

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.776 of 2020

[Arising out of Order dated 28.02.2020 passed by National Company Law Tribunal, Ahmedabad Bench, Ahmedabad Court 2 in C.P. (I.B) No.518/NCLT/AHM/2019]

IN THE MATTER OF:

Before NCLT

Before NCLAT

M/s. Mateshwari Minerals
Proprietorship Firm,
Through Mr. Piyush Bangar,
Sole Proprietor,
88-Main Sector,
Shastri Nagar,
Bhilwara – 311001
(Rajasthan)

Petitioner/
Operational Creditor

Appellant

Versus

Jet Granito Private Limited
Survey No.119/P-1,
8-A, National Highway,
Matel Char Rasta, Dhuva,
Tal. Wankaner,
Dhuva – 363622
(Gujarat)

Respondent/
Corporate Debtor

Respondent

For Appellant:

Shri Puneet Jain, Advocate

For Respondent:

Ms. Shaili Shah, Advocate

ORDER
(Virtual Mode)

24.02.2021 This Appeal has been filed by the Appellant claiming to be a proprietorship firm. After having the Impugned Order before him, Mr. Piyush Bangar should have filed this Appeal in his own name and then

shown that the Appellant is proprietor of M/s. Mateshwari Minerals. However, we are not standing on such technicality.

2. The Appeal has been filed against the Impugned Order dated 28th February, 2020 passed in C.P. (I.B) No.518/NCLT/AHM/2019 by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad Court – II). By the said Impugned Order, the Adjudicating Authority dismissed the Application filed by the Appellant under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC - in short) on the sole technical ground that the Application filed was in the name of M/s. Mateshwari Minerals, a Proprietorship and as it was filed in the name of M/s. Mateshwari Minerals, the Adjudicating Authority held that it was not a legal entity and thus held that the Application was not maintainable and bad in law.

3. We have heard Counsel for both sides and seen the Appeal and Reply filed.

4. The findings recorded by the Adjudicating Authority read as under:-

Findings

8. **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 the 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.

9. On perusal of the records it is found that the instant application is filed by/in the name of **M/s. Mateshwari Minerals** as operational creditor. Even in part 1 of form 5 name of operational creditor is shown/written as M/s. Mateshwari Minerals, proprietorship firm.
10. In this regard it is pertinent to refer some of the important decisions which are as under:

In Miraj Advertising Corporation vs. 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 it to be instituted in the name of proprietor”

11. 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.
12. 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**

13. 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. Mateshwari Minerals**, 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.
14. 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.
15. Apart from the above, the respondent has also raised some objections with regard to the amount of debt relating to one invoice dated 31.2.2016 for Rs.5,63,213/-.
16. 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.
17. 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.”

5. The learned Counsel for the Appellant is submitting that the definition of a “person” in Section 3(23) of IBC is inclusive definition and thus the Adjudicating Authority should not have held that the Appellant is not included in the definition.

6. Counsel referred to the Application (Annexure - B – Page 32) to submit that the same was filed by the Appellant in his own name as Mr. Piyush Bangar, sole proprietor of M/s. Mateshwari Minerals. He, however, showed name of the firm “M/s. Mateshwari Minerals Proprietorship Firm” as the name of Operational Creditor in the column of Part – 1 of the Format. The learned Counsel for the Appellant states that thus it should not have been held that there is defect in filing. The Appellant then relies on Judgement of this Tribunal in the matter of **“Neeta Saha, Member of Suspended Board of Palm Developers Pvt. Ltd. Vs Mr. Ram Niwas Gupta (Proprietor of Ram Niwas Gupta & sons) & Anr.”** in Company Appeal(AT) (Insolvency) No. 321 of 2020 (Annexure E Page 68) to state that in that matter also, when the Operational Creditor had filed the Application in the name of proprietorship, objections were raised and the Adjudicating Authority in that matter had allowed amendment to the Application and this Court had, inter alia, noticed Section 2(f) of IBC and upheld the Orders of the Adjudicating Authority allowing amendment or curing of defect.

7. Reliance is also placed on Judgement in the matter of **“Bhagwati Vanaspati Traders Versus Senior Superintendent of Post Offices, Meerut”** reported as (2015) 1 SCC 617 to submit that in that matter, when

Post Office had issued NSC (National Savings Certificate) in the name of the proprietorship concern but at the time of maturity, Post Office raised objection that the certificate could not be realized as it was not in the name of a legally recognised person, the Hon'ble Supreme Court had observed:-

“We find merit in the second contention advanced at the hands of the learned counsel for the appellant. It is indeed true, that the NSC was purchased in the name of M/s. Bhagwati Vanaspati Traders. It is also equally true, that M/s. Bhagwati Vanaspati Traders is a sole proprietorship concern of B.K. Garg, and as such, the irregularity committed while issuing the NSC in the name of M/s. Bhagwati Vanaspati Traders, could have easily been corrected by substituting the name of M/s. Bhagwati Vanaspati Traders with that of B.K. Garg. For, in a sole proprietorship concern an individual uses a fictional trade name, in place of his own name. The rigidity adopted by the authorities is clearly understandable.”

Further reliance is placed on Judgement in the matter of **“Doshi Brothers vs. State of Mah.”** reported as 2020 (1) Maharashtra Law Journal where also the Hon'ble High Court of Bombay has held (in para – 36) that such defect is curable.

8. The Counsel relied on Section 9(5) (Proviso) of IBC to state that the Adjudicating Authority should not have rejected the Application and if it was of the opinion that there is a defect, the Appellant should have been allowed to cure the same.

9. The learned Counsel for the Respondent argued that she is not objecting to the maintainability on the issue of description of the Applicant

before the Adjudicating Authority. She, however, tried to make submissions with regard to the merits of the Application under Section 9.

10. Although the Adjudicating Authority in para – 15 (as reproduced above) referred to part of dispute raised by the Respondent, the Adjudicating Authority has not dealt with or decided the same. As such, in the Appeal, we are not going into the merits of the Application under Section 9 of IBC.

11. As regards the question of maintainability of the Application in the name of proprietorship firm, we had already noticed Section 2(f) of IBC in Judgement in the matter of “Neeta Saha” (supra) where the Section provides that the provisions of this Code shall apply to:-

“(f) partnership firms and proprietorship firm; and”.

However, without entering into legal issue if such Trade Name is “person”, we find that it was a curable defect. The learned Counsel for Appellant has rightly relied on the Judgement in the matter of “Neeta Saha” (supra). The Adjudicating Authority should have given opportunity to the Appellant to appropriately amend the Application in part – 1 of the Format where name of the Operational Creditor is shown. Mr. Piyush Bangar can show his name and suffix that he is sole proprietor of M/s. Mateshwari Minerals.

12. For reasons mentioned above, the Appeal is allowed. The Impugned Order is quashed and set aside. The matter is remitted back to the Adjudicating Authority. The Adjudicating Authority will give opportunity to

the Appellant to correct the description of the name of the Operational Creditor in the Format (Annexure - B – Page 32). Then the Adjudicating Authority should decide the Application hearing both sides, whether or not the same deserves to be admitted.

13. The Appeal is disposed accordingly. No orders as to costs.

14. The parties should appear before the Adjudicating Authority on 10th March, 2021.

[Justice A.I.S. Cheema]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

rs/md