(2020) 10 NCLT CK 0008

In the National Company Law Appellate Tribunal

Case No : Company Petition No. IB-549/ND Of 2018

R. Rangarajan Sole Proprietor-Nirmal Glass Agencies — APPELLANT

Vs

M/s. Bangalore Safety Glass Works (P) Ltd. — RESPONDENT

Date of Decision : 14-10-2020

Acts Referred:

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 6

Insolvency And Bankruptcy Code, 2016 — Section 4, 5(6), 8, 9

Citation : (2020) 10 NCLT CK 0008

Hon'ble Judges : Dr. Deepti Mukesh, J;Hemant Kumar Sarangi, Member (Technical)

Bench : Division Bench

Advocate : Ravi Agrawal, Vipul God

Final Decision : Dismissed

Judgement

Hemant Kumar Sarangi, Member (T)

1. The present application is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity `IBC, 20161, read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity the Rules'), by Mr. R. Rangarajan, sole proprietor of Nirmal Agencies, with a prayer to initiate the Corporate Insolvency Resolution Process (CIRP), against M/s. Bangalore Safety Glass Works (P) Limited (for brevity 'Respondent').

2. The Applicant, the Operational Creditor ("OC"), is the sole proprietor of Nimal Agencies, having its office at 106, Nirmal Agencies, Sharada Nilaya, 7th Main, 11th Cross, Malleswaram, Bangalore-560003

3. The Respondent, the Corporate Debtor ("CD"), is a company incorporated on 05.09.2005, under the provisions of Companies Act, 1956 with CIN No. U26109DL2005PTC140348, having its registered office at 25, Paschim Vihar Ext. Opposite Ordnance Depot, Rohttak Road, New Delhi-110063. The Authorised

Share Capital of the respondent company is Rs.2,50,00,000/- and Paid Up Share Capital of the company is Rs.2,24,58,480/- as per Master Data of the company.

4. It is the case of the OC that, it was in the business of providing consultancy services in respect of liaising with CD and its other sister concerns and that the CD engaged, OC's services vide letter, Ref: BSGW/2015, dated 21 May, 2015, for realization of certain dues from various government entities, viz. KSRTC, BMTC, NWKRTC, NEKRTC and all their Divisions, Workshops throughout Karnataka, in respect of material supplied by CD to the said government entities. An arrangement was arrived between the OC and CD that the said arrangement was to remain in force unless terminated by three month's notice by either party.

5. The OC states that, after the aforementioned letter was issued by the CD engaging OC's services, OC started liaising with the concerned government entities named above and started the process of reconciling CD's accounts with the said entities to facilitate the payments to be released. In this process OC travelled extensively to all divisions of KSRTC and its sister concerns and personally ensured that the accounts assigned to him were reconciled. In all the OC facilitated in realization of a total amount of Rs. 2,53,54,000/- from various government entities for CD. The OC was due an amount of Rs. 8,02,396/ - and CD had already deposited an amount of Rs. 76,062/- towards Tax Deducted at Source (TDS) in OC's PAN account.

6. Further, on 30.12.2015 CD, instead of making any payment to the OC sent a mail to the OC through its VP Marketing Mr. Ajay Singh, asking the OC not to follow up with KSRTC and BMTC, all divisions and workshops, as CD would take care of the same. Thereafter, the OC stopped following up with KSRTC and BMTC as per the instructions of CD's VP Marketing, Mr. Ajay Singh. However, OC was shocked to receive an email from the same person on 01.10.2016, accusing OC of not having followed up with KSRTC and BMTC and further stating that CD is not interested in working with the OC and that it would not honour any settlement due and payable to OC.

7. The OC states that it had admittedly raised the invoices only for the period for which no objection was raised by the CD and for the period for which he was asked to work. When the OC worked for the CD and got substantial benefit for the CD and when OC demanded for his commission on the basis of payment received for the CD, the CD refused to pay the same. 8. The OC further states that, there was no communication whatsoever, from 21.05.2015 till 30.12.2015 regarding work efficiency of the OC and about any dispute or allegation whatsoever. For the first time when one Mr. Ajay Sing, VP Marketing requested the OC not to follow the work with KSRTC and BMTC the OC stopped following up with the same, then CD for the first time raised a bald allegation against the OC that OC is not doing its work.

9. In spite of various requests made and reminders sent by the Operational Creditor, the Corporate Debtor did not reply. On failure to pay the outstanding

dues by the Respondent, the applicant sent a demand notice dated 25.11.2017, under Section 8 of the Insolvency and Bankruptcy Code, 2016, to the respondent, asking them to make the entire payment of Rs.6,01,334/- (Rupees Six Lakhs One Thousand Three Hundred Thirty Four), within 10 days from receipt of the notice, failing which the applicant shall initiate the Corporate Insolvency Resolution Process ("CIRP") against the Respondent.

10. After the delivery of demand notice sent under Section 8 of the Code, the Respondent has given its reply. In its reply to the said notice, the Corporate Debtor inter-alia states that 'g) You were very clearly informed on 01 October 2016 for failure to reconcile the ledger of 15 clients and give details of difference in square meter calculation by the clients while releasing the payment. The company still has huge outstanding by which it has become quite difficult to run day to day affairs.

Please reconcile the ledgers and give proper reason for short payment and difference between Invoices raised and actual payment received."

11. The applicant has stated that total debt due and payable is Rs .6,01,334 / - (Rupees Six Lalchs One Thousand Three Hundred Thirty Four). As per the invoices the default occurred on 18.01.2016.

12. The application under section 9 of the IBC, 2016 was filed by the applicant to initiate CIRP.

13. The Corporate Debtor has caused an appearance in the matter and has filed its reply. In its reply to the present section 9 application, the Corporate Debtor states that, the instant petition is not maintainable as the OC has not tendered the correct statement of accounts, which is under dispute as the OC was not appointed for BMTC, the CD had appointed the OC Sh. R. Rangarajan, proprietor of M/s. Nirmal Agencies for procurement of orders, negotiation of prices and collection of payments from KSRTC, NEKRTC and NWKRTC only vide letter No. BSGW/ 2015 dated 21.05.2015, which is annexed by the OC along with the petition.

14. The CD further states that the OC had made certain collections from KSRTC, NEKRTC and NWKRTC and remitted some parts to the CD and on 01.10.2016, the CD wrote an email for reconciliation of accounts. Despite the email, the OC did not reconcile the statement of accounts with the CD. The CD has paid a sum of Rs. 140,203/- to the OC and has deposited a sum of Rs. 60,860/- as TDS. The CD had deducted the TDS believing the statements rendered by the OC were correct. However, on reconciliation of accounts, it was found by the CD that the TDS had been excessively deducted as the OC was entitled for collections from KSRTC, NEKRTC and NWKRTC only but had tendered accounts of BMTC for which the OC was not engaged, which is evident from the Statement of Accounts filed by the OC in the instant petition.

15. Records further reveal that CD has sent a legal notice dated 23.05.2018,

wherein, inter-alia it has stated that,

"3. My client have considered the notice, replied the same for compliance on 15 December 2017. Instead of complying the requirements of my client your client has resorted to hiring you for instituting case under Insolvency and Bankruptcy Act 2016. A copy of my client's reply is enclosed for you information and action.

4. My client never refused the due payment of your client. The loss suffered by my client because of the callous attitude of your client needs to be rectified. The pending payments from various clients before your client leaving my client's Company has to be cleared."

16. Further the Hon'ble Supreme of India in Mobilox Innovations Private Limited vs. KirusaSortware Private limited has observed that-

"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, as outlined above, and in particular the mandate of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in of the Act."

As per the reply filed by the Corporate Debtor, it can be inferred & concluded that there is a pre existing dispute between the Corporate Debtor and Operational Creditor, and falls well within the definition of 'Dispute' as per Section 5(6)which is reproduced below:

"Dispute" includes a suit or arbitration proceedings relating to-(a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty.

17. The main dispute which appears is with regard to the reconciliation of the accounts between the OC and CD, with regards to the client BMTC, whether, the OC was authorized to follow up with BMTC or not, as pe the letter of appointment the CD did not authorize OC for BMTC, but in further communication the name of BMTC appears. However, there is much cloud in the submissions of both the parties and the OC has not been able to clearly demonstrate the debt claimed to

be due by it is actually due or not.

18. The registered office of respondent is situated in New Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.

19. The present application is within the prescribed limitation period.

20. As a sequel to the above discussion, this application fails and the same is hereby rejected and dismissed.

21. It is made clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy and the right of the applicant before any other forum shall not be prejudiced on account of dismissal of the instant application.

22. Let the copy of the order be served to the parties