
(2022) 03 NCLT CK 0061
In the National Company Law Tribunal
Case No : C.P (IB) No.1777/KB/2019

N.K Realtors Private Limited

APPELLANT

Vs

Mounthill Realty Private Limited

RESPONDENT

Date of Decision : 23-03-2022

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 4, 8, 8(2), 9, 9(2)(e), 9(3)(a), 9(3)(b), 9(3)(c)
Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 — Rule 6, 8, 9
Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 — Regulation 8

Citation : (2022) 03 NCLT CK 0061

Hon'ble Judges : Rajasekhar V.K., Member (J); Balraj Joshi, Member (T)

Bench : Division Bench

Advocate : Anirban Pramanick, Subhasree Dey, Pratip Mukherjee, Ranjit Rajak

Final Decision : Dismissed

Judgement

Balraj Joshi, Member (Technical)

1. The Court convened through video conference.

2. This is a petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 ('the Code') as an operational creditor by N. K Realtors Pvt. Ltd. (hereinafter referred to as the 'Applicant/Operational Creditor') before the National Company Law Tribunal ('Adjudicating Authority') against Mounthill Realty Pvt. Ltd. (hereinafter referred to as the 'Corporate Debtor') praying for:

(a) An order for the initiation of the Corporate Insolvency Resolution Process ('CIRP') against the Corporate Debtor.

(b) An order for appointment of Interim Resolution Professional ('IRP')

Facts of the Case

3.1 The Operational Creditor is a Real Estate Marketing Service Consultant established in 1987, in Kolkata, West Bengal & provides marketing services to various real estate projects. The Corporate Debtor is a non-Govt. company limited by shares and established in 2009 under the Company Act 1956, and is a real estate residential and commercial developer.

3.2 The Corporate debtor authorized the operational creditor to represent it for offering to book/sell the units/flats/Apartments in an upcoming project of the corporate debtor viz; 'Mounthill Essence' at Rajarhat, Chowmatha, Kolkata, having total no. 342 flats/units {approx. 327000sq.ft.}.

3.3 In terms of an Agreement dated 07.02.2013, the corporate debtor and the operational creditor agreed that the operational creditor shall be the sole marketing agent for selling the entire project. It was also agreed that the corporate debtor shall not sell the flats directly to anybody or through any other brokers except through an operational creditor. The marketing fee/brokerage of 2% was agreed to be paid on the entire sales, to be paid on a pro-rata basis every two months excluding the service tax.

3.4 Accordingly, in terms of the said agreement, invoices were raised on the corporate debtor for a total sum of Rs.43,54,918.29 (Rupees forty-three lakh fifty-four thousand nine hundred eighteen and twenty-nine paise only) from 13.02.2013 to 30.06.2017 and the paid to the operational creditor a total sum of Rs.39,55,883.77 (Rupees thirty-nine lakhs fifty-five thousand eight hundred eighty-three and seventy-seven paise only) but a sum of Rs.3,99,034.52 (Rupees three lakhs ninety-nine thousand thirty-four and fifty-two paise only) is outstanding in terms of the agreement. The last bill /invoice raised by the operational creditor was on 30.06.2017 which was received but the corporate debtor failed and neglected to pay the said bill. Annexure-B, pages 49 to 110 (Photo-stat invoice copies)

4. Submission by the Operational Creditor/Petitioner

4.1 The operational creditor submitted that in the circumstances as aforesaid, he issued a statutory demand notice Annexure-C, pages 111 to 126 (A copy of Demand Notice dated 07.01.2019 along with the postal receipt) under FORM 3 under sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 5 of the Insolvency and Bankruptcy Rules, 2016 dated 07.01.2019 demanding inter alia, the amount aforesaid.

4.2 The operational creditor submitted that the corporate debtor received the demand notice dated 07.01.2019 on 12.01.2019 and admitted it by a reply to notice Annexure-D, pages 127-129 (A copy of reply dated 24.01.2019) dated 24.01.2019.

4.3 The Operational Creditor submitted that he placed on record the following documents to prove its 'operational debt' on the part of the Corporate Debtor.

i. Computation chart showing particulars of bills/invoices.

ii. Invoices/ brokerage bills as raised by the Operational Creditor.

iii. The subsidiary Ledger account Pages 98-110(A Copy of Ledger Account for the different accounting period) for different accounting period as maintained by the Operational Creditor from 1st April 2012 to 31st March 2020;

iv. Statutory Notice in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with postal registration receipt;

5. Submission by the Corporate Debtor/Respondent

5.1 The corporate debtor submits that the instant application under section 9 of the Code as the statutory notice issued under Form -3 has been served without any annexures as mandated under the code and also the operational creditor has failed to establish any existence of debt nor there is any acknowledgment of the debt by the corporate debtor.

5.2 It is further submitted that the operational creditor has not complied with the statutory provisions of section 9(3)(b) and 9(3)(c) of the code and that the application is thus not maintainable in the eyes of law and as such the same should be dismissed in limine.

5.3 The corporate debtor submits that the subject contract in question stipulates the mode of payment to the operational creditor which is the 'marketing Fees' and the said clause of the agreement also stipulates that the operational creditor firm is only entitled to get 2% cost on whatever properties they sell out of the 32700 sq. ft. area but the operational creditor has failed to sell the flats within the allocated 32700 sq. ft. in under the terms of the agreement.

5.4 The corporate debtor submits that there are a series of transactions between the parties for which several payments have been received by the applicant and the applicant has failed to substantiate as to how such alleged sum has fallen due. Other contentions put forth by the Corporate Debtor are bald negations of the assertions of the Operational Creditor.

6. Rejoinder by the Operational Creditor

6.1 The operational creditor asserts that Form 3 along with all the annexures were duly forwarded to the corporate debtor as would appear from the postal receipt on page no 111 of the petition.

6.2 The operational creditor submits that since the project was not completed within the stipulated time and all the flats were not handed over by the corporate debtor, bookings in respect thereof, could not be done despite due diligence by the operational creditor. The rest of the assertions are bare denials.

7. Observations and findings:

We have heard the learned counsel appearing on behalf of the Operational Creditor and the learned counsel appearing on behalf of the Corporate Debtor and perusing the pleadings filed by the parties.

7.1 To admit this instant petition under Section 9 of the code, the following pre-requisites are to be fulfilled:

(1) Whether invoice/Demand Notice, as applicable, of the unpaid operational debt, was duly served and delivered upon the Corporate Debtor?

(2) Whether there is a pre-existing dispute?

(3) Whether there is an existence of debt that is due and payable and which has not been paid and that a default has occurred from the date of default and whether the said debt is more than or equal to the threshold limit under section 4.

(1) Service of Demand Notice

Statutory Notice in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with postal registration receipt has been issued on 07.01.2019, but posted on 10.01.2019, which is evident from Annexure -C placed on record on page111 of the petition.

7.2 That the demand notice has been received by the corporate debtor is also not in doubt, as there is a reply by him to the subject notice on 24.01.19, acknowledging the receipt of the notice on 12.01.2019, albeit it is not an acceptance of the amount claimed but points out a deficiency in the claimed amount vis-à-vis the invoices attached.

7.3 The invoice which is said to be in default as attached with the notice under section 8 bears the no. BBRNKR/00212/12-13 dated 19.02.2013 and is amounting to Rs. 1,02,236/-, while the other invoice bearing no. BBRNKR/0057/17-18 dated 30.06.2017 for Rs.525/-. However, the total of these two invoices works out to Rs.102761/- only as against the claimed amount of Rs. 3,99,034.52 in Part IV of the Application in Form -5. Notwithstanding the difference in the amount claimed thus, the notice has been sent and received by the corporate debtor.

(2) Pre-existing Dispute

7.4 In its reply to the notice under section 8, the corporate debtor has raised the issue of the difference in the amount of the invoices and that mentioned in the application vis-à-vis his own account details which appears to give a different picture than that painted by the Operational creditor. Now the question that craves an answer is whether this letter passes the muster of a 'dispute' or not. It must be mentioned here that no details have been provided in the pleadings which would show whether there was a pre-existing dispute that would have been raised by the corporate debtor. There is virtually no correspondence from both sides that could throw some light on the issue of pre-existing dispute vis-à-vis raising of a claim or even asking for payment by the operational creditor.

7.5 The affidavit on page 34 of the application given by a Director of the Operational creditor states at point 4 that the corporate debtor in spite of the

notice neither made any reply nor paid any amount. This is contrary to the fact that the corporate debtor had replied to the notice by way of the letter dated 24.01.2019, albeit he was late by 2 days, disputing the amount being claimed apparently emanating out of lack of reconciliation of the entire account which is a running account. Given the law laid down by Hon'ble Supreme Court in *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*, (2018) 1 SCC 353 the court held that mere 'existence of a dispute' is not enough and the Court has defined a 'genuine dispute' as bona fide and truly existing before the receipt of the demand notice/invoice, as the case may be, and that the grounds of its existence must be real and such conflict of claims or rights should be apparent from the reply to Demand Notice as contemplated by Section 8(2) of the Code. This not being so in the instant case, no ground of pre-existing dispute has been made out by the corporate debtor, as the Corporate Debtor disputed it for the first time through the reply to the demand notice dated 24.01.2019 which was after the prescribed 10 days period. As such, there is prima facie no existence of a pre-existing dispute.

(3) Whether the operational debt is due and payable

7.6 Subsequent to the demand notice under section 9(3)(a) of the Insolvency and Bankruptcy Code, 2016 (supra) dated 07.01.2019 placed as a matter of record⁶, the dispute was raised by the corporate debtor in reply to then the demand notice via a letter dated 24.01.2019, which is unaccompanied by any document to prove the contention expressed.

7.7 The Operational creditor has not denied getting the payments from the corporate debtor as is borne out by the ledger account furnished with the application which is an 'On account' payment ledger and does not bear a one-to-one correlation between the invoices claimed and paid. As can be seen that one of the invoices was sent along with the section-8 notice bearing no. BBRNKR/00212/12-13 dated 19.02.2013 is shown to have been paid vide an entry on page no. 98 (3rd entry from the bottom) of the application against the same invoice. As such we do not see how the operational creditor construes that this particular invoice dated 19.2.2013 remained unpaid and thought it fit to include in the notice under Sec-8.

8. Furthermore, there is nothing on record to show that the operational creditor had also been systematic and persuasive in asking for payment of its outstanding claim and has chosen to file the application without any in-house reconciliation and has chosen to casually include the oldest and the latest invoice in the demand notice in Form 3 of Rule 5. Whereas there is no provision for the payment of interest included either on the invoices or even in the agreement, the same has been claimed @18% impromptu without any basis.

9. Thus, here is a case wherein the allegedly unpaid invoice already stands paid in the records of the Operational creditor himself, charging of the interest where no provision exists and all this being bereft of any worthwhile documentation

Such matters serve as poor examples of the treatment of the IBC as an ad-hoc recovery mechanism and that too without adducing any substantive logic and fulfillment of the necessary documentation as required by the code provisions.

10. In light of the above, the instant petition made by the Operational Creditor under Section 9 of the Code, seeking initiation of CIRP in respect of the corporate debtor in C.P.(IB)No. 1777/KB/2019 is rejected on the grounds of failure to produce the proof as required under Section 9(2)(e).

11. The registry is directed to send e-mail copies of the order forthwith to Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the I.R.P., and the jurisdictional Registrar of Companies by Speed Post as well as through email for information and for taking necessary steps.

12. Certified Copy of this order may be issued, if applied for, upon compliance with all requisite formalities.