IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH,(COURT II)
KOLKATA

IA (IB) No. 59/KB/2023
in
CP (IB) No. 2078/KB/2018

Under section 19(2) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal, 2016.

In the matter of:
Trimurti Associates Private Limited

... Financial Creditor

Versus

BKM Industries Limited

... Corporate Debtor

-And-

In the matter of:
Pritam Bayal,
Resolution Professional of BKM Industries Limited

... ***Applicant***

Versus

NIT Global Data Centers & Cloud Infrastructure India Private Limited
… Respondent

Coram:

Smt. Bidisha Banerjee, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (through hybrid mode):

For the Applicant

Mr. Rishav Banerjee, Advocate

Mr. Aishwarya Kumar Awasthi, Advocate

Mr. Rajarshi Banerjee, Advocate

Ms. Prerana Shaha, Advocate

Mr. Pratim Bayal, Advocate

For the Respondent

Mr. Vaijayant Paliwal, Advocate

Ms. Charu Bansal, Advocate

Mr. Sakabda Roy, Advocate

Mr. Deepanjan Dutta Roy, Advocate

Mr. Krishnan Singhal, Advocate

Order pronounced on: 19 September 2023

ORDER

Per: Balraj Joshi, Member (Technical)

1. This court convened *via* hybrid mode.

2. The present I.A. has been filed under section 19(2) of the Insolvency and Bankruptcy Code, 2016 ("Code") by Mr. Pritam Bayal, the Resolution Professional of BKM Industries Limited ("Corporate Debtor") seeking the following directions:

   a. An order/order(s) directing the respondent to restore and handover the financial data of Corporate Debtor of the instant CIRP to the Applicant with immediate effect. It is the statutory duty of the Resolution Professional to get the accounts audited within permitted time line for completion of the ongoing CIRP in the instant matter. Also accounting record of a corporate debtor is one of the most critical things for its operation. But dereliction on part of the respondent unnecessarily impedes the progress and compelled the Resolution Applicant to file an application against non-cooperation.

   b. If the accounting data could not be restored at all then the respondent should ensure an alternative method to reconstruct the entire lost accounting data and bear all the cost for same.

3. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process ("CIRP") on a petition filed under section 7 of the

Code by Trimurti Associates Private Limited *vide* an order dated 30 December 2020.

4. Mr. Pritam Bayal, the Applicant herein was appointed as the Resolution Professional on 17 February 2022.

5. ***Submissions of the learned Counsel appearing on behalf of the Applicant.***

5.1. The learned Counsel submitted that in order to finalise the account statement for the Financial Year 2021-2022, on enquiry, it came to the knowledge of the Applicant that the SAP accounting software of the Corporate Debtor was not accessible since several months. The Resolution Professional received an email from the accounting software service provider *via* one of the suspended Board of Management, asking for an update on the payment status of their dues.

5.2. The Resolution Professional contacted the Respondent to ask about the access of the accounting services of the Corporate Debtor, Mr. Pritam Roy Chowdhury, on behalf of the Respondent replied that the accounting record of the Corporate Debtor have been permanently deleted as payments were not made inspite of repeated reminders for payments.

5.3. It is submitted that the Resolution Professional agreed to settle the dues of the Respondent and requested the Respondent to share the accounting data. The Respondent replied that the accounting data cannot be shared as the same had been completely deleted[1].

5.4. The learned Counsel submitted that complete deletion of the accounting data by the prime custodian of the same, is complete irresponsibility on the part of the Respondent.

5.5. It is submitted that at the initial stage of CIRP of the Corporate Debtor, the accounting data was accessed by the Resolution Professional and the transaction auditor, however the access was withdrawn when the CIRP was going on and the Corporate Debtor was under moratorium.

[1] Annexure 5 at pages 32-40 of the I.A.

5.6. The accounting data comprising of the ledger accounts of various stakeholders of the Corporate Debtor, trail balance, cash and bank book etc., are the most critical resource of the Corporate Debtor's commercial operation and one of the essential ingredients to maintain its going concern characteristics.

5.7. It is submitted that it is the duty of the Resolution Professional to maintain the books of accounts of the Corporate Debtor, to finalise the accounts for the financial year 2021-2022 and onwards and get the same audited, however, due to non-cooperation from the Respondent and complete lack of basic responsibility on the part of the Respondent.

6. ***Submissions of the learned Counsel appearing on behalf of the Respondent***

6.1. It is submitted that the Corporate Debtor and the Respondent entered into a Master Service Agreement ***("MSA")*** dated 04 July 2018, whereby the Respondent was providing internet data center services to the Corporate Debtor which included but not limited to colocation hosting, managed hosting, remote infrastructure, monitoring & management services, security services, SAP application, hosting, mail & messaging, cloud services and related services.

6.2. However after the initiation of CIRP on 30 December 2020, the Corporate Debtor stopped making payment to the Respondent in the month of January 2021 and no payment has been made thereafter.

6.3. On 16 March 2021 the Respondent sent a letter to the Corporate Debtor requesting the Corporate Debtor for release of outstanding dues of Rs.2,61,991/-, thereafter the Respondent met with the erstwhile Resolution Professional on 22 March 2021 and the erstwhile Resolution Professional agreed to arrange the funds to pay for retaining the services in case it was held to be essential service, otherwise, to terminate the same.

6.4. The Credit Control Department of the Respondent again wrote to the Corporate Debtor on 25 March 2021 seeking payment of outstanding dues of I N 2,61,991/- by 28 March 2021. This was followed by another email on 30 March 2021.

6.5. On 14 May 2021, the Erstwhile Resolution Professional, by way of an email informed the Respondent that the Services rendered by them were essential for the Corporate Debtor and that the invoices raised by them were placed before the CoC but the same remained unapproved. The Erstwhile Resolution Professional further undertook to again place the said invoices for approval before the CoC and in the meanwhile, requested the Respondent to continue providing the Services. In response, the Respondent vide email dated 15 May 2021 stated that they will not process deactivation ofthe Services and alsorequested the Erstwhile Resolution Professional to expedite the process of payment against the Services rendered.

6.6. Thereafter, on 4 June 2021, the Respondent again wrote to the Corporate Debtor and sought payment of outstanding dues of Rs.5,25,682/- and also highlighted that in the event of failure to so, the Respondent would be constrained to terminate the Services without further intimation. This was followed by reminder emails on 15 June 2021 and 30 June 2021, however, to no avail.

6.7. On 13 July 2021, the Credit Control Department of the Respondent addressed a final reminder to the Corporate Debtor seeking payment of outstanding dues of Rs.7,89,373/- and clarified that upon failure to pay, they will be constrained to terminate the Services. Thereafter, since no payments were made by the Corporate Debtor, the Respondent was compelled to suspend the Services on a temporary basis.

6.8. The learned Counsel submitted that as many 12 reminders were sent to the Corporate Debtor within 11 months and in the absence of any

positive response, the Respondent was constrained to terminate the services on 30 November 2021.

6.9. Subsequently, another email was sent by the Respondent to the Corporate Debtor on 26 July 2021 seeking payment of Rs.7,89,373/-, within 10 days. The email further clarified that if the payments are not made within the stipulated period, the Services will be permanently terminated without further intimation and as a further consequence, the Respondent would take back al equipment (including servers), fi any), and purge all data residing in any such equipments) with 15 days thereafter, for which the Respondent could not be held liable.

6.10. In response to the above, the Erstwhile Resolution Professional *vide* email dated 26 July 2021 informed the Respondent that the CoC had approved the payment of Rs.2,63,691/- for the period from April 2021 to June 2021 and the said amount would be remitted once it is received from the members of the CoC. However, no payments were received by the Respondent.

6.11. Thereafter, the Respondent once again wrote to the Corporate Debtor on 12 August 2021 enquiring about the status of payment and also cautioned that they would be constrained to permanently deactivate the Services and as a consequence thereof, all data would be deleted if no payment is made by 18 August 2021. In response, the Erstwhile Resolution Professional on 14 August 2021, informed the Respondent that the CoC had not yet remitted the promised amount of Rs.2,63,691/-.

6.12. In absence of any payments, the Respondent sent follow up emails to the Corporate Debtor on 15 September 2021 and again on 16 November 2021 with sufficient warnings of permanent deactivation ofthe Services and consequential loss of theaccounting data of the Corporate Debtor.

6.13. Having received no response despite multiple reminders, the Respondent was left with no choice but to permanently suspend the Services on 30 November 2021 in terms of Clause 5.12 of the MSA and consequently purge the same in terms of Clause 13.10 of the MSA.

6.14. Even after the permanent termination of the Services, the Respondent kept on following up for the payment of dues as no confirmation or assurance was given by the Corporate Debtor. In the meanwhile, the Erstwhile Resolution Professional was replaced with the Applicant to act as the Resolution Professional for the Corporate Debtor vide order dated 17 February 2022.

6.15. Thereafter, the Applicant, on 13 May 2022, wrote to the Respondent enquiring about the possibility of retrieving the lost data.

6.16. The Respondent responded to the same on 16 May 2022, stating that in view of non-payment ofdues for the period from 01 January 2021 to 30 November 2021, the Services were permanently terminated, and the lost data could not be retrieved at any cost.

6.17. Further, on 15 July 2022, the Applicant again wrote to the Respondent, enquiring about the minimum amount to be paid to the Respondent to recover the lost data. To which, the Respondent vide email dated 15 July 2022 once again clarified that the lost data could not be recovered at any cost. This was followed by a series of communications to and fro, wherein the Respondent highlighted the fact that only after sending repeated reminders and warnings to the Erstwhile Resolution Professional that the Respondent terminated the Services on 30 November 2021, followed by the deletion the data.

6.18. The learned Counsel submitted that the Respondent has rightly terminated the services of the Corporate Debtor and led us through to clause 5.12. of the MSA, as per which if the Corporate Debtor failed to pay the dues for the Services within 10 (ten) days of the payment

becoming due, the Respondent reserved its right to terminate the Services after giving 5 days' notice to the Corporate Debtor.

6.19. The learned Counsel further led us through Clause 13.10 of the MSA provided that within fifteen (15)days of the termination of the Services, the Respondent shall purge the customer (Corporate Debtor in this case) data residing in such Dedicated Equipment, including the servers) of the Respondent, without any further notice to the customer.

6.20. It is submitted that eight (8) notices/reminders were sent by the Respondent to the Corporate Debtor before suspending the services on 20 July 2021.

6.21. Despite the fact that no payments were received, the Respondent continued to provide services to the Corporate Debtor without receiving any payment of its dues for the period of eleven months.

6.22. It is also submitted that post the termination of Services and the MSA, the Respondent could not have retained and/or continued to be in possession ofthe data of the Corporate Debtor and it was in fact the duty of the Resolution Professional in terms of Section 25 of the Code to take appropriate steps to protect and preserve the assets of the Corporate Debtor including the business records of the company. However, despite multiple opportunities, no steps were taken in this regard by the Erstwhile Resolution Professional. Further, despite the fact that the data of the Corporate Debtor residing on the servers of the Respondent was in a downloadable form, the Erstwhile Resolution Professional made no attempts to coordinate with the Respondent to download thesame or request the Respondent to download and share the same with the Erstwhile Resolution Professional to secure a copy of the data of the Corporate Debtor in accordance with the mandate of the Code. Further, there were no attempts made by the Erstwhile

Resolution Professional to take a back-up of the data of the Corporate Debtor.

6.23. It is further submitted that under the terms of the Code, the provision of vital services to a corporate debtor during the CIR Process is subject to continuous payment towards such services. However, the Corporate Debtor, despite recognizing the importance of the services rendered by the Respondent, miserably failed to disburse any payments towards the same in terms of the Code.

6.24. In support of his contention the learned Counsel placed reliance on the findings of the Hon'ble NCLAT in Dakshin Gujarat VIJ Company Ltd. v. 21 M/s. ABG Shipyard Ltd. & Anr.[2]. Hence, payment towards the provision of services availed during the CIR Process period are not barred under Section 14 of the Code and must be continuously paid or be accounted for as the insolvency resolution process costs. However, in absence of both, the service provider cannot be expected to provide services free of cost to the Corporate Debtor.

6.25. Further reliance is placed on the findings of the Hon'ble NCLAT in ***Shailesh Verma, Resolution Professional of Lavasa Corporation Limited v. Maharashtra State Electricity Distribution Company Limited***,[3] the Resolution Professional was obligated under the provisions of the Code to make regular payments to the Respondent for the Services rendered to the Corporate Debtor during the CIR Process period. Pertinently, the Corporate Debtor could not have continued to receive the benefits of the Services provided by the Respondent without making payments to the latter for dues relating to the CIRP period. However, the Corporate Debtor neither made any payments to the Respondent despite repeated reminders/warnings/follow ups nor provide any assurance to the

[2] C.A.(AT) (Ins.) No. 334 of 2018, para 13
[3] C.A.(AT) (Ins.) No. 383 of 2022, paras 11-13

Respondent that its outstanding dues would be being considered as part of the CIRP costs.

6.26. It is further submitted that the Applicant has preferred the present application under section 19(2) of the Code and as such, the present application is not maintainable against the Answering Respondent, who was merely a service provider to the Corporate Debtor and has no relation, whatsoever, to the management of the Corporate Debtor.

6.27. Section 19 of the Code enjoins only the personnels associated with the Corporate Debtor to cooperate with the Resolution Professional. Persons unrelated to the Corporate Debtor cannot be directed to cooperate with the Resolution Professional. Such being the case, thepresent application under section 19(2) of the Code is not maintainable against the Respondent. The learned Counsel placed reliance on the order passed by the learned NCLT, Chandigarh Bench in ***Educomp Infrastructure and School Management Limited and Ors. v. Vinod Kumar Dandona and Ors.[4],*** and submitted that in the present application filed under section 19(2) of the Code is not maintainable against the Respondent, as the Respondent, being an unrelated party to the Corporate Debtor, is not covered within the purview of section 19 of the Code.

Analysis and Findings

7. Heard the learned Counsel on behalf of the Resolution Professional and the learned Counsel appearing on behalf of the Respondent.

8. The issue raised by the Petitioner is that the Respondent terminated the services and is not providing the financial documents of the Corporate Debtor and thereby not co-operating with the Resolution Professional.

[4] C.A. No. 335/2018 in C.P. (IB) No. 10/Chd./Hry./2018, para 86

9. The Respondent has raised three contentions/defenses:

   9.1. The service has been rightfully terminated in view of the MSA.

   9.2. Continuous payment was not made.

   9.3. The I.A. is not maintainable.

10. Let us consider the first two contentions/defenses, it is not disputed that an MSA had been entered into between the Corporate Debtor and the Respondent and that the Respondent was providing an essential service to the Corporate Debtor.

11. The erstwhile Resolution Professional was aware of the service provided by the Respondent. The Respondent has clearly notified the erstwhile Resolution Professional in the email dated 25 March 2021 which is a follow up of the email sent on 16 March 2021.

12. It is not the case that there was no communication from the Respondent requesting the erstwhile Resolution Professional to make the payment or informing the erstwhile Resolution Professional that the service will be terminated. The Respondent fulfilled his obligation and informed the erstwhile Resolution Professional that it shall suspend the services which is clear from the email dated 30 March 2021. The erstwhile Resolution Professional has taken steps and has requested the CoC to make the payments as can be seen from the email sent on 14 May 2021[5] by the erstwhile Resolution Professional. In the said email herein, the erstwhile Resolution Professional has stated that *"Your service is very essential to BKM Industries Limited ("Corporate Debtor/Company") as all the accounting data and the financial records of the Company are kept in the accounting software- SAP, the security and cloud service of which is being provided by you."*

[5] Page 48 of reply

13. On 13 July 2021, the Respondent sent an email to the erstwhile Resolution Professional requesting for payment of dues and in failure to do so by 16 July 2021, the connection would be disconnected.

14. Hence, the Respondent had given a fair warning to the erstwhile Resolution Professional with regard to the suspension and had also stated that it would not be liable for any consequential damage.

15. On 26 July 2021[6], the Respondent sent a prior notice was sent for permanent disconnection of services, wherein the Respondent has clearly stated that "*Prior to this we shall purge all your data residing in any such equipments) for which we shall not be held liable and responsible as the same will be done by us due to you not leaving any other alternative. Any loss of data due to such act of purging by us shall not be our responsibility in any way and nor we shall be held liable for the same. You by not complying with this para hereby give the No-Objection Consent of retaining the equipment and to do as stated in this para and agree that such No-Objection is not taken under any coercion or force nor economic duress and accordingly, all such purge will be counted as done as per your consent*.

    However again as a matter of good corporate governance, we shall allow you to take back your data residing in your equipment [including your servers)] within this period of 5 days under our supervision and control. Kindly authorize suitable person from your end for this and to give a discharge once your entire data is copied / deleted from your servers collocated with us."

16. Pursuant to this, the erstwhile Resolution Professional sent an email to the Respondent stating that the CoC had approved the payment of the Respondent from the period from April to June 2021, but the same had not been released by the CoC. The same is reiterated in the email sent

[6] Annexure R-7 at Pp. 58-60 of the reply

by the erstwhile Resolution Professional on 14 August 2021 which was sent in reply to the email dated 12 August 2021 by the Respondent, wherein the Respondent informed the erstwhile Resolution Professional that *"we have still not received any payment and if we don't receive any payment by 18th August'21, we'll be forced to permanently deactivate the services and all data will be lost. We'll not be responsible for any consequence or loss due to this deactivation and data loss since it's the result of your failure to pay the outstanding amount against services used."*

17. On 16 November 2021, the Respondent in its email has clearly stated that it shall initiate permanent deactivation and all the data would be lost in case of non-payment and thereafter the services were deactivated by the Respondent.

18. From the correspondences between the Respondent and the erstwhile Resolution Professional that have been referred above, two things are clear, firstly, that the service provided by the Respondent was essential for the Corporate Debtor and secondly, payment was not made for the services rendered during the CIRP period. The services were discontinued by the Respondent during moratorium, although sub-section 2 of section 14 states that supply of essential services and goods shall not be discontinued but then sub-section 2A of section 14 of the Code envisages that

> *"(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid*

dues arising from such supply during the moratorium period or in such circumstances as may be specified."

19. In view of section 14 (2A) of the Code, the Respondent has rightfully terminated the services after non-payment of dues for the services rendered during the CIRP period. Ample warning had been given before the Respondent discontinued the services and deleted the data.

20. Now moving on to the third defense and the main issue of non-corporation of the Respondent. It is crystal clear from the correspondences referred to in the paragraphs above that the Respondent continued to provide services till the end of November 2021, which shows that the Respondent had rendered assistance for several months despite non-receipt of dues. Hence, it cannot be said that the Respondent did not provide any assistance. After deletion of data from the servers of the Respondent, there is nothing that the Respondent can do, as clarified through the emails. Be that as it may, let us now move to the last of the issues raised by the Respondent i.e. the maintainability of the I.A. The present I.A. is filed under section 19(2) of the Code, which is reiterated hereunder for reference:

"19(2) Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary action."

21. From the reading of section 19(2) of the Code, it is observed that the Resolution Professional can file an application to the Adjudicating Authority if any personnel of the Corporate Debtor or promoter or person related to the management of the Corporate Debtor or any other person does not cooperate with the Resolution Professional. The Respondent herein is a service provider and fall outside the ambit of a

promoter or a personnel of the Corporate Debtor or a person in management of the Corporate Debtor but the Applicant does fall under the purview of "other person", hence the I.A. is maintainable.

22. Hence, let us now see whether the Respondent has cooperated with the erstwhile Resolution Professional and the Resolution Professional of the Corporate Debtor.

23. Taking into consideration all the correspondence before us and the events that have followed, the Respondent has provided his services and has cooperated with the erstwhile Resolution Professional and had informed the erstwhile Resolution Professional about deletion of the account of the Corporate Debtor and as per the letter dated 26 July 2021, the Respondent had clearly specified that the account would be deleted and had further requested the erstwhile Resolution Professional to take a backup. Thereafter, with due warning the account was deactivated and deleted.

24. It is not the case that the Respondent is refusing to give the accounts of the Corporate Debtor, but it has stated that since the account has been scrubbed off from the servers, it is not possible to access the same or restore the same. The Respondent has time and again cooperated during the CIRP and also provided its services despite of non-payment, thus, it cannot be said that the Respondent has not cooperated during the CIRP period.

25. In view of the above circumstances, we cannot allow the prayer of the Resolution Professional.

26. With the above observations ***I.A. (IB) No. 59/KB/2023 in C.P. (IB) No. 2078/KB/2018 is hereby dismissed***.

27. The Registry is directed to send email of the order forthwith to all the parties and their ld. Counsel for information and for taking necessary steps.
28. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Balraj Joshi **Bidisha Banerjee**
Member (Technical) **Member (Judicial)**

Signed on the 19th day of September 2023.

GGRB (LRA)