(2020) 02 NCLT CK 0006

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

Case No : (IB) No. 1233 (ND) Of 2019

You We And Car — APPELLANT

Vs

OLA Fleet Technologies Private Limited — RESPONDENT

Date of Decision : 29-02-2020

Acts Referred:

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 5
Insolvency And Bankruptcy Code, 2016 — Section 4, 8, 8(1), 8(2)(a), 9, 9(3)(b), 9(3)(c), 9(5)

Citation : (2020) 02 NCLT CK 0006

Hon'ble Judges : Ina Malhotra, J;Sumita Purkayastha, Member (Technical)

Bench : Division Bench

Advocate : Siddharth Sharma, Charu Tyagi, Sanjeev Puri, Faisal Shervani, Aditya Vikram

Final Decision : Dismissed

Judgement

Sumita Purkayastha, Member (T)

1. The present petition has been filed under Section 9 of the insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency Resolution Process of the Respondent/ Corporate Debtor on grounds of its' inability to Liquidate its financial debt.

2. As per the averments made in the application, the Petitioner rendered after sales services for the Nissan Cars owned by Corporate Debtor and further used to repair their accidented cars. The said business relationship between the Petitioner and the Corporate Debtor was based upon the assurance, guarantees and representations of the Corporate Debtor. The Corporate Debtor was covered under a comprehensive Insurance Policy under which their accidented cars were sent to the Petitioner for repair. These were carried out after approval of the Corporate Debtor. A surveyor from the Insurance company (who had business

contract with the Corporate Debtor] would approve the work and would release the payment covered. The remaining amount was to be paid by the Corporate Debtor.

3. It is further submitted by the Petitioner that during the period from 2017-2018 they provided services to the Corporate Debtor for which various invoices were raised by them. However, the amounts raised under the invoices are still outstanding. It is submitted that the Corporate Debtor is no more interested in taking back the delivery of the accidented cars as these have become very old. In fact the Corporate Debtor made a proposal to the Petitioner to keep the cars and adjust their salvaged value against the pending dues. The same is not acceptable to the Petitioner who has to pay additional parking and rental charges as well as incur expense on maintenance and up-keep of the cars which are lying unclaimed by the Corporate Debtor.

4. It is submitted that pursuant to the services rendered by the Petitioner, an amount of Rs. 74,19,082/51 is still due inclusive of interest at the rate of 12 % pa, and parking/rental charges. It is submitted that on 26.04.2019 the Corporate Debtor had transferred Rs. 6,022/51 vide NEFT to the Operational Creditor which stands deducted from the above outstanding amount.

5. The Petitioner served a Demand notice dated 17.12.2018 by registered speed post to the Corporate Debtor U/Sec. 8 of the Insolvency & Bankruptcy Code, 2016 seeking remittance of payments within 10 days from the date of receipt of the notice. Since the respondents failed take necessary steps, the Petitioner has filed this petition in the required format praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor for its inability to liquidate their claim of Rs. 74,19,082/51 which is inclusive of all charges. Affidavit in compliance under Section 9(3)(b) and certificate in compliance of 9(3)(c) of the Code are on record.

6. Consequent to issuance of notice by this Tribunal the Corporate Debtor filed their reply on 10.07.2019 in which the following contentions have been raised:

i. The aforesaid amount purported as an Operational Debt had been disputed by the Respondent-Company prior to the issuance of Petitioner's Demand Notice dated 17.12.2018 and filing of the instant application. The Respondent-Company replied to the Demand Notice dated 26.12.2018, bringing it to the attention of the Petitioner the existence of dispute arising out of the discrepancies and inconsistencies in the invoices issued by the latter within the period of 10 days. It is the case of the Respondent Company that it is not liable for any default which may give rise to any outstanding 'Operational Debt' thereby entitling the Petitioner the right to file an application under Section 9 of the IBC. ft is therefore argued that the instant application is wholly misconceived.

ii. The Petitioner has deliberately concealed the factum of receipt of advance payment from the Respondent Company Despite pointing out that the invoices alleged to be outstanding by the applicant stand adjusted by virtue of advance payment made by the Respondent Company, the Petitioner in the Rejoinder Notice has evasively stated that it had adjusted all the payments made by the Respondent Company qua outstanding invoices applying the principle of " First-in First-Out". It is pertinent to mention that the Petitioner has failed to specify the invoices against which such payments have been adjusted.

iii. Further it is submitted by the Respondent Company that payments qua several invoices alleged to be outstanding by the Petitioner in the present application have already been made by the Insurance Company. This was indicated to the Petitioner by the Respondent Company in its reply to the Demand Notice dated 26.12.2018. However, the Petitioner has wrongly alleged such invoices to be still outstanding without verifying the details of the same. A list of the payments made by the Bajaj Allianz General Insurance Company with respect to the invoices alleged to be outstanding by the Petitioner have been annexed with the present reply as Annexure R-1.

iv. The Petitioner has made a claim of Rs. 74, 19, 082/51 out of which Rs. 17,46,014/50 is alleged to be outstanding on account of various invoices raised by the Petitioner during the period ranging from January 2018 to May 2018 for alleged "after-sale" services provided during the years 2017 and 2018. It is submitted that Respondent Company has been flagging discrepancies and concern with respect to the same since long which stand acknowledged by the Petitioner. Furthermore, evidently the disputes relating to the invoices have been raised and attempted to be settled between the parties much prior in time to issuance of the Demand Notice.

v. It is respectfully submitted that the discrepancies such "as the petitioner raised invoices for amounts which already stood received from Insurance Company, invoices raised without seeking approval for work from the Respondent Company, invoices raised without informing the respondent company about completion of work, invoices were raised without Ticket IDs," were highlighted to the Petitioner on numerous occasions on regular basis. The factum of the existence of disputes with respect of the invoices raised by the Petitioner and several attempts to resolve the same stand well documented in the E-mail dated 01.08.2018 and the minutes of meeting dated 10.10.20.18. The copy of E-mail has been annexed with the present reply as Annexure R-3.

vi. Subsequently, vide E-mail dated 19.09.2018 the Petitioner acknowledged that it would not be possible to provide supporting documents in relation to the purported repair work carried out as requested by the Respondent Company for clearing the invoices raised by the Petitioner. A copy of the E-mail dated 19.09.2018 is annexed as Annexure R-4.

vii. It is submitted that E-mails dated 04.04.2018 and 05.04.2018 addressed to the Petitioner clearly demonstrate discrepancies and the fact that both the Petitioner and the Respondent Company were in the process of re-conciliating the same.

viii. It is submitted that without any basis the Petitioner has made a claim of Rs. 74,19,082/51 out of which evidently a major share is claim towards purported parking charges, rental charges and interest at the rate of 12 % per annum on the alleged Operational Debt for a period of 11 months. The purported outstandings claim under the aforementioned three heads amounting to Rs. 56,79,090/70 was never raised by the Petitioner at any time prior to issuance of the Demand Notice, and as such, the Respondent Company did not have the opportunity to dispute this illegitimate demand except in its reply to the Demand Notice.

7. On perusal of the documents placed on record and submissions made by both the parties, this Adjudicating Authority is guided by the principles laid down by the Hon'ble Apex Court in the matter of "Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited. The Hon'ble Supreme Court analysed the meaning of dispute with respect, to Operational Creditors and observed:

"33. The scheme under Sections 8 and 9 of the Code, appears to he 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........."

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of

Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

8. From the aforesaid decision, it is clear that the dispute must exist before the receipt of demand notice or invoice. On appraisal of the arguments advanced by the Ld. Counsels, it emerges that there were disputes existing prior to the issuance of the Demand Notice. We find the e-mails on record to corroborate the Corporate Debtor's defence that a dispute in respect of discrepancies in respect of various invoices raised, existed even prior to the issuance of the demand notice. The Corporate Debtor has annexed the same. A pre-existing dispute does not entitle the Operational Creditor to seek Insolvency Resolution of the Corporate Debtor. The defence raised by the Corporate Debtor needs reconciliation of accounts which can only be gone into by a Civil Court, the adjudication of which may or may not culminate in their favour, but suffice it to say that a plausible defence has been raised by way of a dispute, which prima facie does not appear to be mere moonshine.

9. In view of the above, this Bench is of the view that the prayer for initiating Corporate insolvency Resolution process against the Corporate Debtor is not sustainable.

10. Petition is therefore Rejected. File be consigned.