

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.341/MB-IV/2022

Under Section 9 of the IBC, 2016

In the matter of

M/s. LBF Publications Pvt. Ltd

[CIN: U22219MP2006PTC019083]

...Operational Creditor

v/s.

M/s. A & A Business Consulting Pvt. Ltd.

[CIN: U74999MH2012PTC237941]

...Corporate Debtor

Order Delivered on: 10.08.2023.

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Operational Creditor:

Ms. Pragati Prajapati a/w Mr. Vinay
Kumar Jain, Ld. Counsel.

For the Corporate Debtor:

Mr. Akshay Petkar a/w Mr. Pranav
Shah i/b Petkar Legal, Ld. Counsel.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by M/s. LBF Publications Pvt. Ltd (“the Operational Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of M/s. A & A Business Consulting Pvt. Ltd, the Corporate Debtor.

1.1. The Company Petition is filed on 24/01/2022 claiming an amount of Rs. 5,45,98,447/- which comprises of the outstanding principal amount of Rs. 3,55,54,756/- and interest amounting to Rs. 1,90,43,691/- calculated on the principal sum at the rate of 18% p.a. from various date till 01.12.2021. in default. The date of default is not specified in Part IV of the petition.

2. The Operational Creditor and Corporate Debtor mutually agreed into terms and entered into a "Consulting Agreement" dated 29/08/2017 wherein Corporate Debtor was appointed as Consultant and subsequently to increase the turnover of Operational Creditor from 12 crores to 125 Crores (i.e. 10 times of the current turnover), for which the Operational Creditor had made following payment in accordance with the terms of the Agreement –

- i. Advance Payment for ERP: Rs.22,00,000/-
- ii. Advance Payment for ERP: Rs. 73,50,000/-
- iii. Advance Payment for Furniture: Rs. 20,00,000/-
- iv. Advance Payment for Furniture: Rs. 30,00,000/-
- v. Advance Payment for Furniture: Rs. 75,00,000/-
- vi. Advance Payment for VCEO Project: Rs. 66,61,500/-
- vii. Advance Payment for VCEO Project: Rs. 8,85,000/-

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- viii. Advance Payment for SAB Project: Rs. 47,04,000/-
- ix. Payment for Social Media Publicity: Rs. 46,256/-
- x. Advance Payment for SAB Project: Rs. 20,25,000/-
- xi. Advance Payment for Speed Plus: Rs. 1,08,000/-
- xii. Advance Payment for Speed Plus: Rs. 3,15,000/-
3. Pursuant to the agreement, the Operational Creditor had made payments total amounting to Rs. 3,67,94,756/. However, such services have been provided by the Corporate Debtor. Out of the above amount, pertaining to the failure to provide the services, the Corporate Debtor has returned some payment of Rs. 4,90,000/- & TDS amount i.e. Rs. 7,50,000/-, as a result of which there was an outstanding liability of principal amount Rs. 3,55,54,756/- due and payable by the Corporate Debtor.
- 3.1. The Operational Creditor has asked several times to refund the remaining amount of advance. The Corporate Debtor has acknowledged the debts and has also apologised for the misconducts via Email dated 24/03/2020, 16/04/2020, 21/10/2020 and 20/11/2020 and have accepted and agreed to make the repayment of the Operational debt. However, no payment has been made by the Corporate Debtor. The Corporate Debtor has provided some cheques to the Operational Creditor to refund the balance of advance, which were made by Operational Creditor for the Consultancy services. The Corporate Debtor has also provided some cheques to Operational Creditor as a security.
- 3.2. The Operational Creditor has sent Demand Notice on date 02/12/2021 in Form-3 u/s 8 of the Insolvency and Bankruptcy Code, 2016. However, the reply to the said notice dated 23.12.2021 has been given by the Corporate Debtor without any relevant information.

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4. The Corporate Debtor vide its affidavit in reply dated 12.07.2023 states that claim of petitioner does not fall within Operational Debt, the petitioner claiming to be Operational Creditor has not provided any goods and services to the respondents therefore its claim cannot be labelled as Operational Debt, the alleged claim in the present matter appears to be in nature of specific performance, there is an absence of any element of goods or services being provided by the petitioner (Operational Creditor) which is *sine qua non* provider; No default in terms of IBC since it does not contain any record in terms of IBC and the present petition at Part-IV has failed to specify the date on which default occurred, all cheques placed on record falls under the period of 10A, in absence of any contractual arrangement , there is no question or occurrence of default on the part of Respondent in any payment of the petitioner; Petitioner has initiated Arbitration under MSME Act before the MSME Council and there are different narration of facts before other authorities.
5. The Operational Creditor has filed rejoinder dated 27.09.2022 stating that, the Petitioner is only claiming rightful dues for the advance money already paid which was duly accepted and acknowledged by the Respondent, and in view of the same the Respondent had issued four Security Cheques total amounting to Rs.3,25,00,000/- as part payment against the total due amount. Apart from this, the Corporate Debtor along with issuing an apology via several emails regarding dishonour of the Cheques, failure to pay the due amount and failure in rendering of services, also made part payments of Rs. 12,40,000/- which further establishes that the Corporate Debtor has duly acknowledged the Debt and even tried to pay them off but couldn't as they be incapable of doing so, thus, confirming that they are Insolvent.
- 5.1. In addition to this, it is pertinent to mention that the GST registration of the Respondent Company has also been *Suo moto* cancelled on account of non-filing of the returns to the GST Department. Therefore, it is well established

that they are incapable of paying the outstanding dues payable to the Operational Creditor and should be adjudged as insolvent as they have even failed to discharge their tax liabilities.

Findings:

6. We have heard the arguments of Learned Counsel for Operational Creditor and the Corporate Debtor.

6.1. In the case of *M/s Consolidated Construction Consortium Ltd. v. M/s Hitro Energy Solutions (P) Ltd.*, 2022 SCC OnLine SC 142, the Hon'ble Supreme Court held that debt arising out of advance payment for supply of goods and services is an operational debt. Accordingly, we find no substance in the agreement that the amount of advance cannot be said to be an Operational Debt. Further, pursuing the matter before MSME facilitation Council under MSME Act is not a bar for filing a petition u/s 9 of the Code, the proceedings before Council are not in nature of dispute. Further the plea of bar u/s 10 A also does not have any merit, as section 10A bars filing of petitions arising from defaults occurring during the period specified therein, and the default arises when a debtor faces to pay the debt to the Creditor on the date on which it falls due. The date of post-dated cheques does not result into any default, hence, such cheques issued for presentation during 10A period cannot bar filing of an application.

6.2. The Corporate Debtor has submitted that the present petition at Part-IV has failed to specify the date on which default occurred. On perusal of consulting agreement dated 29.08.2017 this bench finds that the agreement was valid for a period of 1 year unless terminated earlier it is not the case of both the parties that this agreement was terminated earlier. Accordingly, the advance amount paid under this agreement becomes due for refund on 10.08.2018 after reducing therefrom fees to the extent the Corporate Debtor

is entitled to compensation under the agreement, in case the services are not provided in full or part. However, the Corporate Debtor placed heavy reliance on clause 4.2 of the agreement that the fees shall be non-refundable. When this bench asked the learned counsel for the Corporate debtor as to whether, this amount of advance was booked as income by the Corporate Debtor in the year of the receipt, or in alternate, how this amount is appearing in their books as on today.

6.3. The Operational Creditor that the Corporate Debtor has acknowledged the debt in an email dated 16.06.2020 enclosing thereto in an excel sheet which shows a sum of Rs.2,88,25,465/- is payable by the Corporate Debtor to the applicant. The said excel sheet also states the fee claimed by the Corporate Debtor and payment of Rs.19,12,500/- refunded back by the Corporate Debtor to the applicant. The three post-dated cheques for a total sum of Rs.2.75 Crores issued by Corporate Debtor to the applicant supports the contents of this e-mail. Accordingly, this bench finds that there exists a debt.

6.4. The excel sheet annexed to the aforesaid email also shows that the Corporate Debtor has claimed fees for the Financial year 2018-19 and 2019-20, and the Operational Creditor has accepted the claim of this fee. In of this, the conclusion that agreement can be said to have expired on 09.08.2018 cannot hold true. The applicant has not determined the date of default PART-IV of the application refers to copy of working sheet placed as Annexure 10 for computation of default on perusal of said statement it is seen that the said statement nowhere states the due date of refund of the advance in the case of non-provision of services under the agreement. Further, the Demand notice in Form-3 states date of default at column 2 as “*calculated in accordance to the date of payment.*” In the absence of due date of payment this bench finds it difficult to arrive at a finding that on the date of

default on which the Corporate Debtor failed to make payment of the amount of advance to be refunded to the applicant. Hence, it cannot be established when the default has taken place. If the date of post-dated cheque is considered to be promise on the part of Corporate Debtor to pay back the amount of advance, no petition could have been filed u/s 10A of the Code in relation to default arising from dishonour of those cheques, as all the three cheques are dated 25.03.2020 to 29.03.2020 and the other three cheques are dated 22.12.2020 to 08.01.2021.

7. Though there exists debt in the absence of due date the date of default could not be ascertained hence, this petition does not satisfy the conditions u/s 8 of the Code i.e. occurrence of default. In view of the above, we find that the present case is fit for dismissal.

ORDER

8. The petition bearing CP (IB) No.341/MB-IV/2022 filed by M/s. LBF Publications Pvt. Ltd (“the Operational Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of M/s. A & A Business Consulting Pvt. Ltd, the Corporate Debtorlaji Mutha, Anil Nagraj Mutha and Yash Ritesh Mutha, the Corporate Debtor is **dismissed**.
9. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
10.08.2023.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)