
(2023) 05 NCLT CK 0097

In the National Company Law Tribunal

Case No : CP (IB) No. 444/Chd/Hry/2019

Vishal Sharma, Proprietor Times Interior Vs Scoop Brand Holdings Pvt. Ltd ?

Date of Decision : 31-05-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 8, 8(1), 8(2)(a), 9

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 — Rule 5

Citation : (2023) 05 NCLT CK 0097

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

Bench : Division Bench

Advocate : Sanjeev Gupta, Sunil Mutreja

Final Decision : Dismissed

Judgement

Harnam Singh Thakur, Member (Judicial)

1. The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC' / 'Code'), by Vishal Sharma, proprietor, M/s Times Interior (for brevity 'Operational Creditor' / 'Petitioner'), with a prayer to initiate Corporate Insolvency Resolution Process (CIRP) in case of Scoop Brand Holdings Private Limited (for brevity 'Corporate Debtor' / 'Respondent').

2. The Corporate Debtor, namely, Scoop Brand Holdings Private Limited, is a Company incorporated on 14.07.2011 under the provisions of the Companies Act, 1956 with CIN No: U93000HR2011PTC043422 with its registered office at: Plot No.34, Sector-32, 3rd Floor, Infinity Business School, Gurgaon, Haryana. Hence, the territorial jurisdiction lies with this Adjudicating Authority. Copy of master data of the corporate debtor is attached with the main petition and marked as Annexure A-1.

3. The facts of the case, briefly, as stated in the petition are that the operational creditor is a proprietor of M/s Times Interior and was regularly involved in doing contractual work for the corporate debtor at various sites from the year 2014-15.

Such work included procuring material for the purposes of carrying out electrical, POP Ceiling, Carpentry, and allied works and then getting the said work executed through various sub-contractors of the operational creditor. Various bills/invoices were raised from time to time and payments were regularly credited in the bank account of the operational creditor by the corporate debtor. An agreement dated 28.09.2017 (as per Annexure A-5 of the Petition) was executed between the operational creditor and the corporate debtor for the outstanding bills except for the last three bills which were raised subsequent to the date of the agreement and were cleared by the corporate debtor. The outstanding amount as on 03.11.2017 for the last 3 bills raised which remained unpaid totalled to Rs.71,60,492/- (Rupees Seventy-One Lakhs, Sixty Thousand, Four Hundred and Ninety-Two only) which with interest @ 18% per annum comes to more than Rs.1,25,00,000/- (Rupees One Crore and Twenty-Five Lakhs only) including invoice no. 032 for amount of Rs. 50,06,740 (dated 07.10.2017) for supply of work done at JW Marriot, Jaipur, invoice no. 034 for amount of Rs. 7,67,812 (dated 12.10.2017) for extra work at Sudha Cinepolish, Hyderabad and invoice no. 035 for amount of Rs. 15,03,064 (dated 03.11.2017) raised for final bill of Grand Goa carpentry and ceiling work carried out at Goa. Despite the repeated request, the respondent did not pay the said amount.

4. It is submitted by the petitioner in Form 5, Part IV that the amount claimed to be in default is Rs. 1,03,53,550/- (Rupees One Crore Three Lakhs Fifty Three Thousand Five Hundred Fifty Only) Principal amount = Rs.72,78,246/- arising out of three outstanding bills/invoices plus interest @24% p.a. from the due date till 17.07.2019 totalling to Rs.30,75,304/-. The default occurred on 03.11.2017 i.e. invoice No.035 amounting to Rs.15,03,064/- was raised for the final bill of Grand Goa carpentry and ceiling work carried out at Goa. Thus dues remain unpaid. Copy of table depicting the details of bills/invoices raised from 2015 to 2017 and payment received by operational creditor (Annexure A-2), invoices (Annexure A-3), Bank statements of IDBI and HDFC (Annexure A-4), Agreement/undertaking dated 28.09.2017 (Annexure A-5), copies of outstanding bills/invoices raised by operational creditor (Annexure A-6), table depicting the computation of amount and dates of default (Annexure A-7), and ledger (Annexure A-8), are attached with the main petition.

5. A demand notice was issued on 19.01.2019 and fresh demand notice in Form 3 is stated to be issued by the operational creditor on 12.04.2019 through speed post and the same has been delivered to the corporate debtor as the tracking report and postal receipts are attached with the main petition (Annexure A-10). However, no reply to the demand notice has been received from the corporate debtor till date.

6. The notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted. The affidavit of service was filed vide Dairy Nos. 5218 dated 30.09.2019. The corporate debtor has filed a reply vide diary No.7220 dated 17.12.2019, wherein it is stated that it is admitted

position that the entire monies due, have already been paid by the respondent and the petitioner. The petitioner has not filed complete ledger for the works done by him for respondent company. The petitioner has not disclosed that his arrangement with respondent shall be entitled to maintain a running bill account and raise invoices after completing the work only. The petitioner had entered into a full and final settlement when entire work was done and the settlement payment was made. A settlement agreement dated 28.09.2017 entered between the parties for full and final closure of work. The petitioner admits that the settlement was done to settle all outstanding dues. The salient terms of the Settlement Agreement are reproduced below:-

Clause 8: That no proceedings whether legal Or otherwise shall be undertaken by me for the payment of amounts mentioned in this undertaking post acceptance of post-dated cheques from Scoop Brand Holdings Pvt. Ltd. That I shall not enter the premises of Scoop Brand Holdings Offices/ Factory/ Stores & godowns for any reasons unless called by Ms. Scoop Brand Holdings P. Ltd.

Clause 10: That I agree to settle all Income tax; Vat, GST, and all applicable taxes on my own after receipt of my dues and balance payments amounting to Rs. 7,04,660 chq no. 006607 of HDFC Bank dated 28.12.2017 shall be released to me by Scoop Brand Holdings Pvt. Ltd. upon me having fulfilled service tax compliances and adducing evidences on behalf of the same to Scoop Brand Holdings Pvt. Ltd. in this regard.

Clause 12: That in the event the cheque no 006607 of HDFC Bank Rs. 7,04,660/- dated 28.12.2017 is stopped for payment by Scoop Brand Holdings Pvt. Ltd. due to a dispute/ claim by any taxation department towards my tax obligations, I shall not hold Scoop Brand Holdings Pvt. Ltd. liable for the same and fulfil all such obligations and hence inform Scoop Brand Holdings Pvt. Ltd. so that the pending payments are cleared.

The petitioner has failed to show delivery proof of invoices. vide email dated 04.09.2017 from Sudha Cinopolis to respondent, which makes clear that time when the petitioner supplied the material, the project was already completed and respondent as well as his agents were asked to move from the site. Post the settlement agreement, there was no work related communication between the parties nor any invoices have been received by the respondent. The petitioner has raised GST invoices however, there is no GSTIN Number mentioned. There is no debt which is payable or in default. There is no default on part of respondent Company. The petitioner has failed to furnish any records/documents to establish default on part of the respondent.

7. The short written submissions have been filed by the petitioner vide Diary No.00236/2 dated 23.05.2022 and by respondent-corporate debtor vide Diary No.00236/3 dated 07.10.2022.

8. We have heard the learned counsel for the petitioner and corporate debtor and have perused the records.

9. The first issue for consideration is whether the demand notice dated 12.04.2019 is stated to be issued by the operational creditor through a registered post. The same has been delivered to the corporate debtor as the postal receipts and the tracking report is attached at Annexure A-10 of the petition. Therefore, a demand notice was duly served.

10. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. Although, it is deposed by way of an affidavit by the operational creditor that he has not received any notice from the corporate debtor in relation to any existing dispute with regard to the unpaid operational debt nor received any reply to the demand notice dated 12.04.2019. Further, it is deposed that no suit/arbitration proceedings are pending before any forum in respect of the unpaid operational debt (Annexure A-11).

However, it is seen from the records that parties entered into a settlement agreement dated 28.09.2017 which evidences that there have been differences/ disputes between the parties before the initiation of current application filed on 29.07.2019 and re-filed on 05.08.2019. The settlement agreement provides (Annexure A-5):-

"Clause 2: That I have settled all my outstanding payments amounting to Rs. 14,09,320 with the company after due debits deductions/corrections and That I agree that no further sums remain payable/outstanding from Scoop Brand Holdings Pvt. Ltd. to me in respect of the works/ services rendered by me as a vendor to Scoop Brand Holdings Pvt Ltd"

Clause 7: That I have agreed and accepted the payment through Post-dated Cheques No.006604, Rs.7,04,660/-, Rs.7,04,660/- of HDFC Bank dated 15.10.2017 and 28.12.2017 respectively, amicably and shall bank as per date schedule shared by M/s Scoop Brand Holdings Pvt. Ltd.

Clause 10: That I agree to settle all Income tax; Vat, GST, and all applicable taxes on my own after receipt of my dues and balance payments amounting to Rs. 7,04,660 chq no. 006607 of HDFC Bank dated 28.12.2017 shall be released to me by Scoop Brand Holdings Pvt. Ltd. upon me having fulfilled service tax compliances and adducing evidences on behalf of the same to Scoop Brand Holdings Pvt. Ltd. in this regard".

Therefore, it depicts that the petitioner has agreed vide its agreement/ undertaking that all the dues were duly paid and no further dues are left. The agreement was made much prior to the filing of the present petition which indicates that there was pre-existing dispute between the parties. Moreover, no claim is proved to be of post-agreement period. Even if it so then it cannot be taken into consideration in presence of pre-existing dispute. The reliance can be placed upon the decision of Hon'ble Supreme Court in the case of "Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited? 2017 1 SCC OnLine SC 353", wherein it was held 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. The Hon'ble Supreme Court further observed, *inter alia* :

"33. 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".

It is submitted by the Corporate Debtor that the invoices produced by the petitioner are of period where the work between the parties had stopped and the respondent had handed over the work site to the owner. The invoices raised or claimed are not supported by any documents. The petitioner had not paid the statutory taxes.

Moreso, the ledger bills attached by petitioner provide sales invoices against which the various work contract receipts are mentioned as:- 1) invoice no. 032 for amount of Rs. 50,06,740 (dated 07.10.2017) for supply of work done at JW Marriot, Jaipur and works contract receipt is adjusted for Rs. 42,43,000 along with 18% GST of Rs. 7,63,740 2) invoice no. 034 for amount of Rs. 7,67,812 (dated 12.10.2017) for extra work at Sudha Cinepolis, Hyderabad and works contract receipt is adjusted for Rs. 6,50,688 along with 18% GST of Rs. 1,17,124 and 3) invoice no. 035 for amount of Rs. 15,03,064 (dated 03.11.2017) and works contract receipt is adjusted for Rs. 12,74,317 along with 18% GST of Rs. 2,29,377 are attached at Annexure A-8 of the petition.

11. The other issue for consideration is whether this application is filed within limitation. A demand notice issued dated 19.01.2019 and fresh demand notice on 12.04.2019 attached as (Annexure A-10) was duly served on the corporate debtor. However, the period of limitation would begin from the date of default i.e. 03.11.2017 i.e. invoice No.035 amounting to Rs.15,03,064/- was raised for the final bill of Grand Goa carpentry and ceiling work carried out at Goa. This application was filed vide Diary No. 3709 on 29.07.2019 and was re-filed vide Diary No.3869 dated 05.08.2019. Therefore, this Adjudicating Authority finds that this application is filed within limitation.

12. As a sequel to the above discussion and the facts as well as circumstances

that since there is a pre-existing dispute between the parties regarding the amount claimed and adjusted by the petitioner, the petition is liable to be rejected, in terms of Section 9 of IBC, 2016. The petition consequently stands dismissed, however, with no order as to costs.