(2020) 02 NCLT CK 0089

In the National Company Law Appellate Tribunal, Pricipal Bench, New Delhi

Case No : (IB) No. 705/ND Of 2019

Deepa Sati APPELLANT

Vs

Karan Motors Pvt. Ltd RESPONDENT

Date of Decision : 18-02-2020

Acts Referred:

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 6

Insolvency And Bankruptcy Code, 2016 — Section 3(6), 3(8), 3(11), 5(8), 5(8)(a), 5(8)(b), 5(8)(c), 5(8)(d), 5(8)(e), 5(8)(f), 5(8)(g), 5(8)(h), 5(8)(i), 5(21), 7, 9

Citation : (2020) 02 NCLT CK 0089

Hon'ble Judges : Abni Ranjan Kumar Sinha, J;Kapal Kumar Vohra, Member (Technical)

Bench : Division Bench

Advocate : S.V. Rateria, Chandra Prabha, C.S. Gupta, Anand Shukla

Final Decision : Dismissed

Judgement

Abni Ranjan Kumar Sinha, J

1. The present petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 ("Code") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 by the Petitioner/Operational Creditor, i.e. "Deepa Sati" for initiation of Corporate Insolvency Resolution Process against the Respondent/Corporate Debtor Company "M/S. Karan Motors Private Limited".

2. The OC was employed as Executive-Design as per appointment letter dated 01.08.201 1. The OC was punctual, hardworking and always gave his best since the day of joining. There was not a single incident where CD had directed the OC for want of his performance.

3. The CD started keeping the salary of the OC for the reason best known to CD. This keeping of salary started from a delay in the payment by one week and

gradually increasing it to month's altogether.

4. The OC requested the CD to clear the payment outstanding salary but the CD assured the OC that the same will be cleared very soon, but instead of clearing the outstanding salary, the CD chose to withhold the salary and went on withholding the same up to 5 months starting May 2014 to September 2014. The OC started going through extreme financial hardship and requested the CD in the month of October 2014 to clear the outstanding salary as she was left no money.

5. The CD then started paying the salary from October, 2014, but in the year 2017 the CD again adopted the same strategy and withheld the salary for the period of April 2017 to September 2017. Due to non-payment of salary, OC started facing financial hardship and therefore, stopped going to CD Company since end of September 2017 and finally tendered his resignation on 22.10.2017.

6. The last salary of the OC was Rs. 25,082/- pm. Demand was also sent by OC through his counsel on 14.02.2019 which has been duly served to them on 25.02.2019, however no payment has been received till date.

7. The total outstanding as overdue salary amount is Rs. 3,24,540/- plus interest @18% P.A. from 14.02.2019 till the realisation of outstanding amount is Rs. 1,87,711/-.

XL The CD in its reply to the Application has stated almost same facts as stated by him in the Reply to the application by Ms. Shally Sati [IB-702/ND/2019] except the following contention. Therefore, we would like to mention only new facts in the reply:

a. Petitioner was appointed on the representation made by her father Mr. Hansa Dutt Sati who was in-charge of production in the foundry. Petitioner's father falsely represented that the Petitioner was qualified and competent to work as a designer and by using his influence and possession got the Petitioner appointed at a salary and possession which is Petitioner never deserved. Due to Petitioner's father indulging in the activities deliberately and intentionally caused losses suffered by CD with respect quality and loss of business of several lacs decides loss of repetition in international market which is entirely on account of the petitioner.

XII. We have already discussed the facts of the cases of each application separately in the aforementioned paras and also discussed the reply filed by the Corporate Debtor against each of the Petitioners/Operational Creditors, we find that the grounds taken by all the Petitioners are common. Similarly, the defence taken by the Corporate Debtor is common in all the applications. Therefore, for the sake of convenience, we would like to dispose off all these cases together by this common order.

XIII. We have heard the Ld. Counsel appeared on behalf of the Operational Creditors/Petitioners as well as Corporate Debtor/Respondent. Ld. Counsel for Corporate Debtor/Respondent, in course of arguments, submitted that pursuant to order dated 08.11.2019, the Corporate Debtor/Respondent had already deposited the cheques of the admitted principal amount before the Registrar, NCLT, New Delhi. He further submitted that so far the claim of the interest is concerned, the Operational Creditors have claimed interest at the rate of 18% and the same is not the agreed rate of interest and the interest does not come under the definition of Operational Debt. He further submitted that since the principal amount has already been deposited by the Corporate Debtor/ Respondent, therefore, applications filed by the Operational Creditors are not liable to be accepted.

XIV. On the contrary, Ld. Counsel for Operational Creditors/Petitioners admitted this fact that the Corporate Debtor/Respondent has deposited the cheques dated 15.11.2019 of Rs. 1,37,837 in favour of Ms. Shally Sati, Rs. 3,81,222/- in favour of Mr. Hansa Dutt Sati, Rs. 4,02,166 in favour of Mr. Ranjeet Singh, Rs. 1,65,880/- in favour of Ms. Asha Devi and Rs. 1,45,276/- in favour of Ms. Deepa Sati before the Registrar, NCLT, New Delhi but they have also claimed the interest at the rate of 18% which they are entitled to get from the Corporate Debtor/ Respondent and therefore, the present applications is filed by the Operational Creditors/Petitioners is maintainable under Section 9 of the Code.

XV. Therefore, since, the admitted principal amount has already been deposited by the Corporate Debtor/Respondent in pursuance to the earlier order dated 08.11.2019 before the Registrar, NCLT, New Delhi and that is also admitted by the Ld. Counsel for Operational Creditors/Petitioners and they only claimed interest at the rate of 18%. In the of the submissions raised on behalf of the parties on that ground, we would like to consider this aspect whether the jurisdiction of Section 9 of the Code can be invoked to recover the amount of interest or not?

At this juncture, we would like to refer the definition of "Debt" and the same is quoted below:-

"3. (11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

Mere plain reading of the provision shows that debt means a liability or obligation in respect of a claim which is due from any person and includes a Financial Debt or Operational Debt.

XVI. At this juncture, we would like to refer the definition of "Claim" Section 3(8) of the Code and the same is quoted below:-

"3.(6) "claim" means--

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"

Mere plain reading of the provisions which shows that a claim is a right to payment and either it is based on judgment and others that is mentioned in Section 3(6) (b) or right to remedy for breach of contract under any law for the time being in force.

XVII. At this juncture, we would also like to refer the definition of Financial Debt and Operational Debt Section 5(8) & Section 5(21) and the same are quoted below:-

5. (8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes--

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

5. (21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment 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;

Mere plain reading of the provision shows that there is a difference between the

Financial Debt and Operational Debt. Operational Debt means a claim in respect of the provisions of goods or services including employment or a debt in respect of the dues arising under any law for the time being in force and payable to the Central Government, or any State Government or any local authority whereas the Financial Debt means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes the other conditions mentioned at Section 5(8)(a to i).

XVIII. If we shall read the definitions of Financial Debt alongwith Operational Debt together then we find that in the definition of Financial Debt the interest is included whereas in the definition of Operational Debt, the word interest is not mentioned. Therefore, we may say that while claiming the Financial Debt the Petitioner may file an application under Section 7 of the Code and claim the interest alongwith the principal amount but while claiming the Operational Debt the Petitioner can file an application under Section 9 of the Code in which Petitioner can claim only the amount, which he is entitled to get for the supply of goods or rendering the services including employment or a debt in respect of the dues arising under any law.

XIX. If we shall read the definition of debt, claim, Financial Debt & Operational Debt together then we are of the considered view that while filing an application under Section 9, the Operational Creditor is required to claim the debt which comes under the definition of Operational Debt because the debt is defined under Section 3(11) of the Code includes both Financial Debt and Operational Debt and two different remedies are available under the Code and one is under Section 7 and other under Section 9 of the Code, which an applicant can exercise to recover the debt is referred under Section 3(11) of the Code.

XX. At this juncture, we would also like to refer the decisions of the Hon'ble NCLAT given in "Krishna Enterprises Vs. Gammon India Pvt." in para 4 held that "it is submitted that the 'debt' includes the interest, but such submissions cannot be accepted in deciding all claims. If in terms of any agreement interest is payable to the Operational or Financial Creditor then the debt will include interest, otherwise, the principal amount is to be treated as the debt which is the liability in respect of the claim, which can be made from the Corporate Debtor.

XXI. In the present applications, as we find that the principal amount has already been paid and as per the agreement no interest is payable, the applications under Section 9 on the basis of claims for entitlement of interest, are not maintainable. If for delayed payment applicant(s) claim any interest, it will be open to them to move before a court of competent jurisdiction for recovery of interest, but initiation of Corporate Insolvency Resolution Process is not the answer.

XXII. In the light of the decisions and aforementioned discussions, when we shall consider the claim of all the Petitioners then we find that the Petitioners filed an application under Section 9 of the Code and claimed themselves as the employees of the Corporate Debtor and in that capacity, they claimed salary and other dues and in course of hearing of the applications, the Corporate Debtor raised the facts that the some of the claims of the Petitioner is barred by limitation and claim which is not barred by limitation in respect of that claim the Corporate Debtor has already deposited the cheques dated 15.11.2019 Rs. 1,37,837 in favour of Ms. Shally Sati, Rs. 3,81,222/- in favour of Mr. Hansa Dutt Sati, Rs. 4,02,166 in favour of Mr. Ranjeet Singh, Rs. 1,65,880/- in favour of Ms. Asha Devi and Rs. 1,45,276/- in favour of Ms. Deepa Sati before the Registrar, NCLT, New Delhi. Therefore, it can be said that the admitted principal amount which the Petitioners claimed have already been paid by the Corporate Debtor.

XXIII. The only question during the course of arguments raised by the Ld. Counsel for Petitioners that they are also entitled to get the interest at the rate of 18 per cent. In view of the decision and discussions made in aforementioned paras, when we shall consider the claim of the Petitioners then we find that there is no document to show the agreed rate of interest and also there is no agreement regarding the payment of interest. In other words, there is no agreed rate of interest between the parties. Therefore, in view of aforesaid discussions, the' admitted principal amount is to be treated as the Operational Debt, which is the liability in respect of a claim which has already been deposited by the Corporate Debtor before the Registrar, NCLT, New Delhi. So far the interest claimed by the Operational Creditors is concerned, in view of aforesaid discussions it does not come under the definition of Operational Debt Therefore, we are unable to accept the contention of the Operational Creditors that the interest also comes under the definition of Operational Debt.

XXIV. For the reasons discussed above, we are of the considered view that since the admitted principal amount has already been paid by the Corporate Debtor, therefore there is no occurrence of default and no debt is due. Hence, all the present applications are not liable to be accepted. Accordingly, all the present applications- IB-702/ND/2019, IB-706/ND/2019, IB-703/ND/2019, IB-743/ND/2019 and IB-705/ND/2019 are hereby dismissed. However, we hereby permit all the Operational Creditors/Petitioners to get the cheques of admitted principal amount from the office of Registrar, NCLT, New Delhi where Corporate Debtor has deposited the same.