(2020) 02 NCLT CK 0124

In the National Company Law Appellate Tribunal

Case No : (IB) No. 1198/(ND) Of 2019

B.P. Agency — APPELLANT

Vs

Brightsun Technocraft Pvt. Ltd — RESPONDENT

Date of Decision : 07-02-2020

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 8, 9, 9(3)(b), 13(2), 14, 14(1), 15, 17, 18, 19, 20

Citation : (2020) 02 NCLT CK 0124

Hon'ble Judges : Ch. Mohd. Sharief Tariq, J;Saroj Rajware, Member (Technical)

Bench : Division Bench

Advocate : Ankit Anandraj Shah, Chandan Goswami

Judgement

Ld. Counsels for both the sides are present.

1. Under consideration is an Application IB-1198/(ND)/2019, that has been filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC) with the prayers to initiate the CIR Process (CIRP) against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional.

2. The Counsel for the Applicant has submitted that the Applicant has supplied material in connection with paper boards and specialty paper to the Corporate Debtor vide invoices dated 31.5.2017,31.8.2017, 22.9.2017, 10.10.2017 and 10.11.2017. The delivery challans are also placed on record. As per the supply of material, a demand has been raised by the Operational Creditor for an amount of Rs. 14,90,683/- along with interest @ 24% per annum with effect from 01.12.2017 to 30.01.2019. The ledger account with effect from 01.04.2017 to 31.03.2018 as maintained by the Operational Creditor on behalf of Corporate Debtor is placed on record, as per which the closing balance is Rs. 14,90,683/-.

3. The Ld. Counsel for the Applicant has referred to the demand notice dated 15.02.2019 to which reply has been given by the Corporate Debtor on 01.03.2018 denying the claim of the Operational Creditor.

4. The Counsel for the Operational Creditor has referred to the communication dated 4.7.2016 which is placed on record by the Corporate Debtor, wherein reference is made about the invoices dated 10.06.2016 and 19.06.2016. It is recorded in the said communication that the material supplied under those invoices was found wet/damaged to the extent of Rs.8,47,886/-, it is also claimed that the Operational Creditor was required to give 5.5% cash discount on the purchase value which has not been paid to the Corporate Debtor. In concluding lines of the said communication, a request was made to the Operational Creditor to take back the wet/damaged material and to reconcile the books of account with the Corporate Debtor and to issue pending credit notes. The Counsel for the Operational Creditor has referred to the invoice dated 10.06.2016 which reflects the name of sender and buyer. The address of the buyer (CD) is noted as 175/ F. I. E. Patparganj, Industrial Area, New Delhi-110092 and the PAN No. AADCB5517D. The Counsel for Operational Creditor has also referred to invoice dated 19.6.2016 wherein the same address of the buyer (CD) is noted. Thereafter, the Counsel for operational creditor drew our attention to the communication dated 4.7.2016, wherein the address of the buyer (CD) is shown as G-82, Surajpur Industrial Area, Side-5, Kasna, Greater Noida, U.P. He has submitted that the buyer's address shown in the invoices is not matching with the address that is mentioned in the correspondence/ communication dated 4.7.2016, the address of the buyer (CD) shown in the said communication never existed, and no material was supplied by the operational creditor at the said address. The Counsel for operational creditor has also referred to the document placed at page 35 of the typed set filed with the rejoinder, which is the Registration Certificate of the godown mentioned in the communication dated 4.7.2016. The certificate was issued by Commercial Taxes Department, U.P., on 18.7.2016, which is subsequent to the date of said communication dated 4.7.2016. The godown situated at G-82, Surajpur Industrial Area Site-V, Kasna Gautam Budh Nagar, Greater Noida, U.P., has been established after the Registration that took place on 18.07.2016, whereas the material was supplied earlier and the invoice were raised on 10.06.2016 and 19.06.2016. Therefore, as per the submissions of the Counsel for the Operational Creditor, there is no question of supply of material at G-82, Surajpur Industrial Area Site-V, Kasna Gautam Budh Nagar, Greater Noida, U.P., which is mentioned in the communication dated 4.7.2016 sent by the Corporate debtor. The Counsel for the Operational Creditor has referred to Form-C, which is placed at pages 33-34 of the typed set filed with the rejoinder, wherein the invoices dated 10.6.2016 and 19.6.2016 are mentioned. Form-C has been provided by the Corporate Debtor to the Operational Creditor on 26.09.2017, [which is subsequent to the date of said communication dated 4.7.2016] by the time no objection has been raised about the purported wet/damaged material. The Counsel for the Operational Creditor has referred to the Ledger Statement that has been filed by the Corporate Debtor being maintained on behalf of the Operational Creditor, which reflects that discount has been paid. The Counsel for the Operational Creditor has alleged that the communication dated 4.7.2017 is

forged one and was never sent to the Operational Creditor. Further, as per the submissions of the counsel for the operational creditor the copy of the said communication has been placed on record by the Corporate Debtor to wriggle out of the meshes of the provisions of the IBC 2016.

5. During the course of hearing it has been noticed by this authority that there is was no compliance of the provisions of Section 9(3) (b) of the IBC, 2016. The Operational Creditor was given notice on 13.1.2020 to make compliance of the said provisions within 7 days, which has been made by filing an affidavit. It is deposed in the affidavit that there is no dispute in relation to the unpaid operational debt and no notice has been received by the Operational Creditor from the Corporate Debtor prior to the notice issued under Section 8 of the IBC, 2016.

6. The Corporate Debtor has filed the Reply attaching the ledger account of the Operational Creditor maintained by the Corporate Debtor with effect from 1.4.2018 to 31.3.2019, which contains three entries as below:

Date

Particulars

Vch Type

Vch No. Excise inv No.

Debit

Credit

Balance

01.04.2018

Cr Opening balance

14,90,583.00

05.04.2018

Cr Purchase Discount A/c

Journal

3

6,42,697.00

8,47,886.(Cr

Cr Wet/Damage Compensation

Journal

4

8,47,886.00

14,90,583.00

14,90,583.00

7. As can be seen from the Ledger Statement, the Corporate Debtor had deducted Rs.6,42,697/- out of the balance of Rs.14,90,583/- on account of 5.5% cash discount on the purchase value and Rs.8,47,886/- on account of wet/ damaged compensation. In other words, as per the submissions of the Counsel for the Corporate Debtor, the amount claimed by the Operational Creditor stands adjusted and settled as shown in the Ledger Account. The Counsel for the Corporate Debtor has submitted that there was an oral agreement for payment of discount on the value of the purchase orders and the Operational Creditor used to pay the discount i.e., sometimes it was less than 5.5% of the value of the purchase order or more than the said percentage. This bench has suggested to the Counsel for the Corporate Debtor that the Operational Creditor might have been paying the Cash discount to the Corporate Debtor on his own volition to promote business relations. However, the Counsel for the Corporate Debtor submitted that the cash discount was paid as a matter of practice, which was stopped midway since May 2017. It is further clarified by the counsel for the Corporate Debtor that in relation to the wet/damaged material, a verbal call was made to the Operational Creditor, but no written communication was made either through e-mail or Postal Department. This Bench has raised query to the Counsel for the Corporate Debtor, as to whether for the wet/damaged material, any debit note was sent to the Operational Creditor. The Counsel for Corporate Debtor submitted that no debit note was raised but there was a verbal arrangement.

8. It is further clarified by the Counsel for the Corporate Debtor that during the course of business, as a matter of practice, any other communication apart from dated 04.07.2016 has not been made between the parties through hand delivery. The Counsel for the Corporate Debtor further submitted that Ledger Accounts filed by the Operational Creditor is forged and false, as the entries as on 1.10.2017 and again on 1.10.2017 are at variance. But, the Corporate Debtor has not pleaded in its reply anything about the Ledger Account maintained by the Operational Creditor on behalf of the Corporate Debtor. Therefore, no improvement can be permitted to be made by the Counsel for the Corporate Debtor at the time of final submissions.

9. The Counsel for the Corporate Debtor has raised the issue that the firm is not a legal entity and cannot file the Petition under Section 9 of the IBC, 2016. However, the authorization letter dated 20.04.2019 indicates that the proprietor of the Operational Creditor, Mr. Parasmal Salechha has authorized Mr. Manish Jain to sign, file and perform all necessary/ required actions for the purpose of filing case against the CD viz., Brightsun Technocraft Pvt. Ltd and authorized to engage Counsel. Further, the Application filed under Section 9 has been signed and verified by the Authorized Signatory viz., Mr. Manish Jain. Therefore, the

objection of the Corporate Debtor is merely of a technical nature, and the same is overruled.

10. From the pleadings of the parties the only question that arises is as to whether there exists pre-existing dispute between the parties? The Claim of the Corporate Debtor is that the Operational Creditor did not pay Rs.8,47,886/-, on account of 5.5% cash discount on the purchase value, as was agreed verbally, so the same has been adjusted from the balance amount of the Operational Creditor. However, there is no agreement between the Operational Creditor and the Corporate Debtor for payment of 5.5% cash discount on the purchase value. The Operational Creditor has paid some cash discount on the purchase value, which might have been done to promote the business relations with the Corporate Debtor. But without any agreement to that effect, the Corporate Debtor as a matter of right cannot claim the cash discount on the purchase value. Therefore, the contention of the Corporate Debtor that it is entitled to 5.5% of cash discount on purchase value is liable to be rejected.

11. The second issue is as to whether the Corporate Debtor is legally entitled to adjust wet/damage compensation out of the balance amount of the operational creditor? There is no evidence that any material was supplied by the operational creditor to the CD at G-82, Surajpur Industrial Area Site-V, Kasna Gautam Budh Nagar Greater Noida, U.P., which is mentioned in the communication dated 4.7.2016 [claimed to be delivered by hand]. The Registration Certificate of the said godown was issued by Commercial Taxes Department, U.P., on 18.7.2016. Whereas, the material was supplied prior in time and the invoice were raised on 10.06.2016 and 19.6.2016. The communication dated 4.7.2016 does not bear any date on which that was received by the Operational Creditor and by whom. Moreover, Form- 'C was issued by the CD on 26.09.2017, which is subsequent to the date of the disputed communication dated 4.7.2016. Further, no debit note has been raised by the Corporate Debtor in relation to the wet/damaged material and there is no evidence that any material was returned to the operational creditor. It goes to demonstrate that the Corporate Debtor for his convenience has created the defence which is spurious and the same stands rejected. Therefore, there does not appear any genuine pre-existing dispute as claimed by the corporate debtor. Accordingly the question raised is decided in favour of Operational Creditor and against the Corporate Debtor.

12. The Operational Creditor has fulfilled all requirements of law. Therefore, Application is admitted and the commencement of the CIRP is initiated, which shall ordinarily be completed within 180 days, reckoning from the day this order is passed.

13. The Moratorium is declared which shall have effect from the date of this Order till the completion of CIRP, for the purposes referred to in Section 14 of the IBC, 2016. It is ordered to prohibit all of the following, namely: -

(a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

14. The supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.

15. The Operational Creditor has not proposed the name of any Resolution Professional for appointment as Interim Resolution Professional ('IRP'). Therefore, Mr. K Subhra Narayan Mohapatra, whose name appears in the latest list of Insolvency Professionals provided by the IBBI, is hereby appointed as IRP. There does not appear that any disciplinary proceedings are pending against the IRP. The IRP is directed to file the declaration as prescribed in the Registry on receiving the copy of this order and take charge of the Corporate Debtor's, management immediately. He is directed to cause public announcement as prescribed under Section 15 of the IBC, 2016 within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed.

16. The IRP shall comply with the provisions of Sections 13(2), 15, 17 & 18 of IBC, 2016. The Directors of the Corporate Debtor, its Promoters or any person associated with the Management of the Corporate Debtor are/is directed to extend all assistance and cooperation to the IRP as stipulated under Section 19, so that he could discharge his functions under Section 20 of the IBC, 2016.

17. The Operational Creditor and the Registry are directed to send the copy of this Order to IRP, so that he could take charge of the CD's assets etc., and make compliance with this Order as per the provisions of IBC, 2016. The details of IRP are as under:

Name: Mr. K Subhra Narayan Mohapatra

Registration number: IBBI/IPA-002/IP-N00618/2018-2019/11981

E-mail: ksnm72@hotmail.com

Mobile No.: 9818118304

18. The Registry is directed to communicate this Order to the Operational

Creditor, Corporate Debtor with immediate effect.

19. The order is pronounced in the open court.

