

(2020) 08 NCLT CK 0092

In the National Company Law Appellate Tribunal, Principal Bench, New Delhi

Case No : Company Petition No. (IB) 159/ND Of 2019

Yogendra Kumar Sharma And Ors

APPELLANT

Vs

Paras Seasons Heaven Pvt. Ltd. And Anr

RESPONDENT

Date of Decision : 17-08-2020

Acts Referred:

Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Person) Regulations, 2016 — Regulation 6
Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 6
Insolvency And Bankruptcy Code, 2016 — Section 8, 8(1), 9, 9(3)(a), 9(3)(b), 9(3)(c), 9(5), 9(5)(2)(d), 14(1), 14(2), 14(3), 14(4)

Citation : (2020) 08 NCLT CK 0092

Hon'ble Judges : Dr. Deepti Mukesh, J

Bench : Single Bench

Advocate : Nupoor Mahajan, Abhishek Chaudhary, Pooja Mishra

Judgement

Dr. Deepti Mukesh, J

1. The Present Application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), 2016 (for brevity 'the Rules') by Mr. Yogendra Kumar Sharma, being the sole proprietor of M/s Kumar Builders (for brevity 'Applicant'), with a prayer to initiate the Corporate Insolvency process against M/s Paras Seasons Heaven Pvt. Ltd. (for brevity 'Corporate Debtor').

2. The Applicant is a Sole Proprietor of the M/s Kumar Builders, having office at B-315, (EWS Block), Richmond Park-1, DLF-IV, Gurgaon-122002. The applicant is engaged in providing civil, interior and finishing work services.

3. The Corporate Debtor is a private limited company incorporated on 30.07.2010, under the provisions of Companies Act, 1956 bearing CIN No.

U64203DL2004PTC131153 and having its registered office at Room No-205, Welcome Plaza, S-551, School Block - II, Shakarpur, New Delhi -110092. \The Authorized Share Capital of the company is 1,00,000/- and the paid-up share capital of Rs 1,00,000/-.

4. The applicant submits that respondent issued various work orders in favour of the applicant for various works at Project Paras Seasons, Sector 168, Noida. Certain work orders were amended during the course of work and accordingly the applicant duly rendered service under various work orders. The applicant raised various RA bills during the period of September 2015 to January 2017, out of which certain bills have been paid by the corporate debtor and the remaining outstanding debt as per the applicant is Rs 28,83,728/-

5. The applicant submits that after completion of contract work, the corporate debtor failed to clear the entire dues and kept on making false promises and assurances.

6. The applicant submits that on 14.11.2018, a demand notice under Section 8 of the I&B code calling upon the corporate debtor to pay the total outstanding amount of Rs.28,83,724/- was served upon the corporate debtor via Speed Post and the notice was also served via email on email id on rajendra.pant@parasbuildtech.com. The postal receipt, Tracking report and email dated 16.11.2018 is annexed with the application.

7. The applicants submit that despite service of the said demand notice no response was received with regards existence of any dispute with statutory period of 10 days also no payment was made by the corporate debtor,

8. The Applicant filed the present Application under section 9 of IBC, 2016 and served the copy of this application which was duly delivered to the Corporate Debtor as per service affidavit. As per Form V, the total debt outstanding is Rs.28,83,724/- being the amount in respect of 5 work orders issued by the corporate debtor.

9. The Corporate debtor in reply to the said application has raised the following objections:

a) The locus standi and lack of competency to file the present application, as the applicant has not provided any document /authority to show that he is the proprietor of M/s Kumar Builder, nor the applicant has been able to establish any connection between the two.

b) The corporate debtor has also disputed various work order stating that such work was never performed on the site. There is an issue of incomplete work, poor quality of work and waste generation from the site due to which extra cost was incurred by the corporate debtor and accordingly various debit notes were raised. The debit notes were required to be adjusted from the outstanding dues of the applicant hence the bill raised if any has been denied. Various copies of letter annexing debit notes are filed with the reply.

c) The corporate debtor submits vide email dated 04.10.2016, 20.10.2016, 18.11.2016 raised query with regards the inadequate man power causing delay and improper quality of work and applicant had responded to the same explaining its contention. The copies of emails have been annexed herein.

d) The corporate debtor submits that the Section 8(1) and Section 9 (3)(a) of the I & B code have not been complied with, as the copy of invoices demanding the unpaid dues have not been provided along with the demand notice as per Section 8 and application under Section 9. In this regards the corporate debtor have relied upon the order passed by the NCLT, Allahabad Bench, in the case of Laxmi Chand Bansidhar Vs. Juggilal Kamplatt Jute Mills Company Limited, Com. Pet (IB/156/ALD/2017) wherein it has been held that bills annexed without signatures cannot be considered invoices. Hence in the present case the corporate debtor has submitted that the 22 bills annexed with the application bears any signature nor is any bill on the letterhead of the company issuing it. Therefore, the bills annexed should not be treated as invoices.

e) That corporate debtor has challenged the so-called debt as the operational debt and has stated that there is no default.

f) That an arbitration on the same dispute is pending and notice dated 10.05.2019 has already been served upon the applicant qua the 4 work orders along with postal receipts has been annexed herein.

10. The applicant in its rejoinder raised the following objection and submits

a) That there is no pre-existing dispute as raised by the corporate debtor.

b) The arbitration filed and the notice being served on 10.05.2019 has been filed after the filing of the present Application and is an afterthought to the said application.

c) That no dispute was raised prior to the sending of demand notice.

d) That the applicant has complied with Section 8 and 9 of the I & B code and along with the Section 8 notice, proper RA bills and final bill have been annexed.

e) That the applicant submits that Mr. Yogendra Kumar Sharma is the sole proprietor of M/S Kumar Builders and a copy of PAN, TIN, Service Tax Number, CST etc was provided to the corporate debtor vide email dated 14.07.2015, which clearly establishes the relation of the applicant with M/s Kumar Builders. In support of the said contention the Copy of GST registration certificate of M/s Kumar Builder has been attached herein.

f) The applicant submits that it is the case of corporate debtor that several debit notes were raised in the name of M/s Kumar Builders. However, none of the debit notes were served upon the applicant, and the same is evident from the address mentioned on the debit notes being "B-113, Sushant Vyapar Kendra, Sushant Lok-I, Gurgaon -122002". The said address is neither the corresponding address nor the office address of M/s Kumar Builders.

g) The applicant submits that vide email dated 14.11.2016, it was intimated by the applicant that the address for all correspondence shall be "B-315, (EWS Block) Richmond Park -1, DLF-IV, Gurgaon - 122002 in all records maintained by the corporate debtor. The copy of email is annexed herein.

h) The applicant submits that vide email dated 06.01.2016, 08.03.2016, 04.10.2016 the applicant informed the corporate debtor that the work under various work order has been completed by M/s Kumar Builders, however, the Kitchen Counter, Balcony tiles, floor tiles etc had been damaged by other agencies present on the premises like the electrician etc. The relevant emails have been annexed herein.

i) The applicant submits that corporate debtor has always delayed payments on one pretext or the other in spite of various reminders. Also, the corporate debtors vide several emails kept extending the date of submission of final bill. The copies of all the email regarding payments have been annexed herein.

j) The applicant submits that work order bearing no/. PSPHL/WO-15-16/S-301 has never been issued to the applicant and that only 4 work orders were issued. Thereafter vide email dated 23.05.2017 five final bills were submitted under 5 different work orders, whereby the work of 'Door Frame Plaster Repair' was carried out under work order bearing no. PSHPL/WO-15-16/S-301 and same has not been disputed.

11. Having considered the submission made and documents on record it is clearly established that the default has occurred for the payment of the operational debt for which the invoices were raised by the applicant and the so called dispute raised by the corporate debtor, is merely a moonshine dispute, since the corporate debtor has not been able to show with proof that the debit notes raised by the corporate debtor were duly served on applicant through any mode. In view of the above observation it can be concluded that the dispute raised by the corporate debtor, is spurious, plainly frivolous and unable to categorize as genuine dispute as reproduced above, since corporate debtor has not been able to establish and bring on record any evidence with respect to service of debit notes to the applicant at its correct address. The other objections fall short of merit. Hence, contention of the corporate debtor, of a pre existing dispute without any evidence and merit is a clear after thought to defeat the claim of the applicant.

12. In "Mobilox Innovative Private Limited vs. Kirusa Software Private Limited", the Hon'ble Supreme Court has very categorically described the dispute to be considered as a ground for rejecting or admitting the application "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 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 required 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."

13. The Applicant has filed a letter dated 10.12.2018 issued by the bank stating that the amount claimed or any part thereof, has not been received by the applicant nor had any person, on its behalf had received in any manner the amount due to them as required u/s. 9(3)(c) of I & B Code. The Applicant has filed an affidavit under section 9(3)(b) dated 29.12.2018 affirming that no notice of dispute has been given by the Corporate debtor relating to dispute of the unpaid operational debt.

14. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.

15. The default occurred on 12.01.2017 and the present application is filed on 31.12.2018, hence the debt is not time barred and the application is filed within the period of limitation.

16. Therefore, in the given facts and circumstances, the present application is complete and the Applicant has established its claim which is payable and due by the corporate debtor. In the light of above facts and records, the present application is admitted, in terms of section 9 (5) of IBC, 2016.

17. Since the Applicant has not named the Insolvency Resolution Professional, this Bench appoints Mr. Vijay Oberoi, having email id: vijayoberoi61@gmail.com and registration no. IBBI/IPA-001/IP-P01909/2019-20/12938 as the Interim Resolution Professional, subject to the condition that no disciplinary proceedings are pending against him. The IRP is required to file consent Form-2 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule 2016 and make disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016, within a period of one week from this order.

18. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Vijay Oberoi, to meet out the expenses and perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the applicant.

19. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1),

shall follow in relation to the corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.

20. A copy of the order shall be communicated to the Applicant and the Corporate Debtor as well as to the IRP above named and intimate of the said appointment by the Registry. Applicant is also directed to provide a copy of the complete paper book with copy of this order to the IRP. In addition, a copy of said order shall also be forwarded to IBBI for its records and to ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.