RMC, the Operational Creditor supplied the same and raised various invoices thereon [Para 1 of Part IV at page 13 of the Petition];

(b) The Operational Creditor raised the following invoices:

- (1) Invoice No.00001 dated 08.04.2016 for ₹1,10,600/-;
- (2) Invoice No.00011 dated 14.4.2016 for ₹6,21,363/-;
- (3) Invoice No.00024 dated 19.04.2016 for ₹72,800/-;
- (4) Invoice No.00049 dated 11.05.2016 for ₹2,94,650/-;
- (5) Invoice No.00058 dated 17.05.2016 for ₹3,76,200/-;
- (6) Invoice No.00074 dated 21.05.2016 for ₹6,11,338/-;
- (7) Invoice No.00086 dated 27.05.2016 for ₹10,64,149/-;
- (8) Invoice No.00114 dated 31.05.2016 for ₹2,43,425/-;
- (9) Invoice No.00115 dated 09.06.2016 for ₹2,68,175/-; and
- (10) Invoice No.00151 dated 21.06.2016 for ₹46,225/-

[Para 1 of Part IV at page 14 of the Petition].

(c) The Corporate Debtor accepted the Ready-Mix Concrete (RMC) without demur. Since the Corporate Debtor failed to make payments within the agreed time-period, the Operational

Creditor by his various emails called upon the Corporate Debtor to make outstanding payment of ₹35,14,802.06 [para 5 at page 15 of the Petition].

5. Invoices have been placed on record as **Exhibit 'B'** at pp.30-66. The invoices do not provide for interest in case of delayed payments. Ledger Accounts are attached as **Exhibit 'E'** at pp.70-72. The total debt due and payable to the Operational Creditor is of ₹32,96,390/- (Rupees thirty-two lakh ninety-six thousand three hundred and ninety only) as principal and ₹11,20,772/- (Rupees eleven lakh twenty thousand seven hundred and seventy-two only) as interest as on 31.03.2017 till 31.08.2018, as mentioned at p.8 of the Petition.
6. The Operational Creditor had served a Demand Notice in Form 3 dated 06.09.2018 to the Corporate Debtor (**Exhibit 'F'** at pp.73-80 of the Petition) in terms of section 8 of the IBC.
7. The Corporate Debtor has sent a reply dated 18.09.2018 (*received by the Operational Creditor on 19.09.2018*) to the Demand Notice, wherein it has been stated that one Mr. Natwarlal Purohit was a partner in NN Enterprises at the time of the transaction, and that he was also a partner in two companies *viz.*, (1) Sarneshwar Infra Private Limited, and (2) Technotrade Impex India Private Limited. The Corporate Debtor has further stated that they had business relations with Mr. Natwarlal Purohit and the aforementioned companies, pursuant to which the Corporate

Debtor supplied RMC to Sarneshwar Infra Private Limited and Technotrade Impex India Private Limited. The Corporate Debtor further states that a sum of ₹24,49,226/- is due and payable by the said Sarneshwar Infra Private Limited and a sum of ₹1,26,000/- is due and payable for goods sold and delivered by the Corporate Debtor to Sarneshwar Infra Private Limited and Technotrade Impex India Private Limited.

8. The Corporate Debtor further affirms in its reply that Mr. Natwarlal Purohit represented to the Corporate Debtor that he was in absolute control of management of the three entities, *viz.*, Sarneshwar Infra Private Limited, Technotrade Impex India Private Limited and NN Enterprises, and that the business carried out by the said entities are inter-connected. Therefore, when the Corporate Debtor requested Mr. Natwarlal Purohit to clear the outstanding amount of ₹25,75,226/-, he requested the Corporate Debtor to purchase the materials from the Operational Creditor equivalent to the amount which was due and payable to the Corporate Debtor.
9. The Corporate Debtor states that it was represented by virtue of this agreement that there would a net effect of "Nil" balance in the accounts of Sarneshwar Infra Private Limited, Technotrade Impex India Private Limited and NN Enterprises. The Corporate Debtor disputes the reliance placed on the email dated 07.11.2017 as the email was not disputed for eleven months by the Operational

Creditor. The Corporate Debtor states that as Mr. Natwarlal Purohit was a partner in Sarneshwar Infra Private Limited and Technotrade Impex India Private Limited hence, he had the right to bind the Partnership Firm and enter into a contract with the third party. The reply has been annexed at **Exhibit 'G'** at pp.81-86 of the Petition.

10. Following the receipt of this reply, the Operational Creditor sent another Demand Notice dated 20.09.2018, recalling its earlier Demand Notice dated 06.09.2018 on the ground of “typographical errors,” and that a fresh Demand Notice was being issued. In terms of this Demand Notice, the Operational Creditor called upon the Corporate Debtor to make payment of a sum of ₹35,14,802.06 which remained due and payable after factoring in the payments made by the Corporate Debtor.
11. The Corporate Debtor sent a reply to this second Demand Notice also on 03.10.2018. In its reply, the Corporate Debtor has largely reiterated its stand in the reply to the first Demand Notice. It further called upon the Operational Creditor to provide inspection of all original documents for verification, since copies of invoices were not supplied with the Demand Notices on either occasion.
12. Mr Mahesh Londhe, Learned Counsel i/b Sanjay Udeshi & Co, appeared on behalf of the Corporate Debtor and made his submissions.

13. In its reply dated 08.04.2019, the Corporate Debtor has set up the following defence: -

- (a) The Corporate Debtor has stated in its affidavit in reply that prior to the notice dated 20.09.2018, the Operational Creditor had issued a demand notice dated 06.09.2018 to the Corporate Debtor. The Corporate Debtor had rebutted all the allegations of the Operational Creditor in the notice dated 06.09.2018 *vide* reply dated 18.09.2019. Upon realising the mistake as well as after appreciating and admitting the genuine case/defence, the Operational Creditor issued a fresh demand notice dated 20.09.2018 [para 5 at p.113 of the Reply];
- (b) The Corporate Debtor states that upon perusal of the two notices it appears that the Operational Creditor itself is not sure about the quantum of alleged debt. The Corporate Debtor states that the existence of a dispute between the Petitioner and the Respondent is abundantly clear from the notices and reply [para 6 at p.113 of the Reply];
- (c) The Corporate Debtor states that under the semblance of rectifying "typographical errors" in notice dated 06.09.2018, the Operational Creditor has materially changed the notice dated 20.09.2018. He further states that the changes are with the intention to conceal from this Tribunal the relevant documents *inter alia* showing dispute between the parties [para 9 at page 114 of the Reply];

- (d) The Corporate Debtor is engaged in the business of civil contractors and construction, and the company is undertaking several construction and infrastructure projects pertaining Government, Semi-Government and private individuals. The Corporate Debtor states that the company is handling projects worth Rs.810 crore approximately and has around 600 employees. The Corporate Debtor is in very good and sound financial position [para 10 at pp.114-115 of the Reply].
- (e) Mr Natwarlal Purohit, one of the partners of the Operational Creditor at the time of the transactions in question, was also a director of the two companies, *viz.*, Sarneshwar Infra Private Limited and Technotrade Impex Private Limited. The Corporate Debtor had supplied RMC to the said two companies, for which a sum of ₹24,49,226/- was due and payable by them to the Corporate Debtor. Additionally, a sum of ₹1,26,000/- was also payable by Technotrade Impex Private Limited to the Corporate Debtor. Thus, a total sum of ₹25,75,226/- was due and payable by the two companies put together to the Corporate Debtor [para 11.1 at p.115 of the Reply].
- (f) The management, transactions and business of the three entities were interconnected, having common partners/directors. Therefore, when the Corporate Debtor requested Mr Natwarlal Purohit to clear the account of the Corporate

Debtor *qua* Sarneshwar Infra Private Limited and Technotrade Impex Private Limited, he requested the Corporate Debtor to purchase material equivalent to the said sums from the Operational Creditor. Mr Purohit also assured the Corporate Debtor that the amount towards purchase of the said material shall be set off against the amounts due and payable Sarneshwar Infra Private Limited and Technotrade Impex Private Limited, the two companies in which he was a director. Based on such representation made by the partner of the Operational Creditor, the Corporate Debtor purchased the material in question from the Operational Creditor [para 11.3 at p.116 of the Reply];

- (g) There was a meeting held on 10.08.2018 at the Corporate Debtor's office at Vile Parle, where the above understanding was reiterated. Pursuant thereto, the Corporate Debtor furnished copies of the ledger accounts of Sarneshwar Infra Private Limited and Technotrade Impex Private Limited to the Operational Creditor. The Operational Creditor then requested for its own ledger account from the Corporate Debtor, which was sent by email dated 10.08.2018. The Operational Creditor placed on record the copy of the email dated 10.08.2018 whereby the ledger account of the Operational Creditor as maintained by the Corporate Debtor was sent. However, there was wilful and material suppression of the ledger account of the other two companies, *viz.*,

Sarneshwar Infra Private Limited and Technotrade Impex Private Limited, which was also sent [para 11.6 at pp.117-118 of the Reply]. The entire communication exchanged between the parties has been placed on record by the Corporate Debtor as **Exhibit 'E'** (pp.205-206 of the Reply) and **Exhibit 'F'** (pp.207-211 of the Reply).

- (h) Despite the consistent stand taken by the Corporate Debtor regarding set off/adjustment of accounts between the three entities, the Operational Creditor has falsely denied the nexus between the three entities and sworn a false affidavit at pp.25-26 of the Petition that “nothing material has been concealed.” [para 11.8 at p.119 of the Reply];
- (i) The Operational Creditor is not a registered partnership firm, and therefore, in terms of section 69 of the Indian Partnership Act, 1932, the present company petition is not maintainable [para 25 at p.123 of the Reply].
- (j) In the guise of correcting “typographical errors,” the Operational Creditor has materially altered the second Demand Notice issued on 20.09.2018, one day after receipt of the reply dated 18.09.2018 (*which was received by the Operational Creditor on 19.09.2018*). It is obvious from the second Demand Notice that the contents of the reply to the first Demand Notice have been factored in and material improvements to the position of the Operational Creditor have been made therein.

Further, there is wilful and material suppression of facts and documents [para 36 at p.126 of the Reply].

14. We have heard the arguments of both sides and perused the records.
15. The first contention of the Corporate Debtor that the Operational Creditor, being an unregistered partnership firm, cannot maintain the present Petition under the IBC, has been considered by us.
16. The relevant section 69(2) of the Indian Partnership Act, 1932, relied upon by the Learned Counsel for the Corporate Debtor, reads as follows: -

“(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.”

17. Learned Counsel for the Corporate Debtor contends that the “partnership firm” referred to in section 3(23) of the IBC essentially means a registered partnership firm and not an unregistered one.
18. *Per contra*, Learned Counsel for the Operational Creditor has relied on a judgment of the Hon’ble Calcutta High Court in ***Shree Balaji Steels vs Gontermann-Peipers (India) Limited***,¹ in the context of

¹ (2002) SCC OnLine Cal 821 : (2003) 114 Comp Cas 193 (Cal) decided on 15.05.2002

winding-up under the Companies Act, 1956, wherein it was held as follows: -

“9. ... In our view, in order to bring the winding-up petition within the bar as contemplated in section 69(2) of the Partnership Act, two things are to be considered. The first one is whether the winding-up petition can be construed to be a “suit” within the meaning of section 69(2) of the Partnership Act, and the other is whether a winding up petition has been filed on a cause of action to enforce a right arising from a contract or conferred by the Partnership Act. So far as the first condition is concerned in this case, it is an admitted position that petition for winding up filed by the unregistered firm cannot be construed to be a “suit” within the meaning of section 69(2) of the Partnership Act ...”

19. A plain reading of the provisions of section 69(2) of the Indian Partnership Act, 1932, reveals that the term “suit” has been used instead of the term “proceedings.” In ***Gaurav Hargovindbhai Dave vs Asset Reconstruction Company***² decided by the Hon’ble Supreme Court while addressing the applicability of the provisions of the Limitation Act, 1963, it was held that Article 62 (of the Limitation Act, 1963) is not applicable on the ground that it would only apply to suits. It was held in that case as follows: -

“The present case, being “an application under section 7, would fall only within the residuary Article 137.”

² Civil Appeal No.4952/2019 decided on 18.09.2019

20. This view was further reiterated by the Hon'ble Supreme Court in *Sagar Sharma vs Phoenix ARC Private Limited*,³ wherein the Court noted that applications under the IBC are petitions.
21. We, therefore, hold that the provisions of section 69(2) of the Indian Partnership Act, 1932, applies to "suits" and therefore, cannot apply to "proceedings" under the IBC.
22. We now come to the issue as to whether the Operational Creditor suppressed material information, as alleged by the Corporate Debtor.
23. Learned Counsel for the Corporate Debtor relied on the judgment of the Hon'ble Supreme Court in *SP Chengalvaraya Naidu (Dead) by LRs vs Jagannath (Dead) by LRs and others*,⁴ to support his contention that the petition ought not to be admitted since the Operational Creditor has not approached this Tribunal with clean hands. In particular, he relied on the following extracts, -

"5. ... *The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no*

³ Civil Appeal No.7363/2019 decided on 30.09.2019

⁴ Civil Appeal No.92/1972 decided on 27.10.1993 [(1994) 1 SCC 1]

hesitation to say that a person whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

“6. ... Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. A litigant who approaches the court is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.”

24. Learned Counsel for the Corporate Debtor further relied on Hon’ble Supreme Court’s judgment in ***Dalip Singh vs State of Uttar Pradesh and others***,⁵ wherein the Hon’ble Court stated as follows:

*“9. In **Sunil Poddar vs Union of India**, the Court held that while exercising discretionary and equitable jurisdiction under Article 136 of the Constitution, the facts and circumstances of the case should be seen in their entirety to find out if there is miscarriage of justice. If the appellant has not come forward with clean hands, has not candidly disclosed all the facts that he is aware of and he intends to delay the proceedings, then the Court will non-suit him on the ground of contumacious conduct.*

*“10. In **KD Sharma vs SAIL**, the Court held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and*

⁵ Civil Appeal No.5239/2002 decided on 03.12.2009 [(2010) 2 SCC 114]

*it is imperative that the petitioner approaching the writ court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The same rule was reiterated in **G Jayashree vs Bhagwandas S Patel.**”*

25. During the hearing, the Learned Counsel for the Corporate Debtor has submitted that there were long-standing business relations between the Corporate Debtor and the Operational Creditor, Sarneshwar Infra Private Limited and Technotrade Impex India Private Limited. When the goods in question were supplied by the Operational Creditor to the Corporate Debtor, Mr Afghan Babu Khan, the authorised signatory of the Operational Creditor-Partnership firm, was a director in Sarneshwar Infra Private Limited. The Registered Office of Sarneshwar Infra Private Limited is the same as that of the Operational Creditor.
26. The crux of the matter is that there was a dispute between the partners of the Operational Creditor, who were also directors in Sarneshwar Infra Private Limited and Technotrade Impex Private Limited. The Operational Creditor as well as Sarneshwar Infra Private Limited and Technotrade Impex Private Limited had business dealings with the Corporate Debtor.

27. We notice that the second Demand Notice dated 20.09.2018 issued by the Operational Creditor has been materially changed and it is not merely to correct “typographical errors.” In particular, paras 8, 9 and 10 at pp.92-94 of the Petition have been added in the second Demand Notice. There is visible improvement in the second Demand Notice after factoring in the reply of the Corporate Debtor to the first Demand Notice dated 03.09.2018. This fact has been explained away as mere “correction of typographical errors” when such is not the case. The material placed on record reveals that there is some force in the contention of the Corporate Debtor that the second Demand Notice was issued after factoring in the reply of the Corporate Debtor (which was received by the Operational Creditor one day before the issue of the second Demand Notice on 20.09.2018). Further, producing only the copy of the email dated 10.08.2018 without placing the relevant communications in context [which have been placed on record by the Corporate Debtor as **Exhibit ‘E’** [pp.205-206 of the Reply] and **Exhibit ‘F’** [pp.207-211 of the Reply] reveals the *mala fide* intent of the Operational Creditor.
28. Once we read the reply of the Corporate Debtor, the position is much clearer. There is a trinity of entities which were dealing with the Corporate Debtor. All the three entities were being managed by the same set of individuals. There were *inter se* business transactions between the triad of entities controlled by the same set of individuals and the Corporate Debtor. There was a fallout

between the partners of the Operational Creditor, and the remaining partner decided to use this position to advantage by issuing a Demand Notice to the Corporate Debtor even though he was fully aware of the assurances given by the other partner of the Operational Creditor to the Corporate Debtor in regard to set off/adjustment of accounts between the three entities on the one hand and the Corporate Debtor on the other.

29. The Learned Counsel for the Operational Creditor fairly admitted during the hearings that there was material change in the second Demand Notice which cannot strictly be termed “correcting typographical errors.”
30. In this view of the matter, admitting the petition against the Corporate Debtor would cause grave prejudice to it. It may be prudent to leave the parties to work out their remedies under other laws before a civil court, rather than decide the issue under summary proceedings which the IBC contemplates. Admitting the petition in such circumstances would amount to gross misuse of the IBC and abuse of process of law.
31. For the reasons stated above, the application fails and therefore, the same is rejected.
32. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced

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on grounds only of dismissal of the present petition by this Adjudicating Authority.

33. Let a copy of this order be communicated to the parties in terms of the provisions of section 9(5)(ii) of the IBC.

Sd/-
RAVIKUMAR DURAISAMY
Member (Technical)
01.01.2020

Sd/-
RAJASEKHAR V.K.
Member (Judicial)