

(2024) 02 NCLT CK 0012

In the National Company Law Tribunal

Case No : CP (IB) No. 4555/MB/2018

M/s. Shreerang Agencies Vs M/s Alpack Paper Packaging Pvt Ltd ?

Date of Decision : 07-02-2024

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(21), 8, 8(1), 9

Negotiable Instruments Act, 1881 — Section 138

Companies Act, 2013 — Section 433(e), 434, 439

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 — Rule 5(1)(a)

Citation : (2024) 02 NCLT CK 0012

Hon'ble Judges : K. R. Saji Kumar, Member (J); Sanjiv Dutt, Member (T)

Bench : Division Bench

Advocate : Arvind Antu Taral, Aditi Dave, Sakshi Chhabra

Final Decision : Dismissed

Judgement

K. R. Saji Kumar, Member (Judicial)]

1. Background

1.1. This Company Petition bearing C.P. (IB) No. 4555/MB/2018 (Application) was filed on 07.12.2018 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules) by M/s. Shreerang Agencies, the Operational Creditor (OC), for initiating Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Alpack Paper Packaging Private Limited, the Corporate Debtor (CD).

1.2. The total amount of default involved is Rs. 51,15,180/- (Fifty-One Lakhs Fifteen Thousand One Hundred Eighty Rupees) which is based on certain unpaid dues in respect of supply of goods. The date of default as mentioned in the Part IV of the Application is 01.04.2018. However, the OC contends that since the last payment was made on 08.05.2018, the continuous cause of action survives in the present Application.

1.3. The aforesaid Application was earlier dismissed vide order dated 07.09.2021 for non-prosecution but was later restored vide order dated 15.09.2023.

2. Contentions of OC

2.1. The OC submits that it is a registered partnership firm and is engaged in manufacturing and supplying of various packing and packaging materials as well as craft paper for industrial use while the CD is in the business of manufacturing boxes. Both the parties had business relationship with each other for couple of decades wherein the OC used to supply packaging material/craft paper to the CD for its business purposes.

2.2. It is submitted by the Ld. Counsel for the OC that, in the name of making payment, the CD issued following cheques which were drawn on Shamrao Vithal Co-Operative Bank Ltd, Mira Road Branch, Thane, to discharge its liabilities only upon persistent demand of the OC:

Sr. No.

Cheque No.

Date

Amount

1.

8963885

23.06.2013

1,00,000/-

2.

8963886

03.07.2013

1,00,000/-

3.

915019

08.07.2013

25,00,000/-

4.

128607

23.06.2013

2,25,000/-

However, all the above-mentioned cheques were dishonored on account of insufficient funds. Pursuant to the aforesaid cheques being dishonored, the OC sent the notice dated 23.08.2013 to the CD under Section 138 of the Negotiable Instruments Act, 1881 (NI Act). It called upon the CD to make payments of the said cheques failing which action under the NI Act would be initiated.

2.3. Pursuant to the notice dated 23.08.2013, the CD requested the OC not to take any action and gave assurance of discharging its liability towards the OC. The OC further submits that due to failure to make payments by the CD, it issued second legal notice dated 14.01.2016, for seeking payment of the amount of Rs. 56,20,180/- and also for initiating winding up proceedings under Section 433(e) and 434 r/w Section 439 of the Companies Act.

2.4. Subsequently, the OC issued demand notice on 11.04.2018 to the CD. In the reply dated 03.05.2018 to OC's demand notice, the CD refuted the OC's claims on ground of their claim limited to Rs. 10,94,399/- and out of which Rs. 5,05,000/- was paid by them and the remaining balance was only Rs. 5,89,399/-. Thereafter, the OC filed this Application on 07.12.2018 for initiating CIRP in respect of the CD.

3. Contentions of CD

3.1. Although the Ld. Counsel for the CD was present online when the matter was first called and passed over on 10.01.2024, later when it was taken up for detailed hearing, he remained absent. Hence, we considered all the pleadings of the CD in its reply for the purposes of this Order. The CD, in its reply dated 31.01.2020, submits that the CD had made part payment of Rs. 50,000/- on 02.05.2018 by way of demand draft No. 950644 and Rs. 50,000/- through NEFT bearing UTR No. INDBN23086431385 on 23.08.2018. However, the OC failed to encash the said demand draft.

3.2. The CD submitted that the OC used to supply goods only after securing the payment through post-dated blank cheques and undated cheques issued by the CD in OC's favour or letter of credit which were never returned by the OC even after receiving payment from the CD. The aforesaid cheques were issued in 2006-07 which were misappropriated by the OC in 2013 for harassing the CD through misusing Section 138 of the NI Act.

3.3. The CD further submits that, on 22.01.2007, the CD had issued a Letter of Credit bearing No. MRD/LC/SCN/97/2006-07 for Rs. 23,00,000/-. Regarding the cheque No. 915019, the CD requested the OC to return the said undated cheque and vide letter dated 07.02.2007, the CD instructed the Shamrao Vittal Co-Operative Bank for stopping the payment of the said cheque on ground of it being misplaced from the CD's custody.

3.4. The CD further submits that the demand notice issued by the OC is defective u/s 8 of the IBC since it is neither supported with an invoice demanding payment of the alleged total operational debt nor any relevant invoices signifying the said

amount has been brought to CD's notice. Merely stating a series of cheques as ground for demand notice cannot be considered to be compliance of Rule 5 of the AA Rules.

3.5. The CD states that the OC had not only suppressed various material facts from this Bench but also filed the Application with frivolous and vexatious grounds without disclosing any cause of action against the CD. The CD further states that the said Application is filed solely for recovering money from the CD which amounts to sheer abuse of process of law and is contrary to the objective of the IBC.

4. Rejoinder of OC

4.1. The OC further submitted that after OC's notice dated 14.01.2016, the CD again requested the OC for not proceeding with legal action and after many personal reminders by the OC, it paid merely Rs. 5,05,000/- which comprises of Rs. 2,50,000/- as last payment from the CD.

4.2. The OC stated that the CD manipulated balance sheets for the period of 2006-2008, where there is discrepancy between the outstanding dues and the amount payable shown in the audited balance sheets of the CD.

4.3. The OC stated that he issued notice dated 18.07.2018 to the Chartered Accountant regarding clarification over deducted amount in CD's audited balance sheet signed and certified by him but no reply has been given to the OC.

5. Analysis & Findings

5.1. We have heard the Ld. Counsel for the OC and also carefully gone through all the pleadings and submissions by both the parties. It is observed that the OC had been engaged in business relationship but there existed certain disputes relating to payment for supply of materials. The OC issued several notices to the CD in respect of the dispute. The first such notice was dated 23.08.2013 for initiation of criminal proceedings under Section 138 of the NI Act. The second notice dated 14.01.2016 was for demanding the outstanding amount and for initiating winding up proceedings before the Hon'ble Bombay High Court under the Companies Act, 2013. The third notice dated 11.04.2018 was for the purpose of recovering certain amount and for initiating winding up proceedings before NCLT. The fourth notice dated 18.07.2018 was for the recovery of certain amount and for initiating winding up proceeding before NCLT. The fifth notice dated 02.08.2018, issued by the OC was again for recovery of certain amount and to initiate winding up proceeding before NCLT. The CD has replied to all the above notices issued by the OC. From the above, it is seen that the attempts of the OC were all through to recover certain monies from the CD. We find that the fifth and the last notice dated 02.08.2018, purportedly issued for the purposes of Section 8(1) of the IBC does not satisfy the requirements as prescribed under that Section. By this notice, the OC finally called upon the CD to pay certain amount together with interest within 21 days from the date of receipt of notice.

It has been stated in the said notice that on failure of payment, the OC would initiate legal proceedings for recovery of the amount in civil court, etc. The said notice does not carry any particulars of operational debt as required by law. Hence, it cannot be held to be in proper format in terms of Section 8(1) of the IBC. We, therefore, hold that there is no demand notice as required under Section 8(1) of the Code r/w Rule 5(1)(a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

5.2. From the recitals contained in the notice dated 02.08.2018, it is evident that the intention of the OC was to initiate proceeding for recovery of money and not for initiation of CIRP under the IBC. The OC cannot be allowed to use this forum as a recovery court. As held by the Hon'ble Supreme Court in S.S. Engineers Vs. Hindustan Petroleum Corporation Ltd., (Civil Appeal No. 4583 of 2022), the NCLT is not a debt collection forum. It is not the object of the IBC that CIRP should be initiated to penalise solvent companies for non-payment of disputed dues claimed by an operational creditor.

5.3. The OC in the present Application has not claimed default of payment of any debt in violation of any agreement/invoice or the like. The OC has provided Customer-wise Vat Sale List maintained by them. The OC's legal notices on different dates and the respective replies of the CD indicate that there were certain disputes regarding actual payments between the parties. In Part IV of the Application, against Sl. No. 1, the OC states that the date from which the debt fell due is 11.04.2018, which is the date on which the third notice was sent to the CD. However, there is no explanation offered by the OC as to how 11.04.2018 could be taken as the date of default as there were total 5 notices as referred to paragraph 5.1 above. If any date of notice were to be taken as date of default, we have five notices on record. At the time of argument, the Ld. Counsel for the OC, however, banked on the last and the fifth notice dated 02.08.2018 to be taken as the demand notice for the purposes of Section 8 of the IBC, again without any legal basis. Interestingly, against Sl. No. 2 of Part IV, the amount of default is Rs. 51,15,180/- and the date of default is 01.04.2018. However, there is no explanation as to how 01.04.2018 can be regarded as the date of default. In the circumstances, the OC has failed to prove date of default and existence of any operational debt under Section 5(21) of the IBC. Hence, we cannot admit this Application to initiate CIRP in respect of the CD.

ORDER

This Application bearing C.P. (IB) No. 4555/MB/2018 under Section 9 of the IBC, filed by M/s. Shreerang Agencies, the OC, for initiating CIRP in respect M/s. Alpack Paper Packaging Private Limited, the CD is Rejected.

We make it clear that any observations made in this Order shall not be construed as expressing opinion on merits. The OC's rights available as per law before any judicial/quasi-judicial forum shall not be prejudiced on the grounds of rejection of the present Application. No orders as to costs. Ordered accordingly.