(2020) 03 NCLT CK 0084

In the National Company Law Appellate Tribunal

Case No : Company Petition (IB) No. 1759/ND Of 2019

Pioneer Engineered Facility Management	APPELLANT
Vs	
Medeor Hospital Limited (Previously known	RESPONDENT

Date of Decision : 03-03-2020

Acts Referred:

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 5, 6
Insolvency And Bankruptcy Code, 2016 — Section 4, 8, 8(1), 8(2), 8(2)(a), 9, 9(3)(b), 9(5), 9(5)(i), 9(5)(ii), 21(4), 81
Payment Of Wages Act, 1936 — Section 6
Payment Of Wages (Amended) Act, 2017 — Section 6

Citation : (2020) 03 NCLT CK 0084

Hon'ble Judges : Abni Ranjan Kumar Sinha, J;Kapal Kumar Vohra, Member (Technical)

Bench : Division Bench

Advocate : Saugata Ganguly, Rakesh Wadhana, Itisha Gulati, Saad Shervani, Amal Anand Jaya Kumar, Abhishek Singh, Prateek Singh

Final Decision : Dismissed

Judgement

Abni Ranjan Kumar Sinha, J

1. The present petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 by the Applicant/operational creditor, i.e. "Pioneer Engineered Facility Management Services Private Limited" for initiation of Corporate Insolvency Resolution Process against the Respondent/Corporate Debtor Company "Medeor Hospital Limited".

2. On 04.05.2012, the Operational Creditor incorporated under erstwhile Companies Act. 1956 as a Private Limited Company.

3. On 01.09.2016, the Operational Creditor started providing hospitality services to the Corporate Debtor at Dwarka Unit via Agreement dated 01.08.2016.

4. On 08.10.2016, being satisfied with the services of the Operational Creditor, the Corporate Debtor approached once again to the Operational Creditor for the hospitality services to be provided at their Qutab Institutional Area Unit. Therefore, the Operational Creditor started providing services to the Corporate Debtor at Qutab unit via Agreement dated 12.10.2016.

5. In pursuant of the Order dated 12th October. 2016. the Operational Creditor after providing service to the Corporate Debtor raised the invoices on the various dates, which are mentioned at page 13 of the paper book.

6. After raising the invoices, the Operational Creditor has received Rs. 18,00,959/- against the invoices referred at page 12 which relates to Phase-1, Dwarka, New Delhi and Rs. 4,86,197/- against the invoices raised at page 13 of the paper book in respect of service provided at Qutab Unit and claimed that total of Rs. 1,35,54,011/- is outstanding due and since the said amount is not paid, therefore, there is a default in payment of the aforesaid amount. Further, the debt become due after 30 days from the date of issuance of invoice.

7. Invoices for Dwarka Unit at page 12 are quoted below: -

Invoice No.

Date

Invoice Value

Payment Due as on 10.06.2019

118/18-19

01.10.2018

14,42,446.00

3,42,446.00

138/18-19

01.11.2018

14,10,368.00

5,10,368.00

159/18-19

01.12.2018

15,56,490.00

6,56,490.00

179/18-19

02.01.2019

17.50.486.00

17,50,486.00

199/18-19

01.02.2019

17,65,353.00

17,65,353.00

219/18-19

01.03.2019

16,00,268.00

16,00,268.00

007/19-20

01.04.2019

15,24,525.00

15,24,525.00

027/19-20

01.05.2019

14,05,734.00

14,05,734.00

051/19-20

01.06.2019

5,58,885.00

5,58,885.00

TOTAL

1,30,14,555.00

1,01,14,555.00

8. Invoices for Qutab Unit at page 13 are quoted below: -

Invoice No.

Date

Invoice Value

Payment Due as on 10.06.2019

086/17-18

15.09.2017

11,977.00

11,977.00

117/18-19

01.10.2018

6,49,967.00

6,49,967.00

137/18-19

01.11.2018

6,32,235.00

39,372.00

178/18-19

02.01.2019

7,67,295.00

7.67,295.00

198/18-19

01.02.2019

7,41,928.00

7,41,928.00

218/18-19

01.03.2019

9,98,197.00

9,98,197.00

006/19-20

01.04.2019

8.05,250.00

8,05,250.00

026/19-20

01.05.2019

8,57,574.00

8,57,574.00

050/19-20

01.06.2019

8,55,052.00

8,55,052.00

Total

63.19.475.00

57,26,612.00

9. In support of its claims, the Operational Creditor has enclosed agreement dated 1st September, 2016 for Dwarka Unit and agreement dated 8th October, 2016 for Qutab Unit, the statement of bank account of the Operational Creditor as well as the invoice, ledger account of the Corporate Debtor is maintained by the Operational Creditor and the TDS deducted by the Corporate Debtor, on the other hand, Corporate Debtor appeared and filed the reply.

10. The facts mentioned in the reply in short is that the applicant has failed to disclose that there is pre-existing pending dispute between the parties with regard to alleged sum payable to the applicant by the respondent's Company. Further, there is a series of correspondence exchanged between the representatives of both the parties pertaining to the applicant invoices and non-compliance with Labour Laws.

11. Further as per the terms of agreement, the service provider/applicant was responsible for complying with the requirements of various statutory provisions as applicable in respect of its employees/staff deputed at the respondent's hospital.

12. Further, as per the said agreement, respondents to ensure the compliance of the Labour Laws by the service provider and service provider would have to furnish the documents with every invoice in support of the same and that document consequently determine the amount of the monthly bills due to the service provider/applicant in consonance with the wages etc. paid by it to the staff deployed at the respondent's hospital.

13. Further as per the agreement, invoices were not liable to be cleared by the respondent until all documents showing payments made in compliance with Labour Laws were furnished to the respondent. The applicant fails to provide the requisite documents although the respondent through various emails had requested the applicant to furnish the said documents.

14. Further, when after the repeated request the applicant fails to furnish the

said documents then respondent was left with no option but to deduct amount on the invoices raised due to the non-compliance of Statutory provisions by the applicant and also issued notices towards the termination of the service of the applicant company but this fact has been concealed by the applicant before this Adjudicating Authority.

15. Further, it is the settled principle of Law that if a notice of pre-existing dispute between the parties has been received by the Operational Creditor or there is record of disputes in the information utility the insolvency code cannot be applied. Thus, the applicant has not approached with clean hand rather suppressed the existence of pending disputes.

16. Further, countless other emails were exchanged between the parties and the respondent on 6th March, 2019 sent an email by which the representative of the respondent's company communicated the applicant company that the latter has not been paying their employees salary in compliance with the Minimum Wages Act as a result of which, the staff has refused to join their services and gathered in protest outside the respondent's hospital at Dwarka.

17. Further, the respondent also sent numerous emails requesting the applicant to furnish all such documents showing compliance of various provision of the Labour Laws but no documents has been furnished by the applicant and accordingly, there is a violation of terms and conditions of the agreement by the applicant that after receipt of the Respondent's notice, the applicants in an attempt to make his liability served a demand notice dated 17th May, 2019 on the Respondent for the alleged amount and in reply to said demand notice vide email dated 24th May. 2019, the respondent informed the applicant that it shall be deducting 60% from the amount raised in the invoice on account of applicant's repeated defaults in furnishing the requisite documents and in complying with the respondent's notice, the respondent also paid Rs. 18.00.959/- towards the salary of the employees paid directly to them and Rs. 4,86.197/-against the invoices raised by the applicant and accordingly, applicant deducted such amount paid by the respondent from the alleged amount in a salary claimed by it and amended the instant application to revised the purported claim and on this ground alone, the claim of applicant is not liable to be accepted.

18. In support of the averments, the applicant also annexed the emails and the invoices against which the payments are made.

19. In pursuant to the reply filed by the Corporate Debtor, the applicant has also filed the rejoinder and the ground taken in the rejoinder is almost same as taken by the applicant in his application and he further, claimed that there is no violation of terms and condition of the agreement and he is making payment to the employees and also following the statutory legal obligation. It is also mentioned that Corporate Debtor release amount of Rs. 4.86,197/- directly to the employees under the direction of the Labour Commissioner.

20. The Operational Creditor also annexed the emails exchanged between the

two and admits that in pursuant of the Labour Court Commissioner's Order, the payment was made by the Corporate Debtor.

21. We have heard the learned Counsel for the Petitioner as well as the respondent, perused the averments made in the application, reply and rejoinder filed by the respective parties and the documents annexed with the application, reply and rejoinder.

22. Learned Counsel appeared for the applicant, in course of arguments submitted that as per the agreement and legal position, the Corporate Debtor is the principal employer and the Operational Creditor is the labour contractor, who provides employees for the principal employer.

23. He further, submitted that in view of the decisions of the Supreme Court reported in (1996) 10 SCC 599 in the case of Hindustan Steel works Construction Limited Vs. Commissioner of Labour and Others (1996) 10 SCC 599 "if the contractor does not pay wages to his workmen engaged by him as a contract labourers then under Section 21(4), the principal employer becomes liable to make good the difference and recover this amount which the principal employer has paid to the workmen of the contractor from the contractor".

24. He further submitted that since no payment was made by the Corporate Debtor, therefore, a demand notice was sent on 17th May, 2019, to the Corporate Debtor. Further, the Corporate Debtor in his reply does not dispute the amount of claim, however, dispute raised in compliance of Labour Law, which are pending only due to the non-payment of dues by the Corporate Debtor.

25. He, further, submitted that the liability to pay the provident fund is cast on the principal employer and in this regard, he placed reliance upon a decision reported in Orissa Cement Ltd. and Ors. Vs. Union of India and Ors. AIR 1962 Supreme Court page 1402.

26. He further, submitted that the present petition is not regarding the labour dues but on the compliance of service agreement, so labour issue cannot be brought by the Corporate Debtor to negate the payment of Operational Creditor and in this regard, he placed reliance upon the decision of Supreme Court in Mobilux Innovations Private Ltd vs. Kirusa Software Private Ltd (2018) 1 Supreme Court Cases 353.

27. On the other hand. Learned Counsel for the respondent, in course of his arguments submitted that prior to the issuance of the demand notice, the dispute was raised by the Corporate Debtor regarding the amount claimed by the Operational Creditor through various email exchanged, therefore, the present application is not maintainable.

28. He further submitted that the respondent through emails dated 24th may 2019 (annexure 5 page 38). 29th June, 2019, 27th April. 2019, 01st April 2019, 06th March, 2018, 24th January 2019. and 18th December 2018 (annexure 6 colly., page 40 and 630/2019 at page 33) directed the applicant to furnish all

such documents showing compliance of various labour law.

29. He further submitted then that he communicated the deduction on account of repeated default on the part of applicant to raise legitimate invoices but these facts were suppressed by the applicant. Learned Counsel further submitted that the applicant while submitting its invoices with the respondent had taken an instance and claimed that it had released cash payment to the employees but this claim had been questioned and applicant had also been questioned by the respondent vide email dated 07th March. 2019 at page 36 of the reply to abstain from making such cash payment as the same is prohibited under Section 6 of the Payment of Wages Act.

30. He further, submitted that there had been serious deficiency of the service on the part of the applicant company. Due to the non-payment of salary, the employees repeatedly went on strike, refused to work and the quality of service provided by them deteriorated considerably and the Respondent vide email dated 06th March, 2019, (annexure 3 page 34) communicated the applicant company that company has not been paying their employees salary in compliance with the Minimum Wages Act, as a result of which, the staffs have refused to join their service and gathered in protest outside the respondent's hospital at Dwarka and the displeasure was also communicated to the applicant company vide email dated 15th April. 2019. 21st November. 2018. 2nd November, 2018, 31st October, 2018 and 21st October, 2018 (Annexure 2 Page 27).

31. He further submitted that when the applicant failed to disburse the salary to its employees, the respondent disbursed Rs. 18,00,959/- towards the salary of the employees directly and further Rs. 4,86,197/- to ensure the staffs/employees received the correct salary.

32. He also placed reliance upon the decision reported in 1982 SCC (3) 235 in the case of People's Union For Democratic Rights vs. Union Of India (1982) SCC (3) 235 and in (1996) 10 SCC 599 Hindustan Steel works Construction Limited Vs. Commissioner of Labour and Others in which Hon'ble Supreme Court held that if the contractor fails to make the payment of wages then principal employer shall be liable to make the payment of wages in full or the unpaid balance due. He also placed reliance upon the decision of Mobilux Innovations Private Ltd vs. Kirusa Software Private Ltd (2018) 1 Supreme Court Cases 353.

33. Now, in the light of the submissions made on behalf of the parties, we shall consider the prayer of the applicant. Since the Respondent/Corporate Debtor by filing the reply to the demand notice dated 17th May, 2019 stated that there are existing disputes with regard to the outstanding payment and the same has been intimated by the management, therefore, we would like to consider this aspect at first, where dispute raised by the Corporate Debtor in reply to demand notice issued under Section (81) is a dispute in terms of Section 8(2)(a) or not?

34. At this juncture, we would like to refer page 27 of the reply i.e. the email sent by one Mr. Sunil Gupta, representative of the Respondent's Company to Mr.

Livleen Anand, the representative of the Operational Creditor by which, he informed regarding the shortage of manpower. Apart from the aforesaid email dated 21st November 2018, there are other correspondence made through the email on 2nd November 2018, 1st November 2018, 31s1 October 2018, 21st October 2018 and on the various dates regarding the shortage of the staffs.

35. We. further find that at page 40 of the reply vide email dated 27th April, 2019. one Mr. Anand Kumar, executive of the Human Resources informed the Operational Creditor regarding the deficiency in the bill submitted by the Operational Creditor in respect of the bills of January 2019, February 2019 and March 2019.

36. At this juncture, we would like to refer this fact that the Petitioner has claimed the payment amount default in respect of bills submitted in the month of January 2019, February 2019 and March 2019. These bills have already been disputed by the respondent vide email dated 27th April. 2019 that has been communicated to the Operational Creditor that there is deficiency in the bill of the January 2019. February 2019 and March 2019, vide email date June. 2019. the deficiency in the bill of month of March 2019 was also communicated and vide email date March 2018, the deficiency in the bills of month of September 2018, October 2018, November 2018 and December 2018 was communicated.

37. On the basis of aforesaid facts, we find that before the delivery of the demand notice, the Corporate Debtor has raised the admissibility of the amount mentioned in the bill which was submitted by the Operational Creditor before the Corporate Debtor in the month of September 2018. October 2018. November 2018, December 2018. January 2019. February 2019 and March 2019 and the Operational Creditor has claimed the amount due for the aforesaid months, which would be reflected from the averments made at page 12 of the application filed by the Applicant.

38. At this juncture, we would also like to mention this fact that the Corporate Debtor, at page 12. admits that he has received Rs. 18,00,959/- towards the salary paid to the employees directly under the protest by the Corporate Debtor and after deducting that amount, total debt is Rs. 83,13,596/- for Dwarka Unit, for Qutab Unit he claimed Rs. 52.40.415/- and in total he claimed Rs. 1.35,54.011/-.

39. On the basis of aforesaid discussions, we find, the objection was raised by Corporate Debtor on the invoice/bill submitted by the applicant prior to the date of issuance of the demand notice. We further find since on 6th June 2019. show cause notice under Section 6 of the Payment of Wages (amended) Act. 2017 was sent in which the correspondence made through the various email, which we have referred in the aforementioned para. We further find, vide email dated 6th June. 2019, the Corporate Debtor has also informed the Operational Creditor that due to non-payment of salary, the staffs deputed by the Operational Creditor refused to join their service on 6th June, 2019 and they have gathered in front of

the hospital near gate No. 1.

40. At this juncture, we would like to refer the argument advanced by the Learned Counsel appeared on behalf of the Operational Creditor, who in course of his argument submitted that no dispute is raised. At this juncture, we would also like to refer the affidavit filed by the Operational Creditor in compliance with Section 9(3)(b) of the IBC, 2016 which is at page 22 of the application. We have gone through the affidavit filed by the Operational Creditor and we find, in para-2. although, the applicant mentioned this fact that he has received email dated 8th June. 2019, in relation to the demand notice dated 17th May, 2019 that he has not mentioned in the affidavit whether any dispute has been raised or not, whereas, from the perusal of the email dated 8th June, 2019 which is at page 33 of the application, we find that the respondent has mentioned in that email that there are pre-existing disputes with regard to the outstanding payment and same has been intimated to the Operational Creditor from time to time by the management of Corporate Debtor.

41. If we shall place reliance, this part of the contention of the email referred at page 33 of the application then we find that this fact has been corroborated by the email, which we have referred in the aforementioned para by which respondent communicated the Operational Creditor regarding the deficiency in the bills raised by the Operational Creditor for the month of September 2018, October 2018, November 2018, December 2018, January 2019, February 2019 and March 2019.

42. Now. question is whether this dispute has been raised within the period prescribed under Section 8(2) of the IBC, 2016 or not. In view of Section 8(2) of IBC, 2016, the Corporate Debtor within a period of 10 days of the receipt of a demand notice either raised the existence of the dispute or made the payment of the unpaid Operational Debt.

43. At this juncture, we would like to refer the demand notice issued by the Operational Creditor which is at page 24 of the demand notice which shows that it was issued on 17th May. 2019 but the applicant nowhere in the application enclosed the documents to show when the demand notice was delivered upon the respondent. In our opinion, the onus is upon the Operational Creditor to prove when the demand notice was delivered. Since, the Operational Creditor fails to convince us the date when was delivered, we have no option but to hold that the respondent has sent the reply within the prescribed period provided under Section 8(2) of the IBC. 2016.

44. At this juncture, we would also like to refer the rejoinder to the reply filed by the Operational Creditor who in para-2 at page 10 of the Rejoinder to the reply admits this fact that the employees and staff members of the Operational Creditor refused to join duty and approached the Labour Commissioner for their salary and complaint was filed on 13th June, 2019 which would be evident from the annexure R-5 at page 42 of the Rejoinder.

45. At this juncture, we would also like to refer the correspondence made between the two through email which is at page 39 of the Rejoinder to the reply, which shows that the labour dispute is also pending between the parties.

46. We have already held in the aforementioned para that before receiving the demand notice, the Corporate Debtor has raised the disputes and the email exchanged between the two, which are prior to the issuance of the demand notice shows that there was a dispute regarding the amount claimed by the Operational Creditor and it has also come that the proper staff were not being deputed/posted by the Operational Creditor as per the agreement. Therefore, we have no option but to hold that the Corporate Debtor has raised the dispute regarding the service and also regarding the payment made by the Operational Creditor to their employees/staff.

47. At this juncture, we would also like to refer the decision upon which both the parties have place reliance. We have gone through the decisions upon which both the parties have placed reliance i.e. the decision in the matter of (1996) 10 SCC 599 in the case of Hindustan Steel works Construction Limited Vs. Commissioner of Labour and Others. Since both the parties placed reliance on this decision, therefore, on the basis of this decision, this Adjudicating Authority finds that there is no dispute that principal employer i.e. the respondents are liable to pay the amount and the principal employer i.e. respondent is entitled to recover that amount paid to the workmen of the contractor. Here, in the case in hand, it is admitted by the Operational Creditor that some amount was directly paid to the employees by the respondent. Therefore, in our opinion, on the basis of the decision upon which both the parties placed reliance, it cannot be said that since there is a labour dispute and the matter is pending before the Labour Commissioner regarding the payment of the amount, therefore, that does not come under the purview of the dispute as under Section 8 and 9 of the IBC, 2016, rather, we are of the considered view that in view of the discussions made above, it can be safely said that the Corporate Debtor has raised the dispute, which is corroborated by the email exchanged between the two. prior to the delivery of the demand notice.

48. At this juncture, we would like to refer the decision of Hon'ble Supreme Court in "Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC OnLine SC 353". in which the Apex Court analysed the meaning of dispute with respect to Operational Creditors and observed:

"24. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing - i.e. it must exist before the receipt of the demand notice or invoice, as the case may be......................................."

"25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

49. Since there is existence of dispute, therefore, in our opinion, in order to admit an application under Section 9. this Adjudicating Authority is required to consider the ground mentioned at Section 9(5)(i) of the IBC, 2016, and if these conditions are not fulfilled then this Adjudicating Authority have no option but to reject the application under Section 9(5)(ii).

50. Here, in the case in hand, we find that notice of dispute has been received by the Operational Creditor and on the basis of documents enclosed with the application and reply, we find that there is existence of dispute. Under such circumstances, we have no option but to reject the application, accordingly, we, hereby, reject the prayer of the application to initiate proceeding under Section 9 of the IBC, 2016.

51. Hence, the present application is dismissed.