

(2024) 03 NCLT CK 0002

In the National Company Law Tribunal

Case No : IA No. 2171/2023 and CP (IB) No. 203/Chd/Chd/2021

Sh. Preet Mohinder Kohli

APPELLANT

Vs

Harbir Automobile Private Limited

RESPONDENT

Date of Decision : 01-03-2024

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(6), 5(20), 8, 9, 9(3)(b), 9(5)(2)(d), 13, 14

Citation : (2024) 03 NCLT CK 0002

Hon'ble Judges : Dr.P.S.N. Prasad, Member (J); Umesh Kumar Shukla, Member (T)

Bench : Division Bench

Advocate : Kamal Satija, Niharika Sohal, Akshay Bhan, Amandeep Singh Talwar

Final Decision : Dismissed

Judgement

Dr. PSN Prasad, Member (Judicial)

Umesh Kumar Shukla, Member (Technical)

1. The present petition is filed by Sh. Preet Mohinder Kohli, (for brevity ?Operational Creditor?/ ?Petitioner?) vide diary no. 01034 dated 31.08.2021 under Section 9 read with sections 13, 14 and other applicable provisions of ?The Insolvency and Bankruptcy Code, 2016? (for brevity ?IBC?/ ?Code?) read with rule 6 of ?The Insolvency & Bankruptcy (Application to Adjudication Authority), Rules, 2016?, for initiation of Corporate Insolvency Resolution Process (CIRP) against the Harbir Automobile Private Limited (for brevity ?Corporate Debtor?/ ?Respondent?).

2. The Corporate Debtor, namely, Harbir Automobile Private Limited, was incorporated on 16.01.2015 and at present has its registered office at Plot no. 182/84, Industrial Area Phase-I, Chandigarh and therefore, falls under the territorial jurisdiction of this Tribunal. The Corporate Debtor is running an authorized dealership of Mahindra cars and other utility vehicles of Mahindra &

Mahindra Limited.

FACTS OF THE CASE

3. The facts of the case, as stated by the Operational Creditor in its petition, are as below:

(i) The petitioner has been legally assigned an operational debt of Rs.48,59,146 by Sh. Surinder Kohli (brother) and Rs.48,59,146 by Smt. Neeru Kohli (wife) vide assignment deed dated 17.08.2021 (Annexed as Annexure- A-9 of the application). Therefore, he is an Operational Creditor in terms of Section 5(20) of Insolvency and bankruptcy Code, 2016 as a part of debt is owed by him personally and he is also assignee of debt from other operational creditors.

(ii) The Operational Creditor has leased the premises situated at Industrial Shed no. 41, Industrial Area, Phase-II, Chandigarh to the Corporate Debtor through lease agreements dated 20.01.2016 and 11.09.2016 at monthly rent of Rs.8,00,000/- (Rupees eight lakh only). The leased premises included the entire building i.e. basement, ground floor and first floor of the premises built on industrial shed no. 41 except for the space measuring approx. 300 sq. ft. on the first floor. The lease was subsisting since October 2016 and the Corporate Debtor made regular payments of rent till July 2018 and thereafter, started making defaults in the payment. The Corporate Debtor stopped making any payment from October 2020 onwards.

(iii) As per Form 5 Part IV, total amount of debt is Rs.1,45,77,438 plus interest at the rate of 24% per annum (applicable post 90 days from the date of invoice) till June 2021 as per the Rent Agreement dated 11.09.2016 and against the invoices raised by Sh. Surinder Kohli, Sh. Preet Mohinder Kohli and Smt. Neeru Kohli. The copies of rent agreement and invoices are attached with the petition as Annexure- P3 and P-4 respectively. The ledger statements, bank statement from June 2018 and Form 26AS of the operational creditor reflecting the amount of Tax deducted at source (TDS) deducted by the Corporate debtor is attached as annexure P-5, P-8 and P-10 of the application respectively.

(iv) The Operational Creditor issued a demand notice under section 8 of IBC read with clause (a) of sub-rule 5 of 'The Insolvency & Bankruptcy (Application to Adjudication Authority), Rules, 2016' on 10.06.2021 at the registered office and workshop of the company and at the address of the director Sh. Harbir Singh calling upon the Corporate Debtor to pay the unpaid Operational Debt in full within 10 days from the date of receipt of the notice. The notice was duly served on the Corporate Debtor and director on 14.06.2021.

(v) In response to the notice under section 8, the reply dated 22.06.2021 was received, in which the Corporate Debtor did not raise any point relating to the existence of any dispute relating to the debt for the period prior to the issuance of notice. The Corporate Debtor also did not make any payment of the debt claimed in the notice. The copy of demand notice and reply for the same is

attached with the petition as annexure A-6 and A-7 respectively.

REPLY OF THE CORPORATE DEBTOR

4. In the hearing on 27.10.2021, the Corporate Debtor accepted the receipt of advance copy of the petition. The Corporate Debtor filed reply vide diary no. 01034/01 dated 26.11.2021 and written submission vide diary no. 01034/05 dated 20.11.2023. The Corporate Debtor, in his reply, has submitted that the petition is not maintainable on the following grounds:

(a) The petition has been filed on the basis of rent agreement dated 11.09.2016, which was entered into with the Harbir Singh s/o Late Harnam Singh, who has been referred to as director and partner in the firm. The lease deed is in no manner an agreement creating debt between Harbir Automobile Private Limited and the Operational Creditor.

(b) The rent does not fall under the ambit of the operational debt.

(c) The application does not meet the threshold of Rs.1,00,00,000/- and an attempt has been made to combine the alleged dues by various persons to meet the threshold for maintaining the petition under section 9 of IBC, but the threshold cannot be met by addition of various assigned debts.

(d) The lease agreement relied upon by the applicant was terminated w.e.f. August 2020 and vide notice dated 10.10.2020, the possession of property was offered by the corporate debtor to the operational creditor, so the operational creditor had no occasion to raise invoices beyond July 2020 and invoices post July 2020 were received for the first time came by the corporate debtor along with the demand notice. The applicant has fabricated invoices for meeting the threshold stipulated for filing the petition under the IBC. The invoices after July 2020 attached as part of Exhibit ?B?, Exhibit ?C? and Exhibit ?D? fake, self-serving and have never been served as the premises stood vacated on the instructions of the lessors w.e.f. 1 August 2020. If the amount claimed under these fabricated invoices from August, 2020 to July, 2021 is subtracted, the alleged debt does not meet the prescribed threshold of Rupees one crore. A complaint to SSP has already been made against the operational creditor for fabrication of invoices which are annexed as Annexure R-6 of the reply.

(e) The petition is defective, as the bank statement for the relevant period has been intentionally concealed i.e. statement prior to July 2018. By doing so, the applicant has concealed amounts of more than Rs.40 lacs. which have been deposited on account of security and advance rent by the Corporate Debtor. The chart reflecting the various bank entries and the ledger from January 2016 till July 2020 are annexed as Annexure R-1 of the reply, which reflects that the respondent corporate debtor is to receive an amount of Rs.21,67,966/- from the operational creditor. The amount of Rs.24 Lacs was credited to the account of the operational creditor as advance rent vide cheque no. 43593 dated 26.09.2016 and another amount of Rs.27,90,000/- was paid as advance rent in the month of

August 2017 vide various cheques, which has been concealed. Not only the advance payments are ignored, the security amount and the payments made towards TDS have also been deliberately concealed. The total amount of Rs.34,56,900/- stands paid as TDS, which are duly reflected in Form 26AS and a copy of the same is annexed as Annexure R-3 of the reply.

(f) The corporate debtor also mentioned in the reply that they had also entered into addendum to the agreement dated 11.09.2016 vide which the amount of rent was reduced to Rs.6 Lacs + GST@18% w.e.f. 01.12.2018 and continued till the vacation of said premises by the lessee. At this stage, an amount of Rs.21,67,966/- is liable to be refunded to the corporate debtor and when Mr. Harbir Singh requested for refund, the operational creditor took an unjustified stand that possession has not been handed over. Thereafter, the corporate debtor issued a letter dated 10.10.2020 asking to take over the possession, as the premises had been vacated. In reply to the same, the operational creditor illegally demanded rent and GST.

(g) Neeru Kohli and Surinder Kohli (co-owners of the property of operational creditor) signed a letter acknowledging that as on 24.08.2020 invoices till July 2020 has been raised in respect of Neeru Kohli and the Chart shows that all invoices were raised on the first of each month, but no invoice was raised on 01.08.2020, which clearly shows that the parties had severed the relationship, the premises had been offered to be vacated and invoices mentioned in the said letter are duly cleared. The copy of the letter dated 24.08.2020 is annexed with Annexure R-7 of the reply.

(h) There is a pre-existing dispute between the parties and the Corporate Debtor received the demand notice on 14.06.2021, which was responded on 22.06.2021 and in the said reply, Corporate Debtor highlighted the objections and established that there exists a pre-existing dispute in respect of the agreement to lease. In this regard, various proceedings were undertaken even before the police authorities. The operational creditor had also filed complaints with the police authorities vide letter dated 04.12.2020 alleging fraud on the part of corporate debtor and thereafter vide letter dated 21.01.2021 alleging trespass which is annexed as annexure R-4 of the reply. Both the parties appeared before the inquiry officer where the corporate debtor offered keys and joint inspection of the premises, to which the operational creditor refused.

(i) Without a valid GST no., the GST invoices could not have been raised and the Corporate Debtor had suffered a loss of Rs.27,79,935/- on account of non-deposit of GST by the operational creditor for the period till July 2020.

(j) It was agreed between both the parties to waive the rent for the month of April 2020 due to lockdown and covid. A perusal of the statement would show that the applicant has already received a total amount of 4,24,44,134/- inclusive of TDS till July 2020 against total invoices raised of Rs.4,07,00,416/- inclusive of GST.

REJOINDER BY OPERATIONAL CREDITOR

5. The rejoinder was filed by the Operational Creditor vide diary no. 01034/02 dated 03.08.2022 and written submission vide diary no. 01034/03 dated 10.04.2023. In the rejoinder, Operational Creditor has reiterated the pleadings made in the petition and also submitted that:

(i) The rent agreement was with Harbir Automobile Pvt. Ltd. through Mr. Harbir Singh, who has signed the agreement in the capacity of director of Harbir Automobile Pvt. Ltd. Further, all invoices were raised in favour of Harbir Automobile Pvt. Ltd. and all payments since the beginning from 11.09.2026 were made by the Corporate Debtor company.

(ii) The actual physical possession of the property was given by the corporate debtor to the operational creditor in the Office of Assistant Commissioner of Police, Sector 34, Chandigarh vide compromise letter dated 24.08.2021 between the parties. Therefore, the amount of rent is due till the date of handing over of actual physical possession.

(iii) The advance rent paid by the corporate debtor vide cheque dated 28.09.2016 has been adjusted against principal lease rentals and vide various cheques were paid as advance rent.

(iv) The offer of possession by Corporate Debtor vide letter dated 10.10.2020 is in violation of the rent agreement as a prior 3 months' notice is required before handing over the possession.

(v) Rent falls with the definition of operational debt as per settled proposition of law as held by NCLAT/NCLT.

(vi) No agreement for waiver of rent for one month i.e. April 2020 was entered into between the parties.

(vii) There was no pre-existing dispute between the parties.

IA no. 2171/2023

6. IA no. 2171/2023 in the main petition was filed vide diary no. 03065 dated 18.09.2023 by Corporate Debtor under Rule 11 of NCLT Rules, 2016 and other applicable provisions of IBC read with Rule 6 of 'The Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016'. In the IA, the corporate debtor submitted that:

a. The petitioners had been collecting GST from the corporate debtor without depositing the same with the department, thus causing a huge loss of the input credit to the corporate debtor. Therefore, the corporate debtor was constrained to shift the premises urgently.

b. Thereafter, the corporate debtor wrote a letter dated 01.06.2023 (copy annexed as annexure RA-1 of the IA) to the GST authorities to confirm the authenticity of invoices raised by the operational creditor, which the corporate

debtor had never received. In response to the said letter, GST authorities, vide letter dated 26.06.2023 (copy annexed as annexure RA-2 of the IA), confirmed that the invoices in the subject matter of the present dispute are forged and the tax collected from Corporate debtor has not been deposited since the year 2018.

c. The operational creditor was not entitled to raise any GST invoices since GST number stands cancelled. Thus, the invoices themselves are non-est in the eyes of law.

d. The importance of GST compliance as proof of genuineness of the invoices is apparent from the amendment brought about in Rule 7 of The Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016, which provides for copies of the relevant extracts of Form GSTR-1 and Form GSTR-3B and copy of e-way bill as proof of claim.

e. The corporate debtor demanded GST returns from operational creditor vide letter dated 08.12.2020 (copy annexed as annexure RA-3 of the IA), however the same have never been supplied, which caused huge loss of input on GST for tax given till July 2020.

7. The Corporate debtor vide the present IA prayed that the application be allowed and the documents may be taken on record and further the present petition under section 9 of the IBC be dismissed. The corporate debtor has also placed reliance on the decision of the apex court in the case of Sabarmati Gas Limited vs. Shah Alloys Limited 2023 (3) SCC 229 with regard to non-maintainability of the petition in view of pre-existing disputes between the parties.

8. The reply in the IA was filed vide diary no. 03065/01 dated 06.10.2023 by the Operational Creditor, wherein it has been submitted that:

(i) The operational creditor had filed GST-3B returns up to June 2018 and GST registration of operational creditor was cancelled by GST authorities suo-moto on 21.10.2019, which came to the knowledge of operational creditor in the month of February 2022.

(ii) The corporate debtor paid the GST/ arrears of GST along with GST interest up to the month of June 2018, which was duly and promptly deposited with the GST authorities.

(iii) The possession of the premises was handed over to the operational creditor on 24.08.2021 before ASP(South), Chandigarh Police (copy of statement of operational creditor annexed as Annexure OC-5 of the reply). Therefore, the operational creditor filed application under section 9 of Insolvency and Bankruptcy Code claiming rent up to the month of June 2021 and the corporate debtor left the premises without clearing the outstanding dues towards the electricity and water consumption (copy of electricity bill paid by the operational creditor annexed as annexure OC-7 of the reply).

(iv) The GST authorities have responded in the most callous manner by giving a finding of forgery without confirming from the operational creditor, as to whether the amounts due under the invoices in question have been paid or not and that too without informing the operational creditor that his GST registration has been cancelled suo-moto.

ANALYSIS AND FINDING

9. We have heard the learned counsels for the operational creditor and corporate debtor and perused the documents/ records submitted by both the parties.

10. It is noted that the documents submitted by the applicant (corporate debtor) in IA no. 2171 of 2023 would be relevant for deciding the issues in the present petition. Therefore, IA no. 2171 of 2023 is allowed and the relevant documents submitted by the corporate debtor are taken on record.

11. The next issue for consideration is ?Whether demand notice in form 3 was properly served?. The operational creditor had served the demand notice dated 10.06.2021 in form 3 and the same was delivered to the corporate debtor on 14.06.2021. Therefore, it is clear that the demand notice was properly served. The corporate debtor replied to the demand notice vide letter dated 22.06.2021, which is well within 10 days of receipt of the notice. Further, no payment has been made by the corporate debtor and in reply to the demand notice, the corporate debtor has raised the dispute with regard to the existence of the amount of debt.

12. The next issue for consideration is ?Whether there was pre-existing dispute between the parties?.

12.1 It is deposed by way of an affidavit under Section 9(3)(b) by the Operational Creditor that no notice of dispute was raised by the Corporate Debtor regarding unpaid operational debt. However, the Corporate Debtor has centered its defense primarily around the contention that there were pre-existing disputes between the parties.

12.2 The Hon?ble Supreme Court in Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353 has held:

?40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the ?existence? of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the ?dispute? is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere

bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

43. ?????.We have seen that a ?dispute? is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6).

45. Going by the aforesaid test of ?existence of a dispute?, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability?.

12.3 It is noted from the pleadings of both the parties that there were pre-existing disputes much before the issuance of the demand notice on 10.06.2021 with regard to the amount of debt sought by the petitioner, which is evident from the following:

(a) The operational creditor himself acknowledged in his letter dated 27.10.2020 that the corporate debtor offered to vacate the premises, however, the operational creditor stated that the corporate debtor has to give clear notice of 3 months in advance as per para 15 of lease deed and also demanded rent and outstanding GST.

(b) In response to the said letter, the corporate debtor vide letter dated 08.12.2020 asked the applicant to take over the possession and to submit their GST returns.

(c) Thereafter, legal notice dated 03.03.2021 was also sent by the operational creditor to vacate the premises and in response, the corporate debtor replied vide letter dated 06.04.2021 stating that neither any rent is due nor any amount of GST is due and the premises is already vacated and possession was offered on various occasions, but the operational creditor himself is not taking over the possession.

(d) The operational creditor filed complaints dated 04.12.2020 and 21.01.2021 with the police authorities, after which the possession of premises was given before the police authorities on 24.08.2021 and the statement of operational creditor was also recorded that the operational creditor and corporate debtor had arrived on a compromise and no further matter is pending, so he did not wish to pursue the proceedings.

(e) The letter of GST authorities submitted by the corporate debtor clearly states

that the GST no. of all three taxable persons are cancelled suo-motto by the department due to default in return filing and these taxable persons were not entitled to raise GST invoices or collect GST after the cancellation of their GST numbers; no goods and service tax has been paid by them after the cancellation of the GST number and GST invoices submitted for the verification are forged and no details have been found in GSTR-01 of these taxable persons.

13. As a sequel to the above discussion and facts of the case, this Adjudicating Authority is of the considered view that there was a pre-existing dispute regarding amount of debt relating to period of rent, amount of GST, TDS and adjustment of advance rent and security and further with regard to the possession of premises for the period, for which the invoices in the present petition are claimed. Therefore, the operational creditor has failed to establish a valid case for initiation of CIRP proceedings in the matter.

14. Since the petition is liable to be dismissed on the ground of pre-existing disputes, this Adjudicating Authority is not examining other issues raised by the petitioner and respondent.

15. The present Section 9 application filed by the Operational Creditor is dismissed without costs.