

(2023) 06 NCLT CK 0003
In the National Company Law Tribunal
Case No : ?IA(I.B.C) 958 Of 2020
?Vijay Kumar Vs DCB Bank ?

Date of Decision : 02-06-2023

Acts Referred:

Indian Penal Code, 1860 — Section 406, 420
Insolvency and Bankruptcy Code, 2016 — Section 5(7), 19(1), 19(2), 60(5)
National Company Law Tribunals, 2016 — Rule 11

Citation : (2023) 06 NCLT CK 0003

Hon'ble Judges : Harnam Singh Thakur, Member (J); Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : Nishi Chaudhary, FS Dhiman

Final Decision : Disposed Of

Judgement

Subrata Kumar Dash, Member (Technical)

IA No. 937/2020

1. This application has been filed by Mr. Vijay Kumar, Resolution Professional of SPG Global Distribution Pvt. Ltd. (herein referred to as Applicant) against Sh. Ramesh Singh Rawat (herein referred to as Respondent) under Section 60(5) of the IBC, 2016, read with Rule 11 of NCLT Rules, 2016.

2. It is prayed by the applicant to direct the respondent to vacate the property as mentioned in the application, and it is further prayed to provide the assistance of the Local Police.

3. The brief facts as submitted in the application are that :

3.1. The Agreement to Sell dated 31.03.2018 was entered into by the corporate debtor with the respondent for the property belonging to the corporate debtor, which consists of the entire first floor, having its covered area 945 square ft. without roof/Terrace right (referred to as "Property No. 1") and 3rd floor consisting of one room (referred to as "Property No. 2") at commercial shop plot number 363, 364, 365, B-Type, situated at Neeru ground, NIT, Faridabad for a

total consideration of Rs.75,00,000/- (Annexure A-2 of the application). Further, a Memorandum of Understanding dated 05.09.2018 (Annexure A-5 of the application) between the corporate debtor and the respondent extending the final date of deposit of full payment, failing which the agreement dated 31.03.2018 shall be terminated.

3.2. After the initiation of CIRP, a claim of Rs. 60,80,000/- was received from the respondent on 07.01.2020 by the Interim Resolution Professional, which was subsequently rejected by the Resolution Professional. It is alleged that the respondent, in connivance with the suspended director, Shri Chandrashekar Kukreja of the corporate debtor, has sent the email dated 02.03.2020 stating that they both had agreed on 19.05.2019 to continue with the terms and conditions and hence the agreement to sell dated 31.03.2018 is still valid and subsisting.

3.3. It is further submitted that the respondent had submitted his claim in various Forms before the resolution professional. The Resolution Professional, through an email dated 15.03.2020, intimated to the respondent on 27.02.2020 that the said claim was rejected. He further informed that the claim did not fall within the purview of section 5(7) of the IBC, 2016, as no document was provided by the respondent regarding the credit amount in the name of the corporate debtor.

3.4. It is mentioned that the respondent has failed to make the final payment to the corporate debtor, and the Resolution Professional has sent the notice dated 23.09.2020 for the vacation of the premises but the respondent has failed to deliver the possession of both properties (Property No.1 and Property No. 2) which prevents the resolution professional from performing his duties under the CIRP process.

4. The respondent has filed his reply vide Diary No. 01626/3 dated 11.04.2023 wherein it has been stated that:

4.1. The respondent is in possession of the 1st floor having covered area 945 sq. without any right or access to 2nd floor or roof/terrace right of 3rd floor of the said plot situated at Nehru Ground, NIT, Faridabad. The director of the corporate debtor, Mr Shekhar Kukreja, received an amount of Rs.30,00 000/- from Mr Ramesh Singh Rawat on 31.03.2018; however, no transfer deed was entered, and subsequently, property disputes under section 420 and 406 of IPC were registered at Faridabad District Courts. It is averred that the respondent Mr. Ramesh Singh Rawat is a bonafide possession holder by virtue of the Agreement to Sell dated 31.03.2018 and on the basis of the consent of the seller. The respondent has also demanded a refund of double the amount of the advance money, and the cheques were also dishonoured. Criminal proceedings under Section 420 of IPC are pending against the Directors and the Company. The respondent has also raised issues with the authenticity of the name of the applicant mentioned in the application.

4.2. The respondent has also stated that he submitted all the documents for his claim amounting to Rs. 60,80,000/- on 07.01.2020 as a Financial Creditor on the basis of the time value of money. The Eviction Notice given by the Resolution Professional is not as per the IBC Rules. The Resolution Professional has no concern to file a police complaint to evacuate the premises of Property No. 1.

4.3. It is further stated that the Resolution Professional has not even filed an application under Section 19(1) & 19(2) under IBC against the Erstwhile Management or Chartered Accountants to obtain the proper list of properties and accounts receivable.

4.4. Further, the reliance is also placed on the judgements of TATA Consultancy Services Limited Vs. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Pvt. Ltd., Civil Appeal No. 3045 of 2020 dated 23.11.2021; Gujarat Urja Vikas Vs. Amit Gupta & Ors. (2021) 7 SCC 209 and Mr. Kolla Koteswara Rao Vs. Dr. S.K. Srihari Raju of NCLAT, New Delhi, PB, CA(AT), Ins. No. 717 of 2020 with respect to the powers of the NCLT and NCLAT regarding interference with a party's contractual right to terminate a contract along with the definition of 'Financial Creditor' under Section 5(7) of the Code.

5. We have heard the learned counsel for the applicant and the respondents and have perused all the records carefully.

6. On going through the Agreement to Sell dated 31.03.2018 executed between the Corporate Debtor and the respondent Mr. Ramesh Singh Rawat, who is the proprietor of RO Systems, it is seen that the total consideration for the sale was Rs. 75 lakhs and part-payment towards the same has been made by the respondent. There are clear stipulations mentioned regarding payment in the Agreement, which is reproduced as under :

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3. That the said Seller will clear all the outstanding dues against this property (i.e. towards price, increase area, dues, enhance compensation, interest/penalty, electricity bills, water and sewerage charges etc.) and will get No-Dues Certificate and Permission to Sell/Transfer of the said property from the concerned department. That the said seller will obtain No Dues Certificate from Municipal Corporation, Faridabad and Signature Verification from Bank at the time of execution and registration of Sale Deed/Transfer Paper

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7. That in case the said seller backs out from the bargain and fails to complete all the formalities then the said seller shall be liable to refund to the said purchaser double of the earnest money received by him/her today. In case the purchaser does not accept such liquidated damages the purchaser shall have the right to get sale of said property effected through Court of law under specific performance of this undertaking at the risk and cost of seller in case the purchaser backs out from this bargain than this earnest money shall stand

forfeited in favor of seller and returns the part payment, if paid.”

7. Subsequently, a Memorandum of Understanding dated 05.09.2018 has been executed between the corporate debtor and the respondent in which it is noted that :-

“As discussed in the meeting on dated 19.05.2019 , I ensure that the clearance from Banker will be given to the buyer of First Floor of said property on dated 03.06.2019 or on next working days and the buyers having the right to pay any action against the seller in case of non-fulfillment of commitment.”

8. In view of the above, it is clear that the sale with regard to the impugned property, i.e. first floor, having its covered area of 945 square ft. without roof/ Terrace right (referred to as “Property No. 1”) and 3rd floor consisting of one room (referred to as “Property No. 2”) is not complete as full and final payments have not been made. Hence, we are of the considered view that the legal ownership of both properties is vested with the Corporate Debtor.

9. As regards the jurisdiction of this Authority to adjudicate on this issue where the right to property is under dispute, it is clarified that the code gives overriding power to this Authority to adjudicate on issues having a direct connection with the resolution process under the code.

10. In this context, a reference is made to Section 25 of the Insolvency and Bankruptcy Code, which is reproduced below :-

“Section 25: Duties of resolution professional.

25. (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:—

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;...”

11. In the present case, it is noted that the Resolution Professional has to take custody and control of all the assets of the corporate debtor as per Section 25 of the Insolvency and Bankruptcy Code, 2016. The document produced by the Resolution Professional, i.e. sale deed dated 02.09.2014, shows that it was executed in favour of the corporate debtor with respect to the first floor only. The agreement dated 31.03.2018, read with MoU dated 05.09.2018, shows that the last date for the execution of the sale deed is fixed as 03.06.2019, which is clearly not complied with. In view of the circumstances, the respondent is

directed to hand over the possession of the impugned properties to the Resolution Professional within 15 days of this order. The statutory authorities, i.e. Local Police, are also directed to provide assistance to the applicant in case the properties are not handed over to the applicant within the prescribed time period.

12. In the result, IA. No. 937 of 2020 is allowed as above and disposed of accordingly.

IA No. 958/2020

13. This application has been filed by Mr. Vijay Kumar, Resolution Professional of SPG Global Distribution Pvt. Ltd. (herein referred to as Applicant) against DCB Bank Limited (herein referred to as Respondent) under Section 60(5) of the IBC, 2016, read with Rule 11 of NCLT Rules, 2016 for releasing the fees of the Resolution Professional/Law Retainer and other professionals along with CIRP cost and other professionals cost.

14. It has been submitted by the applicant that:

14.1 The application under Section 9 of IBC for initiation of Corporate Insolvency Resolution Process was admitted by this adjudicating authority vide order dated 06.12.2016 and thereafter moratorium was declared and Mr. Divyanshu Mishra was appointed as Interim Resolution Professional. In the 1st CoC meeting held on 04.01.2020, Mr. Vijay Kumar was resolved to be appointed as Resolution Professional, and the same was also affirmed vide order dated 21.01.2020 of this adjudicating authority.

14.2 Thereafter, the resolution professional convened the 2nd meeting of the Committee of Creditors held on 10.02.2020 in which the fees of the RP Mr. Vijay Kumar, Rs. 1.5 Lakhs per month was approved with 100% voting rights.

14.3 Furthermore, the resolution professional conducted the 3rd CoC on 10.08.2020, where CoC members discussed the expenses forming CIRP cost from 07.02.2020 till 12.08.2020 and overturned their decision from the 2nd CoC meeting and denied to pay the Professional Fees of lockdown period and rejected fixed clerkage and expenses from 10.08.2020.

14.4 The applicant places reliance on the order passed by the Hon'ble NCLT, New Delhi, on 13.07.2020 in the matter of Nawal Kishore Prasad Vs. Hospitech Management Consultants Pvt. Ltd. bearing CP No. 1639/ND/2019.

14.5 The CoC in the present CIRP comprises DCB Bank Ltd. (Secured Financial Creditor), Excise and Taxation Officer cum Assessing Authority and M/s S.R. Electronics (Operational Creditor).

15. It is submitted by the respondent that:

15.1 The 1st CoC meeting dated 04.01.2020 recorded Rs. 2,77,768/- as CIRP Cost. Further, in the 2nd CoC meeting dated 10.02.2020, the Resolution Professional Fee of Rs. 1,50,000/- was approved. In the 3rd CoC dated

10.08.2020 it was agreed that the fees be paid at the time when services are required at IBBI rates.

15.2 The CoC paid the total cost of CIRP from 29.01.2020 to 28.02.2020 amounting to Rs. 2,32,684/- which included conveyance cum visiting charges including legal retainer fee, CS Bill for ROC report and Professional Fee from 29.10.2020 to 28.02.2020 including clerkage and office expenses. It was further resolved that the Bill of Rs. 2,89,482/-submitted by RP would be considered later.

15.3 The applicant further places reliance on the order passed by the Hon'ble Supreme Court of India vide its judgment dated 15.03.2022 in Civil Appeal No. 4065/2020 Alok Kaushik VS. Mrs. Bhuvaneshwari Ramanathan and others, which holds that "the Adjudicating Authority is sufficiently empowered under Section 60(5)(c) of the IBC to make a determination of the amount which is payable to an expert valuer as an intrinsic part of the CIRP costs. Regulation 34 of the IRP Regulations defines 'insolvency resolution process cost' to include the fees of other professionals appointed by the RP. Whether any work has been done as claimed and if so, the nature of the work done by the valuer is something which need not detain this Court, since it is purely a factual matter to be assessed by the Adjudicating Authority ".

15.4 The respondent has relied upon the judgements of

1) Sangram Singh vs. Electron Tribunal passed by Hon'ble Supreme Court in Civil Appeal No. 214/1954 dated 12.03.1995

2) Arjun Singh Vs Mahindra Kumar Prasad passed by Hon'ble Supreme Court in Civil Appeal No. 768/1963 dated 13.12.1963

3) Khushvinder Singhal Vs Reena Tiwari passed by the Hon'ble NCLAT, Delhi In Com. App. (At) (Insolvency No. 469/22 dated 04.05.2022

4) Deepankur Sharma Vs Pradeep Cycle Industries passed by the Hon'ble NCLAT, In Com. App. (At) (Insolvency No. 474/22 dated 04.05.2022

16. We have heard the learned counsel for the applicant and the respondents and have perused all the records carefully.

17. It is noted that the amount of Rs. 2,34,000/- has been paid towards the total cost of CIRP from 29.01.2020 to 28.02.2020, including a fee of Resolution professional and other charges etc. It is also noted that In the 2nd meeting of the CoC, it was agreed by the member over the fees of the Resolution professional, which was passed with 100% voting share. The professional fees of Rs. 1,50,000/- were approved in the second CoC meeting. As regards the decision of the CoC not to pay the Clerkage and expenses of the RP, It is seen the same has been decided by the CoC on 10.08.2020 in the 3rd meeting, that is, after the period of the 1st lockdown. Further, in the 3rd CoC meeting held on 10.08.2020, the following decision was made :-

"We cannot pay any expenses during lockdown period. We reject fixed clerkage

and expenses, which were inserted in the 2nd CoC for future months starting from this month. The Future bill be submitted accordingly. The Committee approved it and passed the resolution with 100% votes.”

18. In this regard, the judgement relied upon by the respondent is not applicable to the present case as those do not specifically discuss the liability of payment of RP’s fees and expenses during the covid period. In this connection, we refer to the decision of the coordinate Bench, New Delhi, on 13.07.2020 in the matter of Nawal Kishore Prasad Vs. Hospitech Management Consultants Pvt. Ltd. bearing CP No. 1639/ND/2019, which holds that “Only on the ground that during the lockdown period, no work has been done by the IRP/RP, the person cannot be debarred from claiming the fee, if it is approved by the COC members.”

19. In view of the discussion above, we direct the RP to consider the claim of the applicant for fees and other expenses during the lockdown period on the lines already approved by the CoC in its second meeting subject to the reasonableness of expenses claimed. He will decide the same in line with the IBBI Circular dated 12.06.2018, which lays down, inter alia, the parameters for determining the fees of the Resolution Professional. After due consideration, the Resolution professional is to place the same before the CoC for its consideration by convening a meeting of the CoC within 7 days of this order. The Payment to the applicant is directed to be made within 15 days of this order.

20. In the result, IA No. 958/2020 is allowed and disposed of accordingly.