

(2023) 03 NCLT CK 0059

In the National Company Law Tribunal

Case No : C.P. (IB) No. 765/IBC/MB/2020

Carestream Health India Private Limited Vs Seaview Mercantile LLP ?

Date of Decision : 24-03-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(21), 5(8), 5(21), 8, 9
Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 — Rule 6

Citation : (2023) 03 NCLT CK 0059

Hon'ble Judges : Kuldip Kumar Kareer, Member (J); Anuradha Sanjay Bhatia, Member (T)

Bench : Division Bench

Advocate : Prapti Kedia, Abhishek Tilak, Sean Wassoodew, Rupesh Mandhare, Tanmay Karmarkar, Vineet Sawant

Final Decision : Dismissed

Judgement

Anuradha Sanjay Bhatia, Member (Technical)

1. This Company Petition is filed by Carestream Health India Private Limited (hereinafter called "Petitioner"), a private limited company incorporated under the Companies Act, 1956 seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Seaview Mercantile LLP (hereinafter called "Corporate Debtor"), a limited liability partnership incorporated under the Limited Liability Partnership Act, 2008. This Petition has been filed by invoking the provisions of Section 9 Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. In the requisite Form-5, under the head "Particulars of Operational Debt", the amount claimed to be in default is Rs. 29,31,193/-. inclusive of interest @18% p.a. The date of default is stated to be 28th February, 2020.

3. The Petition reveals that the Petitioner is a company engaged in the business of trading in medical equipment. The Corporate Debtor is engaged in the business of dealing in property. The Petitioner entered into a 'without Prejudice'

letter of intent on 7th May, 2019 with the Corporate Debtor, in relation to a commercial premises bearing Unit No. 702 in the building Silver Metropolis, for licensing, on terms set forth therein. The Petitioner paid an advance security deposit for the sum of Rs. 25,68,280/- to the Corporate Debtor on 7th May, 2019, vide the 'without Prejudice' Letter of Intent (hereinafter referred as "LoI").

4. Thereafter, the Original LoI was mutually replaced with a "revised" 'Without Prejudice' letter of Intent, wherein the Premises Usage requirement and procurement of corollary certificate were deleted. The Petitioner, vide an Email, dated 4th June 2019, decided to cancel the Revised LoI, as the Petitioner was unable to fulfil the conditions stipulated under the Maharashtra IT/ITES Policy. Thus, the Corporate Debtor was called upon to return the Advance Security Deposit paid to him on 7th May, 2019. However, the Corporate Debtor neglected to return the Advance Security Deposit paid by the Petitioner.

5. Thus, the Petitioner issued Notice dated 14th November 2019 to the Corporate Debtor, calling upon the Corporate Debtor to refund the Advance Security Deposit, along with 18% interest p.a., compounded at monthly interest, until payment/ realization. In response to the notice, the Corporate Debtor issued a reply, dated 3rd December, 2019, to the Petitioner asserting that the demand notice was untenable and it raises a frivolous demand upon them.

6. Since the Corporate Debtor was unable to clear the pending dues, the Petitioner issued a Demand Notice dated 10th February, 2020 u/s. 8 of the Code, to the Corporate Debtor calling upon the Corporate Debtor to return the unpaid operational debt i.e. Security Deposit of Rs. 29,05,528/- which is inclusive of 18% p.a. interest, with effect from the date of cancellation of the letter of intent i.e. 4th June, 2019. In response to the Demand Notice, the Corporate Debtor issued a reply dated 17th February, 2020 wherein they refused to return the Advance Security Deposit. Hence, this Petition.

Reply of the Corporate Debtor:

7. The Corporate Debtor in the reply denied each and every averment, statement and allegation and contention made by the Petitioner.

8. The Corporate Debtor submits that the present petition is not maintainable as the claim made by the Petitioner does not fall under the definition of "operational debt" under Section 5(21) of the Code.

9. Further, the claim made by the Petitioner is not in respect of provision of goods or services or employment, but it is for refund of a security deposit paid by the Petitioner under a Letter of Intent in anticipation of execution of Leave and Licence agreement.

10. The Corporate Debtor further submits that the Original LoI was mutually replaced with a Revised LoI which was also dated 7th May, 2019 but transmitted by realty brokers Cushman and Wakefield on 21st May, 2019. Further, in view of the fact that LoI 's bear the same date, it was for the Petitioner to satisfactorily

explain why two different documents bearing the same date were executed. Also, it was for the Petitioner to satisfactorily explain how the Revised LoI allegedly transmitted on 21st May, 2019 could be dated 7th May, 2019. The Petitioner has miserably failed to explain how a Security Deposit could be paid on 7th May 2019 and the possession of the Unit handed over pursuant to Revised LoI which came into existence only on 21st May, 2019.

11. The Corporate Debtor further submits that as per the LoI, the Petitioner was entitled to terminate the LoI, only if the Petitioner finds a defect in the title relating to the proposed licensed premises, within a period of 30 working days, from the date of signing of the LoI and only in such event, the security deposit was to be refunded without interest. However, it is further provided that in case the Petitioner chose not to enter into the leave and license agreement for any reason, the Corporate Debtor had a right to forfeit the security deposit paid under the LoI.

12. The Corporate Debtor further submits that the LoI annexed to the Petition makes no reference to interest payable on return of the security deposit. Thus, the Petitioner is not entitled to any interest thereon.

13. The Corporate Debtor further submits that there is a pre-existing dispute between the parties and the Corporate Debtor's reply to the Demand Notice dated 17th February, 2020 raises the dispute between the parties and thus, the present petition is not maintainable and liable to be dismissed.

Findings:

14. Heard the Counsel appearing for the Petitioner and the Counsel for the Corporate Debtor and perused the material available on record.

15. The Petitioner on 7th May, 2019 entered into a 'without prejudice' Letter of Intent with the Corporate Debtor, in relation to commercial premises, for licensing, on terms set forth therein. The Petitioner paid an Advance Security Deposit of Rs. 25,68,280/- to the Corporate Debtor vide 'Without Prejudice' marking. Thereafter, the Original LoI was mutually replaced with a revised "Without Prejudice" Letter of Intent, thereby deleting the Premises Usage requirement and procurement of corollary certificate.

16. Clause 6 of the LoI relates to "Premises Usage" viz. for ITeS use. As per Clause 25, there is a provision for DOI Certificate to be obtained by the Licensee. The property being situated in a building where only IT/ITeS related work could be carried on, the onus was on the Petitioner to obtain the DOI Certificate to obtain the DOI Certificate for ITeS purpose. Since the criterion of annual turnover from IT/ ITES activities exceeding 75% of the annual turnover of the Petitioner could not be fulfilled, the certification under the Maharashtra IT/ ITES framework proved incapable of grant to the Petitioner despite evaluation and pursuit with Directorate of Industries, Government of Maharashtra. Thus, the Petitioner, vide Email dated 4th June 2019, decided to unilaterally cancel the LoI dated 7th May,

2019/ Revised LoI dated 21st May, 2019.

17. In the light of the above pleadings, the core issue that falls for consideration in the above Company Petition is :-

- Whether the Petitioner qualifies as an "Operational Creditor" and
- whether the Advance Security Deposit amount claimed by the "Operational Creditor" qualifies as an "Operational Debt" within the meaning of the Code.

18. In order to decide the above issue, it is important to extract the definitions of "Operational Creditor" and "Operational Debt" as defined under Clause 20 and 21 of Section 5 which reads as under:-

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority."

19. It is an admitted fact that in this case that the "Operational Creditor" is a Licensee who has not supplied any goods nor services to the Corporate Debtor. Also, the "Operational Creditor" is not a Central Government any State Government or any local authority as envisaged in Clause 21 of Section 5 of the IBC. Similarly, the amount claimed by the "Operational Creditor" is the "Advance Security Deposit" payable by the Corporate Debtor to the "Operational Creditor".

20. Therefore, from the above referred facts and from the plain reading of the definitions, this Bench feels that the claim of the "Operational Creditor" does not qualify as an "Operational Debt" and the "Operational Creditor" also does not qualify under the definition of "Operational Creditor" within the meaning of the Code and the above Company Petition is liable to be dismissed on the ground of maintainability. Thus, the amount claimed in the Petition Rs. 29,31,193/- does not qualify as an "Operational Debt" under Section 5 (8) of the Code and is not default under Section 3 (12) of the Code.

21. Accordingly, CP (IB) 765 of 2020 is dismissed with no cost. However, the above order does not preclude the Operational Creditor from recovering the same before an appropriate forum of course subject to limitation.