(2023) 03 NCLT CK 0067

In the National Company Law Tribunal

Case No : C.P.(IB)-3421(MB)/2019

Grauer and Weil (India) Limited Vs Cupro Tubes Enterprises Private Limited ?

Date of Decision : 24-03-2023

Acts Referred:
Insolvency and Bankruptcy Code, 2016 — Section 5(8), 7, 9
Negotiable Instrument Act, 1881 — Section 138, 141

Citation : (2023) 03 NCLT CK 0067

Hon'ble Judges : Kuldip Kumar Kareer, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Sahil Mahajan, PCA Sanat Jariwala

Final Decision : Dismissed

Judgement

Kuldip Kumar Kareer, Member Judicial

1. The Present Application is filed under section 7 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by Grauer and Weil (India) Limited (for brevity 'Financial Creditor') through its Authorised representative, Mr. Ajit Pandey, AGM (Legal), who has been duly authorised vide Board Resolution dated 16.05.2019 for initiating Insolvency Resolution Process (CIRP) against Cupro Tubes Enterprises Private Limited (for brevity 'Corporate Debtor') for default in repaying an amount of ☐ 15,17,011/-, as on 15.10.2018.

2. Looking at the Company Petition, it reveals that Nicomet Industries Limited (for brevity 'Nicomet') had placed two purchase orders (P.O. Nos. NICO/2018-19/305 and NICO/2018-19/306) dated 04.10.2018 for Nickel Sulphate Crystal with the Financial Creditor. During the routine course of business, the Financial creditor had time to time supplied the material and same was duly received by Nicomet without raising any dispute and objection. Meanwhile, Nicomat failed to pay an amount of Rs. 15,17,012/- towards the

Invoices raised by the Financial Creditor. Further, by email dated 06.02.2019, the Financial Creditor has informed to Nicomet that after adjustment of the material supplied by Nicomet, the balance outstanding of Rs. 15,17,012/- is payable by Nicomet to Financial Creditor. By email dated 06.03.2019, Nicomet requested time to clear the outstanding dues.

Further, the common Director of Nicomet and the Corporate Debtor, Mr. Atul Rajinder Agarwal submitted that since Nicomet is in financial difficulty, the Corporate debtor will pay the dues on behalf of Nicomet. In order to discharge the aforesaid liability, the Corporate Debtor herein had issued two (2) cheques (cheque no. 000890 and 000891) dated 25.04.2019 and 15.05.2019, amounting to Rs. 15,17,011/-. The said cheques were presented for encashment. However, the aforesaid cheques were dishonoured and returned to Financial Creditor by the Bank along with the memos with the remarks "Funds Insufficient". Therefore, the Financial Creditor has filed the proceedings (Criminal Complaint No. S/2819/2019) under section 138 r/w 141 of Negotiable Instrument Act, 1881 against the Corporate Debtor and its Directors, which is pending before the Metropolitan magistrate 43rd Court at Borivali. Simultaneously, the Financial Creditor has filed the present petition before this Tribunal.

3. In response to this, the corporate debtor has filed a detailed reply and has raised the objection that the present application is misconceived, mischievous and untenable in law and facts of the case. Further submitted that the application filed by the Financial Creditor is not maintainable and must be dismissed at the threshold, as the applicant is not even a creditor of the respondent company. In addition to this, the Respondent has raised the following preliminary defences:

i.) No money is disbursed by the applicant to the answering respondent.

ii.) No time value of money is receivable by the applicant from the answering respondent;

iii.) The alleged guarantee is not for any loan disbursed to any Company for time value of money;

iv.) No amount is shown as payable to the applicant in the books of accounts of the answering respondent;

v.) The applicant also is not showing any amount as recoverable in its books of accounts as goods were supplied to Nicomet Industries Ltd. and not to the answering respondent.

vi.) While reiterating that the answering respondent gave no guarantee as alleged, in other cases where guarantee is issued for securing the payment for goods and services supplied, only application under Section 9 of the Code is maintainable and not under Section 7 of the Code.

4. After hearing both the parties and on perusal of CP(IB)3421(MB)/2019 including other material on record, we are of the view that the applicant has

himself admitted that he had supplied material to Nicomet Industries Ltd., who is not the respondent to the present application. The said company owed an amount of Rs. 15,17,012/- to the applicant. The Respondent however offered two cheques aggregating to Rs.15,17,012/- to the applicant and the same were dishonoured. Accordingly, the applicant has initiated the criminal complaint/ proceedings under section 138 read with section 141 of the Negotiable Instruments Act, 1881. The Complaint filed under NI Act against the respondent can be maintainable. However, the application filed under section 7 of IBC, 2016 is not maintainable as the applicant has not disbursed any debt against the consideration for time value of money in terms of the definition of 'financial debt' under section 5(8) of the Code. Further, in the absence of financial debt, the applicant herein cannot claim to be a financial creditor, as the amount in default is recoverable from the third company. Moreover, after looking the nature of transaction between the Applicant and Nicomet Industries Ltd., we are of the considered view that the Applicant is not a financial creditor in respect of the Respondent and has no right to file an application under Section 7 of the IBC against the Corporate Debtor. For the aforestated reasons, we are of the opinion that the present petition deserves to be dismissed. Hence, the CP(IB)/3421/2019 is dismissed as not maintainable.

