(2020) 03 NCLT CK 0037

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

Case No : Company Petition No. IB-2114/(ND) Of 2019

NTS Scaffoldings Pvt. Ltd — APPELLANT

Vs

VXL Realtors Pvt. Ltd — RESPONDENT

Date of Decision : 16-03-2020

Acts Referred:

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 5
Insolvency And Bankruptcy Code, 2016 — Section 5(20), 5(21), 7, 9, 60(5)
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2020) 03 NCLT CK 0037

Hon'ble Judges : P.S.N. Prasad, J;Dr. V.K. Subburaj, Member (Technical)

Bench : Division Bench

Advocate : Bhuvan Arora

Final Decision : Dismissed

Judgement

1. This is a petition filed by M/s. NTS Scaffoldings Pvt. Ltd., the petitioner/ operational creditor seeking to initiate CIRP against the Respondent company/ Corporate Debtor M/s. VXL Realtors Private Ltd., under Section 9 of IBC 2016 for the alleged default on the part of the Corporate Debtor in settling the amount of Rs. 11,13,667/- including the interest component towards the supply various shuttering and scaffoldings materials on hire basis. The details of transactions leading to the filing of this petition as averred by the petitioner are as follows:

i. That in May 2014, the corporate debtor approached the operational creditor for hiring shuttering and scaffoldings materials.

ii. That on 19.05.2014, a Memorandum of Under (MOU) was entered into between the corporate debtor and the operational creditor for supply of different specifications of shuttering and scaffoldings materials on hire basis. Copy of the Memorandum of Understanding (MOU) dated 19.05.2014 between the corporate debtor and the operational creditor for supply of different specifications of shuttering and scaffoldings materials on hire basis is annexed herewith and marked as Annexure A-V.

iii. Based on the agreed terms as per the MOU, the corporate debtor placed orders for supply of various shuttering and scaffoldings materials on hire basis.

iv. That the operational creditor supplied various shuttering and scaffolding materials on hire basis to the satisfaction of the corporate debtor vide material receipt challans from 20.05.2014 till 07.12.2018 which were duly received and acknowledged by the corporate debtor. Copies of the material receipt challans from 20.05.2014 till 07.12.2018 duly acknowledged by the corporate debtor are annexed herewith and marked as Annexure A-VI(Colly).

v. That the operational creditor issued invoices against the corporate debtor from 31.05.2014 to 31.10.2018 for the services rendered by it which were duly acknowledged by the corporate debtor. Copies of the Invoices raised by the operational creditor against the corporate debtor from 31.05.2014 to 31.10.2018 is annexed herewith and marked as Annexure A-VII(Colly).

vi. That the corporate debtor made on account payment to the operational creditor and therefore, the operational creditor was constrained to maintain a running account. It is not out of context to mention here that certain ad-hoc payments, in the initial years, with respect to the invoices were made by the corporate debtor, however, with effect from 04.08.2017, the corporate debtor stopped making payments for the services rendered by the operational creditor, copy of the ledger account of the corporate debtor from 01.04.2014 to 04.06.2019 maintained by the operational creditor in the ordinary course of business is annexed herewith and marked as Annexure A-VIII.

vii. That out of total material supplied by the operational creditor to the corporate debtor during the relevant period, material worth Rs. 1,01,700/- is still lying at the premises of the corporate debtor as on date.

viii. That the operational creditor sent various reminders/e-mails/made verbal communications to the corporate debtor requesting for release of the outstanding payment of the unpaid operational debt. However, all the request of the operational creditor fell on the deaf ears of the corporate debtor as it failed to make payment against the invoices raised by the operational creditor, copies of the e-mails sent by the operational creditor to the corporate debtor for the period from 15.12.2018 to 05.03.2019 requesting for release of the outstaying payment of the unpaid operational debt are annexed herewith and marked as Annexure A-IX(Colly).

ix. That the operational creditor sent a Demand Notice dated 29.03.2019 demanding payment of an unpaid operational debt as per provisions under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 via Speed Post. Copy of the Demand Notice dated 29.03.2019 demanding payment in prescribed Form 3 under Rule 5 of the Insolvency and Bankruptcy

(Application to Adjudicating Authority) Rules, 2016 duly served upon the corporate debtor along with proof of delivery and track report are annexed herewith and marked Annexure A-X (Colly).

x. That pursuant to the said Demand Notice dated 29.03.2019, the corporate debtor through its counsel replied to the demand notice by denying the liability of the operational creditor and raised the dispute for the first time. Copy of the reply dated 21.04.2019 given by the counsel of the corporate debtor to the demand notice dated 29.03.2019 sent by the operational creditor is annexed herewith and marked as Annexure A-XI.

2. The petitioner has also filed vide CA 104/2020 on 31.12.2016 an application under Section 60(5) of the IBC, 2016 read with Rule 11 of the NCLT Rules 2016 seeking to allow substitution of the proposed Interim Resolution Professional by Mr. Arun Chadha in Form 2 along with affidavit in support since the earlier proposed IRP is already handling a lot of assignments PAN India.

3. Consequent to the issuance of notices by the petitioner as well as this Tribunal, the corporate debtor filed its reply on 11.10.2019 in which the following contentions are raised by the corporate debtor:-

i. The settled law is that no petitioner can be filed under Section 7 by a financial creditor or under Section 9 by an operational creditor under the Insolvency and Bankruptcy Code, 2016 (IBC) for recovery of its dues. The code is not a recovery mechanism.

ii. The petition filed by the petitioner is admittedly for an claim towards the hire charges, purportedly payable by the respondent, and not in respect of any provision for goods or services. The claims purportedly outstanding hire charges, which does not fall within the meaning of "operational Debt" under Section 5(21) of the Insolvency and Bankruptcy Code, 2016 (IBC). Accordingly, the petitioner is not a operational creditor within the meaning of Section 5(20) of the IBC.

iii. Further, various reminder e-mails sent by the petitioner does not mention the amount due. Therefore, the respondent earnestly believed that what was being demanded through e-- mails was a sum of Rs. 1,510/- as referred above. There Is one letter dated 14.12.2018 that has been attached to the petition (placed at page 171), which was not received by the respondent. Had such letter been received, the respondent would have reacted to that immediately. As already stated above, all the emails sent by the petitioner were silent about the amount due from the respondent.

4. We have gone through the details of documents filed by both the parities and heard the arguments made by the counsels of both the parties. The major issued raised by the corporate debtor in its reply is that the claims purportedly outstanding hire charges does not fall within the meaning of "Operational Debt" under Section 5(21) of the IBC 2016 and the petitioner is not an operational creditor within the meaning of Section 5(20) of the IBC. During the course of

arguments, the counsel for the corporate debtor has cited the case law of Parvath Industries vs. All Digital Network India Limited in which the Hon'ble NCLT, Bangalore Bench has observed that there is an alternate remedy available with the petitioner to file Civil Suit to recover the arrears of lease amount and has dismissed the petition. He has also cited the judgment in Aurora Accessories (P) Ltd. vs. Ace Acoustics & Audio Video Solutions (P) Ltd., by Hon'ble NCLT Bench of Guwahati in CP (IB) No. 15/GB/2019 dated August 9, 2019 in which it is observed that the lease of immovable property can't be considered as supply of goods or rendering of any services.

5. Hon'ble NCLAT in its order dated 17th, January 2020 in Company Appeal (AT) Insolvency No. 331 of 2019 in the matter of Mr. M. Ravindranath Reddy vs. Mr. G. Kannam & Others has observed the same point i.e. lease of immovable property cannot be considered as supply of goods or rendering of any services. Going by the same analogy, this Tribunal comes to the conclusion that the hire charges for the supply of shuttering and scaffolding materials also will not become operational debt and consequently the petitioner does not become an operational creditor. In view of the above reasons, the petition fails and it is disposed of as Dismissed. No Costs.

