
(2023) 11 NCLT CK 0006

In the National Company Law Tribunal

Case No : C.P. No. 3385/IBC/MB/2019

Topsgroup Service (India) Limited Vs M/s. Atos India Pvt. Ltd ?

Date of Decision : 01-11-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 8, 9

Citation : (2023) 11 NCLT CK 0006

Hon'ble Judges : V.G. Bisht (Retd.) Member (J); Prabhat Kumar, Member (T)

Bench : Division Bench

Advocate : Prakash Shinde, Naresh Thakur

Final Decision : Disposed Of

Judgement

Justice (Retd.) V. G. Bisht, Member (J)]

1. This is an creditor/applicant application under section filed 9 of by the operational Insolvency & Bankruptcy Code, 2016 (hereinafter referred as "IB Code" for short) against corporate debtor/respondent, for initiating corporate insolvency process ("CIRP" for short).

Brief facts:-

2. The Operational Creditor is a Company engaged in the business of providing security guarding services, security consultancy services, electronic security solutions etc. The Operational Creditor had provided security guarding services to the Corporate Debtor as per the requirement of the Corporate Debtor under the security service agreement (Annexure-A) dated 01.09.2016 and accordingly, raised monthly invoices. The invoices so raised contained a provision that payment should be released within 4 (four) days of the receipt of invoice failing which the Corporate Debtor was liable to pay an interest @ 24% p.a. and as per the agreement the Corporate Debtor was required to make payment within 45 days of submission of the invoices.

3. The aforesaid arrangement of Security services was discontinued and concluded vide discontinuation letter dated 02.04.2019 (Annexure-C) issued by

Corporate Debtor. The Corporate Debtor also failed to make payment of the invoices generated by the Operational Creditor after 31.01.2019 upto 28.02.2019 amounting to Rs. 6,87,959/-and interest thereon. The Operational Creditor therefore issued a notice dated 25.05.2019 (Annexure-E) but Corporate Debtor refused to clear the outstanding dues. Thereafter, the Operational Creditor issued a demand notice dated 26.06.2019 under Section 8 of the Insolvency and Bankruptcy code, 2016 under Form 3 thereby demanding the total outstanding payment but again the Corporate Debtor failed and neglected to comply with the said notices. Therefore, the present petition for initiation of Corporate Insolvency Resolution Process.

4. The Corporate Debtor, on the other hand, resisted the claim by filing affidavit in reply and contended that the dispute exists in relation to the purported claim which commenced as early as November, 2018 i.e. prior to the receipt of the notice of demand. According to the Corporate Debtor, under the security service agreement dated 01.09.2016 and more particularly in the light of (clause 2), the Operational Creditor was responsible for payment of all wages of guards and contributions to provident funds. However, as it committed default, the Corporate Debtor was constrained to make payment to the said guards on receipt of notice/s from Labour Commissioners and other authorities. Although the purported claim of the Operational Creditor is Rs. 7,33,874/- but the Corporate Debtor has made payment of Rs. 9,70,062/- and thus the Corporate Debtor has claim of Rs. 2,36,188/- against the Operational Creditor.

5. The Corporate Debtor next contends that there are no amounts which are due from it and as an afterthought and counterblast to the termination of the agreement by it, the Operational Creditor issued a purported notice dated 25.05.2019 and subsequently under Form 3 dated 26.06.2019. Consequently, the present petition is liable to dismissed with costs, argues Corporate Debtor.

FINDINGS

6. Mr. Prakash Shinde, Learned Counsel for the Operational Creditor made two-fold submissions.

- i) It is only after the issuance of the demand notices the Corporate Debtor took false stand of making all the payments and,
- ii) Secondly, as per the invoices raised by the Operational Creditor no amount was paid and, in this eventuality, the Corporate Debtor is liable for initiation of CIRP under the provisions of I & B Code, 2016

7. Mr. Naresh Thakur, Learned Counsel for the Corporate Debtor, on the other hand, has filed on record list of dates summarising the transaction between the parties and forcefully submitted that their existed a dispute prior to the issuance of the demand notice. Moreover, it is Operational Creditor who is liable to pay the sum of Rs. 2,36,188/- to the Corporate Debtor. For all these reasons, present petition needs to be dismissed with costs, argued Learned Counsel.

REASONS

8. We have carefully perused the record.

9. There is no dispute between the parties that they entered into the security service agreement (Exhibit-B) on 01.09.2016. Part I of the said agreement deals with undertaking of which clause 2, inter alia provides that the security personnel deployed at Atos Location will be employees of service provider and the necessary statutory requirements such as minimum wages, ESI, PF etc. shall be the responsibility of service provider who is registered with PF and ESI in the name of Tops Security Limited. Similarly, Clause 7 provides that service provider agrees to be exclusively responsible to observe and comply with all applicable laws, rules, enactments and guidelines including without limitation, Contract Labour (Regulation & Abolition) Act, 1970; Industrial Disputes Act, 1947; Minimum Wages Act, Payment of Bonus Act, Employee Provident Funds Act; Employees State Insurance Act; Payment of Gratuity Act, 1972; Workmen's Compensation Act, 1923; the Private Security Agencies (Regulation) Act, 2005, as applicable from time to time.

10. Coming to the part VI of the said agreement, it deals with payment of taxes. According to clause 12, service provider shall raise its invoice on Atos with reference to the agreement under which the invoice is issued which shall state the description of services being invoiced and the charges payable by Atos. Atos shall make the payments monthly for all undisputed invoices within forty-five (45) days of receipt of invoice. The invoices shall reach Atos within ten (10) days of the next month for which month the invoices are raised. Any invoices sent after ten 10 days shall be processed along with invoice for the following month. Atos shall not be obligated to pay any amounts other than the agreed charges as specified in the Schedule I.

11. Part IX then deals with immediate termination clause on the happening of any of the contingency mentioned therein.

12. It is a specific case of the Corporate Debtor that as dispute arose on the ground of Operational Creditor having failed to make timely payment of wages, bonuses and other statutory dues (ESI, PF etc.) to the security guards/security personnel deployed at various office locations of Corporate Debtor from time to time, the Corporate Debtor terminated the security service agreement on account of material breaches of the terms and conditions of the said agreement and which is apparent from the notice of termination and agreement dated 02.04.2019 filed on record by the Operational Creditor.

13. Why the Corporate Debtor took this extreme step is not hard to seek from the pleadings of the Corporate Debtor. It is clear that it had received a notice (Exhibit-D) from Assistant Commissioner of GST and Central Excise, Chennai South Commissionerate inter alia claiming an amount of INR 24,36,023/- as an outstanding due towards GST for the period April, 2018 to December, 2018, notice received from the Labour Department Bangalore (Exhibit-E) directing the

Corporate Debtor to pay the outstanding dues directly to the employees/guards/workers of the Operational Creditor deployed at Bangalore, notice (Exhibit-F) received from Labour Department Pune directing the Corporate Debtor to pay the outstanding dues directly to the employees/guards/workers of the Operational Creditor deployed at Pune and the notice (Exhibit-G) received from Labour Department Vadodara directing Corporate Debtor to pay the dues directly to the employees/guards/workers of Operational Creditor deployed at Vadodara. All these facts were duly brought to the notice of the Operational Creditor by Corporate Debtor vide its notice (Exhibit-I) dated 24.05.2019 and called upon them to resolve and release payment to their guards within 2 days of receipt of the notice.

14. It is worth mentioning here that immediately on the next date i.e. on 25.05.2019 the Operational Creditor issued a demand notice under Form 3 of the IB Code to Corporate Debtor demanding payment in respect of purported operational debt in the sum of Rs. 70,86,080/- for services rendered for the month of March, 2019. Before that, it will not be out of place to note here that since there were statutory dues as demanded by various Government Offices the Corporate Debtor was compelled to pay an amount of Rs.34,39,923/- on 28.05.2019 and Rs. 3,92,197/- on 30.05.2019, towards payment of wages of guards/workers from the month of February, 2019 and March, 2019. These facts are not at all disputed by the Operational Creditor.

15. From the above, it is as clear as day light that there existed pre-existing dispute between the parties in respect of the wages of the security guards deployed at various locations of the Corporate Debtor by Operational Creditor. The dispute should not have arisen in as much as the security service agreement had put all statutory obligation on the Operational Creditor to take care of the wages of the employees so deployed at various locations of the Corporate Debtor and also to comply with the statutory requirements of ESI, PF etc. which, admittedly the Operational Creditor failed to perform.

16. Apart from above, the stand taken by the Corporate Debtor is also substantiated by various e-mails filed on record at page nos. 143-146 of the reply.

17. From the above discussion, we are clear in our mind that before issuance of the demand notice under Section 8 of the IB Code there existed a dispute between the parties. There is admittedly a plausible contention in respect of dispute raised by the Corporate Debtor before issuance of the demand notice in respect of payment of salary and wages etc. of the employees belonging to the Operational Creditor. Definitely the Corporate Debtor is on firmer ground when he raises the plea of existence of a dispute.

18. In the light of above discussion, we are also satisfied that the plea (of pre-existing dispute) raised by the Corporate Debtor satisfies all the necessary requisites laid down by the Hon'ble Apex Court regarding "existence of dispute"

in the case of Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited in Civil Application No. 9405 of 2017 dated 21.09.2017.

19. We are therefore, not inclined to allow the present Company Petition. Hence, the following order.

ORDER

1) Company Petition No. 3385/2019 filed under section 9 of I & B Code, 2016, filed by Tops group Service India Ltd., Operational Creditor/Applicant against Atos India Pvt. Ltd., Corporate Debtor for initiating Corporate Insolvency Resolution Process is dismissed.

2) We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

3) Any other pending IAs'/MAS' if any, in the present Company Petition stand disposed of.

4) File be closed and consigned to record.