(2019) 05 NCLT CK 0017

In the National Company Law Appellate Tribunal

Case No : Company Petition No. IB-1387/ND Of 2018

M/s. Spicejet Ltd. APPELLANT

Vs

M/s. Affordable Infrastructure & Housing Projects Pvt. Ltd. RESPONDENT

Date of Decision : 21-05-2019

Acts Referred:
Insolvency And Bankruptcy Code, 2016 — Section 5, 5(20), 5(21), 8, 9

Citation : (2019) 05 NCLT CK 0017

Hon'ble Judges : Dr. Deepti Mukesh, J;Pradeep R. Sethi, Member (Technical)

Bench : Division Bench

Advocate : Varun Kr. Chopra, Gurtejpal Singh, Sameer Jain, Karan Valecha, Himesh Thakur

Final Decision : Dismissed

Judgement

,,

Pradeep R. Sethi, Member (T)",,

1. The application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as â??Codeâ??) for initiation of",,

Corporate Insolvency Resolution Process in the case of Affordable Infrastructure and Housing Projects Pvt. Ltd. (hereinafter referred to as,,

â??Corporate Debtorâ??). The application is filed in the prescribed Form no. 5 by Spicejet Ltd. (hereinafter referred as â??Operational Creditor).,,

The application is signed by Sh. Vijay Kumar Roy, Deputy General Manager (Legal) of the Operational Creditor. His affidavit verifying the",,

application is at Pages 19 to 20 of the application. Vide Board Resolution dated 14.08.2018 the Operational Creditor authorized Sh. Chandan Sand Sr.,,

VP (Legal) & Company Secretary in respect of matters relating to the Corporate Debtor. Sh. Chandan Sand was also authorized to delegate the,, power. Vide authority letter dated 03.10.2018, Sh. Chandan Sand Sr. VP (Legal) & Company Secretary authorized Sh. Vijay Kumar Roy Deputy",,

General Manager (Legal).,,

2. The Master Data of the Corporate Debtor is at Annexure-A3 of the application. The Corporate Debtor was incorporated on 04/05/2011 and its,,

CIN is U45400DL2011PTC218553. The registered address is 227, Square One, Saket District Centre, Saket, New Delhi, 110017. Therefore, the",,

jurisdiction lies with this Bench of the Tribunal.,,

3. It is stated in Part-IV of form No.5 that the Corporate Debtor is in real estate construction and development business and that the Operational,,

Creditor is in the business of operating scheduled private airlines for passengers and cargo. It is stated that the Corporate Debtor and Operational,,

Creditor executed a letter of intent on 31/07/2015 (LOI) for construction, furnishing and signing of Servicing Lease Agreement for Plot no.249-G,",,

Phase IV, Udyog Vihar, Gurugram (Haryana)-122016 and that as per the terms of the agreement, interest free deposit (IFSD) equivalent to six",,

months rental, of which part deposit equivalent to three month rental was payable within 7 days of signing the LOI and the remaining deposit",,

equivalent to three monthsâ?? rent was to be paid upon execution of the definitive lease. It is submitted that pursuant to the said condition, the",,

Operational Creditor deposited a sum of Rs. 1,20,00,000/- as deposit with the Corporate Debtor being equivalent to three months of rent through",,

RTGS on 08/09/2015. It is stated that as per Clause 21 of the LOI, both the parties agreed that if the conditions precedent set forth in the LOI were",,

not satisfied on or prior to 31/08/2015, the LOI would stand terminated and the Operational Creditor and Corporate Debtor shall have no further",,

obligations and it was agreed that any amount paid by the Operational Creditor to the Corporate Debtor would be promptly refunded by the Corporate,,

Debtor. It is stated that the aforesaid date of 31/08/2015 was extended to 21/09/2015 vide addendum dated 07/09/2015 and that no Servicing Lease,,

Agreement in terms of the LOI dated 31/07/2015 was executed between the parties on or before 21/09/2015 and therefore, the Corporate Debtor was",,

under an obligation to refund the deposit amounting to Rs.1,20,00,000/- to the Operational Creditor in terms of Clause 21 of the LOI. It is stated that",,

without any cogent reasons, the Corporate Debtor failed to refund the deposit and that a demand notice under Section 8 of the Code was sent to the",,

Corporate Debtor demanding payment of Rs.1,20,00,000/- and that the Corporate Debtor in spite of receiving the demand notice, did not make any",,

payment within 10 days nor informed the Operational Creditor of any previously existing dispute as envisaged under Section 8 of the Code. The,,

affidavit of no dispute has been filed as annexure A-2. It is stated that the Corporate Debtor vide letter dated 19.09.2018 replied to the demand notice,,

dated 06.09.2018 raising baseless and meritless grounds and thereby failed to raise any notice of â??disputeâ?? within the meaning of Section 5 of,,

the Code. The amount claimed to be in default is stated to be Rs.1,20,00,000/- and the date on which the amount became due is stated to be",,

21.09.2015 In part 3 of the application, no Interim Resolution Professional (IRP) has been proposed.",,

4. Vide order dated 12.10.2018, the Operational Creditor was given opportunity to bring on record the documents proving the nature of debt in order to",,

pursue the application under Section 9 of the Code. The additional documents were filed by diary dated 11.02.2019. Vide order dated 14.11.2018, the",,

Corporate Debtor was directed to file the reply and rejoinder if any, was also to be filed. The reply was filed by diary no.9275 dated 26.11.2018 and",,

the rejoinder was filed by diary dated 15.01.2019. Application for condonation of delay in filling the application under Section 9 of the Code was filed,,

by the Operational Creditor by diary dated 15.01.2019.,,

5. In the reply, the Corporate Debtor has submitted that the debt, as alleged, is not an Operational Debt in terms of Section 5(21) of the Code and that",,

under Clause 7 of the LOI, interest free security deposit (IFSD) was to be given by the Operational Creditor to the Corporate Debtor for the purpose",,

of entering into a lease deed and the deposit of three monthsâ?? rent of Rs.48,00,000/- per month (minus maintenance charges of Rs.8,00,000/- per",,

month) coming to Rs.1,20,00,000/- was to be paid at the time of execution of the LOI and that the deposit was paid simply as a security to secure the",,

performance by the Corporate Debtor under the LOI, under a transaction of real estate. It is submitted that it is settled position of law that IFSD paid",,

in relation to a simple real estate transaction is not an operational debt under the Code. It is further submitted that the entire purpose of giving a,,

security deposit in a transaction is to ensure and secure the performance of the

LOI and that in the event of the party giving the security deposit falling,,

to fulfil its obligation toward the security holder, there is an inherent right to forfeit the security which accrues in favour of the security holder for the",,

losses sustained by the security holder due to the acts of the party rendering the security. It is submitted the IFSD was validly forfeited by the,,

Corporate Debtor and without prejudice, the same is a valid and subsisting dispute between the parties and falls outside the purview of the Court. It is",,

stated that the Operational Creditor had failed to adhere to the terms of the LOI and to the contrary, the Corporate Debtor fulfilled all its obligations",,

under the LOI and thus a valid and bona fide dispute was raised by the Corporate Debtor by way of reply to the demand notice. It is stated that in,,

furtherance of its contractual obligations towards the Operational Creditor, the Corporate Debtor executed a Memorandum of Understanding dated",,

15.06.2015 with Jan Sewa Trust in respect of the leased premises for the purposes of sub-letting the same to the Corporate Debtor and also,,

processed a sum of Rs.18,88,000/- and Rs.63,00,000/- towards payment of stamp duty and security deposit respectively. It is further stated that an",,

Architect namely La Archplan Pvt. Ltd. was engaged for the purposes of construction, furnishing and designing of the demised premises as per the",,

needs and specifications provided by the Operational Creditor in terms of Clause 5 of the LOI and that payment of Rs.11,45,000/- as running payment",,

has to be made to the Architect. It is stated that the Corporate Debtor fulfilled all its obligations and incurred huge expenses in furtherance to the,,

same and the Operational Creditor breached in its contractual obligations and the present claim presented by the Operational Creditor is vehemently,,

disputed as being baseless. It is submitted that the present application is barred by limitation as it is filed after the expiry of three years from the date,,

when the alleged date fell due. It is also stated that the basis of the alleged debt i.e. the LOI dated 21.07.2015 was only conditionally accepted by the,,

Corporate Debtor and that the reason for accepting the LOI conditionally was the unacceptance of the Clause containing the provision of refund and,,

this understanding was also in the knowledge of the Operational Creditor and that is the precise reason for which the Operational Creditor never,,

demanded a refund during the period of 3 years within limitation.,,

6. In the rejoinder, it is submitted that the sum received under the LOI dated

31.07.2015 is in the nature of Operational Debt since Clause 15 of LOI",,

shows that the LOI was for providing architectural, design and furnishing service to the Operational Creditor and that the Corporate Debtor in its reply",,

to the demand notice under Section 8 has admitted in unequivocal terms that it provided services to the Operational Creditor. Reference in this regard,,

has been made to the Memorandum of Understanding dated 15.06.2015 stated to be executed by the Corporate Debtor with Jan Sewa Trust and,,

engagement of architect La Archplan Pvt. Ltd. It has been denied that the amount of Rs.1,20,00,000/- paid by the Operational Creditor to the",,

Corporate Debtor was a refundable security deposit and it is further denied that the transaction between the parties was a purely real estate,,

Transaction. It is submitted that the LOI is not a lease agreement but an agreement to provide design, consultancy, architectural and furnishing",,

services. It is submitted that as per the LOI dated 31.07.2015, it was expressly agreed between both the parties that the LOI is not intended to and",,

does not create any binding obligation on the parties to enter into a lease agreement and since there was no obligation on any party to enter into a,,

lease deed, how did the Corporate Debtor forfeit the alleged security amount and that too without any notice or information to the Operational",,

Creditor. It is stated that the Corporate Debtor has raised the question of deductions, forfeiture of security, damages etc. for the first time only when",,

demand notice under Section 8 was sent by the Operational Creditor and that the Corporate Debtor is trying to raise a feeble, make-shift and moon-",,

shine defence. It stated that the alleged MOU between the Corporate Debtor and one Jan Sewa Trust is 15.06.2015 whereas date of execution of,,

LOI between the Corporate Debtor and Operational Creditor is one and half months afterwards i.e. on 31.07.2015 and therefore, the Corporate",,

Debtor was under no obligation under the LOI to execute the MOU and the same was executed by the Corporate Debtor under its own free will. It is,,

stated that the application is not barred by limitation. It is submitted that the addendum dated 07.09.2015 is accepted by the Corporate Debtor by its,,

conduct. As regards the conditional acceptance of the LOI dated 31.07.2015, it is submitted that merely writing â??Conditionally Acceptedâ?, without",,

mentioning any specific condition cannot be later used to claim that there existed no Operational Debt.,,

7. During the course of the hearing, the Learned Counsel for the Operational Creditor has referred to the application as well as the rejoinder and",,

submitted that there is an Operational Debt in respect of provision of design, consultation, furnishing, etc. services. It is therefore pleaded that the",,

Operational Creditor having advanced Rs.1,20,00,000/- as advance payment had a claim in respect of provision of Goods and Services by the",,

Corporate Debtor. Thus, it fell within the definition of Operational Creditor, to whom an Operational Debt was owed by the respondent Corporate",,

Debtor. The Learned Counsel for the Corporate Debtor has relied on the reply and has submitted that the business of the Corporate Debtor is of,,

renting out of properties and that no invoice was raised on the Operational Creditor. It is submitted that the amount of Rs.1,20,00,000/ - is security",,

deposit and not an advance and the amount may be a debt but not an Operational Debt.,,

8. We have carefully considered the submissions of the Learned Counsel for the Operational Creditor and the Corporate Debtor and have also,,

perused the record. As per Part-IV of Form 5, the principal amount due stated to be Rs.1,20,00,000/- and the date on which the amount became due is",,

stated to be 21.09.2015. it is stated in Part-V that as per the terms of the LOI, interest free deposit inter alia of three months rental was payable within",,

7 days of signing the LOI and that pursuant to the condition, the Operational Creditor deposited a sum of Rs,1,20,00,000/- as deposit with the",,

Corporate Debtor, being equivalent to three months of rent through RTGS on 08.09.2015. It is further stated that no Servicing Lease Agreement in",,

terms of the LOI dated 31.07.2015 was executed between the parties on or before 21.09.2015 and therefore, the Corporate Debtor was under an",,

obligation to refund the deposit amounting to Rs.1,20,00,000/- to the Operational Creditor in terms of Clause 21 of the LOI.",,

9. The present application is filed under Section 9 of the Code. Therefore, the issue of consideration is whether the deposit amounting to",,

Rs,1,20,00,000/- is an Operational Debt as defined in Section5(21) of the Code. Section 5(21) of the Code reads as follows:",,

â??Operational Debtâ? 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.,,

10. As discussed above, it is stated by the Operational Creditor that the amount off Rs.1,20,00,000/- is interest free deposit equivalent to three months",,

rental given as per the terms of the LOI. No goods or services are provided by the Operational Creditor to the Corporate Debtor. Therefore, the claim",,

is not in respect of provision of goods or services by the Operational Creditor and is prima facie not covered by the definition of â??Operational,,

Debtâ?? supra.,,

11. The contention of the Operational Creditor is that the LOI was for providing services as the Corporate Debtor was to provide architectural, design",,

and furnishing service. It is further pleaded that the amount of Rs.1,20,00,000/- was an advance payment by the Operational Creditor in respect of",,

provision of goods or services by the Corporate Debtor and therefore an Operational Debt was owed by the Corporate Debtor to the Operational,,

Creditor. Reliance in this regard was placed on the decision of the Honâ??ble Company Law Appellate Tribunal in Overseas Infrastructure Alliance,,

(India) Pvt. Ltd vs. Kay Bouvet Engineering Ltd. Company Appeal (AT) (Insolvency) No.582 of 2018 and to Para No. 8 of the Judgment in which it,,

is inter-alia held as follows:,,

â??It is expressly stipulated in the Tripartite Agreement that the Appellant has paid 10% of the contract value to the sub-contractor,,

(respondent) as advance payment. Therefore, there should be no difficulty in holding that the Tripartite Agreement provided for supply for",,

goods and rendering of services and the Appellants claim was in respect of such provision of goods and services. Viewed in this,,

perspective, it can be stated without any hesitation that the appellant having advanced 10% of the contract value to Respondent- sub-",,

contractor as advance payment had a claim in respect of provision of goods or services bringing him within the definition of Operational,,

Creditor, to whom an â??Operational Debtâ?? was owed by the respondent-Corporate Debtorâ??.",,

12. The Learned Counsel for the Operational Creditor has referred to Clause 15 of the LOI which reads as under:-,,

Section 15,Fit-outs Rent Free Timelines,"To be offered fully fitted out as per

client specification and as per

attached layout, Annexure 2. Will

attach the fit out layout. The below

timeline is agreed.

1. Signing of LOI and exchange of

3 months of initial deposit.

2. Lessor to finalise design as per

lessee architect team and complete

fit out in 3 months from design and

BOQ finalization.

3. 30 days of rent free post lessor

completing Fit-outs and offering

possession to the lessees for a fully

furnished facility as per the

specification of the Lessee.

Rent commencement from the 31st

day from the date of such

possession.

18. The Corporate Debtor has referred to the addendum (Annexure-A6 of the application). However, during the course of the arguments the Learned",,

Counsel for the Operational Creditor has not been able to refer to any clause of the addendum which would substantiate his plea that consultancy,",,

Architectural design and furnishing service were provided by the Corporate Debtor and the amount of Rs.1,20,00,000/- is not IFSD. Therefore, the",,

issues raised with reference to the addendum, including the addendum not being signed by the Corporate Debtor, are not been examined.",,

19. The Learned Counsel for the Corporate Debtor has referred to clause 21 of the LOI and has stated on termination of LOI, the amount paid by the",,

Operational Creditor to the Corporate Debtor is to be promptly refunded by the lessor. On the other hand, the Learned Counsel for the Corporate",,

Debtor argued that the LOI is conditionally accepted by the Operational Creditor and the reason for accepting the LOI conditionally was the,,

unacceptance of the clause containing the provision of refund. In view of the decision taken by us above about that the amount of Rs.1,20,00,000/ is",,

not an Operational Debt, the claims of the two parties regarding refund/forfeiture of the IFSD are not being examined. Similarly, the application for",,

condonation of delay in filing the application under Section 9 of the Code as well as the issue of the limitation are not examined.,,

20. In conclusion, it is held that the amount of Rs.1,20,00,000/- is not proved to be an operational debt and therefore, the application under Section 9 of",,

the Code is rejected and dismissed.,,