
(2020) 03 NCLT CK 0047

In the National Company Law Appellate Tribunal

Case No : Company Petition No. (IB)-1563 (ND) Of 2019

Parsvnath Developers Limited

APPELLANT

Vs

Fast Track Food Private Limited

RESPONDENT

Date of Decision : 19-03-2020

Acts Referred:

Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Person) Regulations, 2016 — Regulation 6, 6(1)
Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 6
Insolvency And Bankruptcy Code, 2016 — Section 3(12), 5(20), 5(21), 8, 8(1), 8(2), 9, 9(1), 9(3)(b), 9(3)(c), 9(5)(i), 9(6), 13(2), 14, 14(1)(a), 14(1)(b), 14(1)(c), 14(1)(d), 14(3)(b), 14(4), 15, 17, 18, 19, 20, 21, 60(1)

Citation : (2020) 03 NCLT CK 0047

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

Bench : Division Bench

Advocate : Arpit Dwivedi, Aayushi Jain

Judgement

Dr. P.S.N. Prasad, J

1. M/s. Parsvnath Developers Limited, claiming as the operational creditor has filed this application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 (for brevity 'the Rules') for initiation of Corporate Insolvency Resolution Process in respect of Respondent Company Fast Track Foods Private Limited claimed to be the Corporate Debtor.

2. The Respondent Fast Track Foods Private Limited against whom initiation of Corporate Insolvency Resolution Process has been prayed for, is a company incorporated on 28.01.2005 under the provisions of the Companies Act, 1956 having its registered office at office B-3, Friends Colony (West), Main Mathura Road, Delhi-110065. Since the registered office of the respondent corporate debtor is in Delhi, this Tribunal having territorial jurisdiction over the place, is the Adjudicating Authority in relation to the prayer for initiation of Corporate

Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. The applicant herein is a public limited company having its registered office at Parsvnath Tower, Near Shahdara Metro Station, Shahdara, Delhi-110032.

4. The pleaded case of the Operational Creditor is as under:

5. A Sub-License Agreement executed on 10.08.2009 ("Agreement") in respect of Unit/Hall No. 15 for area admeasuring 2738 sq. ft. and Sub-way Shop No. 2 & 3 admeasuring 235 sq. ft. approx., situated at Parsvnath Mall, Kashmere Gate, Delhi (hereinafter referred to as "Said Property"). In terms of the Agreement, Corporate Debtor were liable to pay service tax and other charges on actual basis, in addition to the Sub-License Fees. Copy of the Sub-License Agreement executed on 10.08.2009 is annexed herewith and marked as Annexure A/2.

6. However, Corporate Debtor has failed in making timely payments of fees and service tax to Operational Creditor during the period of the Agreement, therefore the Operational Creditor was constrained to issue Legal Notice dated 29.03.2017 through its counsel to the Corporate Debtor. Copy of the Legal Notice dated 29.03.2017 is annexed hereto and marked as Annexure A/3.

7. Subsequently both Corporate Debtor and Operational Creditor mutually discussed the matter and agreed to settle the matter. As such a Memorandum of Understanding cum settlement Agreement dated 14.12.2017, whereby the Corporate Debtor had agreed and that an amount of Rs. 16,20,145/- (Rupees Sixteen Lakhs Twenty Thousand One Hundred and Forty Five Only) is due and payable towards the payment of the unpaid operational debt due in regard to the premises and the same is the full and final settlement to subjected to the above said amount. It was further agreed therein that apart from the above Corporate Debtor is also required to provide TDS Certificates for the Financial Years 2013-14 for an amount of Rs. 2,74,212/- and for the financial year 2014-15 for an amount of Rs. 2,05,000/-. Consequently, Corporate Debtor has issued four (4) Post-dated cheques for a total amount of Rs. 16,20,145/- and the details of the same are as follows;

? Cheque No. 001058 dated 10.01.2018 for an amount of Rs. 4,00,000/- drawn on ICICI Bank;

? Cheque No. 001059 dated 15.02.2018 for an amount of Rs. 4,00,000/- drawn on ICICI bank.

? Cheque No. 001060 dated 15.03.2018 for an amount of Rs. 4,00,0008/- drawn on ICICI Bank.

? Cheque No. 001063 dated 15.04.2018 for an amount of Rs. 4,20,145/- drawn on ICICI Bank

However, all the aforesaid cheques were dishonoured on presentation due to insufficient fund.

8. Thereafter during June, 2018 a Memorandum of Understanding cum Settlement Agreement dated 18.06.2018 was again executed in between the Corporate Debtor and Operational Creditor and by which Corporate Debtor has handed over seven (7) post-dated cheques as security towards the payment of the due, as detailed hereunder;

? Cheque No. 001155 dated 25.06.2018 for an amount of Rs. 2,00,000/- drawn on ICICI bank.

? Cheque No. 001156 dated 25.07.2018 for an amount of Rs. 2,00,000/- drawn on ICICI Bank.

? Cheque No. 001157 dated 25.08.2018 for an amount of Rs. 2,00,000/- drawn on ICICI Bank.

? Cheque No. 001158 dated 25.09.2018 for an amount of Rs. 2,00,000/- drawn on ICICI Bank.

? Cheque No. 001159 dated 25.10.2018 for an amount of Rs. 2,00,000/- drawn on ICICI Bank.

? Cheque No. 001160 dated 25.11.2018 for an amount of Rs. 2,00,000/- drawn on ICICI Bank.

? Cheque No. 001161 dated 25.12.2018 for an amount of Rs. 4,20,145/- drawn on ICICI Bank

9. Under the fresh settlement agreement dated 18.06.2018 it was promised that the said security cheques would be returned back to the Corporate Debtor when Demand Draft would be issued by the given dates for the same amount. However, Corporate Debtor has failed to provide Demand Draft for the amount for the amount in the agreed manner. Hence Operational Creditor deposited the aforementioned cheques for encashment, but those were also dishonoured by the banker due to insufficient funds.

10. It is stated that the total amount of Rs. 16,20,145/- is due to be paid by the Corporate Debtor to our Client towards the operational debt due. It has also been asserted that apart from the above the Corporate Debtor is also liable to provide TDS Certificates for the Financial Year 2013-14 for an amount of Rs. 2,74,212/- and for the financial year 2014-15 for an amount of Rs. 2,05,000/-.

11. On 20.03.2019, the Operational Creditor issued a Demand Notice (in the Form as provided in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) under Section 8(1) of Insolvency and Bankruptcy Code, 2016 calling upon the Corporate Debtor for the payment of Rs. 16,20,145/- (Rupees Sixteen Lacs Twenty thousand One Hundred and Forty Five Only) and providing TDS Certificates for the Financial Years 2013-14 for an amount of Rs. 2,74,212/- and for the financial year 2014-15 for an amount of Rs. 2,05,000/-. Which was duly served to the Corporate Debtor on 22.03.2019. Despite of the receipt of the Demand Notice, till date Corporate Debtor neither

sent any notice of dispute nor discharged the outstanding dues.

12. Respondent company has filed its reply on 19.09.2019 mainly with the contention that there is a pre-existing dispute between the parties. The respondent has even stated that he has suffered loss of Rs. 38,00,000/- because its materials and equipment's were locked in the premises of applicant and released by applicant after a long period of time. The respondent mainly relied upon the fact that the he has suffered losses and the same shall be set-off against the dues of the applicant. However, the respondent has filed no documentary evidence in favour of its contention of pre-existing dispute and alleged losses suffered by it because of wrongful act of applicant.

13. It is pertinent to mention here that "default" is defined in Sec 3(12) in very wide terms as meaning non-payment of a debt once it becomes due & payable, which includes non-payment of even part thereof. Even part of the dues, once becomes payable comes within the meaning of debt and if not paid will amount to "default".

14. In the present case it is seen that there is a clear admission of non-payment of balance part debt which can be seen in e-mail dated 05.08.2019 and therefore there has been occurrence of default in payment of the claimed debt by the respondent corporate debtor.

15. Needless to say, that the expressions "Operational Creditor" and "Operational debt" have been defined in Section 5(20) and 5(21) of the Code, which are reproduced below.

"5. In this part, unless the context otherwise requires, -

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) "operational debt" 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;"

16. From the definition of "operational creditor" and "operational debt", it can be seen that the following persons can claim to be an "operational Creditor".

- i. The person who has claim in respect of provisions of goods (supplied) to the corporate debtor.
- ii. Persons who have provided service to the corporate debtor, including those who are in employment.
- iii. Central Govt., State Govt. and local authorities, who are entitled to claim debt in respect of dues arising under any law for time being in force.

17. It is thus seen that the unpaid petitioner, who rendered services by way of

providing sub-license to the Corporate Debtor, comes within the purview of 'Operational creditor'.

18. The procedure in relation to the Initiation of Corporate Insolvency Resolution Process by the "Operational Creditor" is delineated under Section 9 of the Code. The present application filed by operational creditor, accordingly, has to be dealt with in terms of Section 9 of the Code.

19. Sub-section (1) of Section 9 mandates filing of the petition only after expiry of the period of 10 days from the date of delivery of notice or invoice demanding payment under sub-section (1) of Section 8.

20. In the present case admittedly the demand notice in Form-3 as per Section 8 of the Code was sent on 20.03.2019. It is thus seen that before filing the present application under Section 9 of the Code, requisite notice under Section 8 was duly served on the Respondent. In response to Section 8 notice, respondent corporate debtor has filed its reply but failed to prove its claim of losses and pre-existing dispute. However, the corporate debtor had not specifically denied the claim in its reply given in terms of sub-section (2) of Section 8 of the Code.

21. The present application under Section 9 of the Code has been filed in requisite Form-5, wherein it was specifically mentioned that no dispute was raised against the claim of the applicant operational creditor. The application under Section 9 is thus complete and the required particulars have been furnished along with details of subsistence of default.

22. That apart in compliance of sub-section (3) (b) and (c) of Section 9 of the Code, the petitioner has affirmed that respondent corporate debtor has not raised any dispute in respect of the unpaid operational debt.

23. It is reiterated that in the present case the default committed by the corporate debtor is not denied. The material on record clearly goes to show that the respondent committed default in payment of the claimed operational debt even after demand made by the applicant operational creditor.

24. In terms of sub-section (6) of Section 9 of the Code the Corporate Insolvency Resolution Process in respect of respondent corporate debtor shall commence from the date of this admission order.

25. The petitioner has not proposed the name of any IRP in part IV of the application. Accordingly, we appoint Mr. Naresh Kumar Munjal, having registration number IBBI/P00362/2017-2018 email id: nkmunjalcacs@yahoo.co.in from the list of Interim Resolution Professionals Made Available By ibbi.

26. The petitioner is directed to pay a sum of Rupees two lakhs to the Interim Resolution Professional to meet the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016.

This shall however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the petitioner.

27. In pursuance of Section 13(2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 9 of the Insolvency & Bankruptcy Code, 2016.

28. We also declare moratorium in terms of Section 14 of the Code, which shall have effect from the date of this order till the completion of Corporate Insolvency Resolution Process as per sub-section (4) of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14(1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

"(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

29. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14(3) (b) of the Code.

30. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in

managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

31. Let the copy of the order be communicated to the Operational Creditor and the Corporate Debtor in accordance with Section 9(5) (i) of the Code. The office is also directed to communicate a copy of the order additionally to the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi and Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.