

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH (Court – II)

KOLKATA

C.P (IB) No.162/KB/2020

An application under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

Sumedha Fiscal Services Limited, having its Registered office at 8B, Middleton Street , 6A, Geetanjali Apartments, Kolkata-7000071.

... Operational Creditor

Versus

Mama Mia Foods Private Limited, having its registered office at Sadananda Industrial Estate Balitikuri, Bakultala, Howrah, West Bengal- 71113..

...Corporate Debtor

Date of hearing: 05 January, 2023
Order Pronounced on : 07 August, 2023

Coram:

Ms .Bidisha Banerjee, Member (Judicial)

Mr. Balraj Joshi, Member (Technical)

Counsels appeared through Physically/ Video Conference

For Operational Creditor : Ms. Rashmi Singhee, Adv.

: Mr. Parikshit Poddar, Adv.

For Corporate Debtor : Mr. Kumarjit Banerjee, Adv.

: Ms. Sanchari Chakraborty, Adv.

: Ms. T. Khanddelwal, Adv.

ORDER

Per: Balraj Joshi , Member (Technical)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (***‘the Code’***) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Ms. Dhvani Fatehpuri, Company Secretary, Sumedha Fiscal Services Limited (***‘Operational Creditor’***) duly authorised *vide* Board Resolution dated 05 July, 2022 for initiation of Corporate Insolvency Resolution Process (***‘CIRP’***) against Mama Mia Foods Private Limited (***‘Corporate Debtor’***).
3. The present Petition was filed on ***15 June, 2020*** before this Adjudicating Authority. The total amount claimed in default is **Rs.2,37,765/-** (Rupees Two Lakh Thirty Seven Thousand Seven Hundred Sixty Five only) [*Principal – Rs.1,87,500 and Interest - Rs.50,265/-*] The ***date of default*** is stated to be as on ***16 February, 2018***;
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.5,50,00,000/-(Rupees Five Crore Fifty Lakh only) with subscribed share capital of Rs.4,98,47,720/- (Rupees Four Crore Ninety Eight Lakh Forty Seven Thousand Seven Hundred Twenty only). Part – IV of the Petition deals with the particulars of the Operational Debt.
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Operational Creditor provides wide spectrum of professional, service in merchant banking, corporate finance, and international financing. Whereas, the Corporate Debtor was first established in the year 2005 to introduce the concept of authentic Italian Gelato.
 - 5.2 *Vide* letter dated 06 January 2017, the Operational Creditor offered financial advisory towards raising fund through strategic investment/venture capital and banking arrangement to the Corporate Debtor, as under:-

- a. Rs. 2.00 Lakhs plus service taxes as inception fees on the date of the signing of this appointment letter.
 - b. Towards SI /VC Success fees of 2.50% plus service tax of the amount sanctioned shall be payable as, 25% to be given on signing and acceptance of Initial Term Sheet Balance on signing of share holders' agreement or induction of first tranche of equity.
 - c. Towards syndication of credit facility- 2% of the sanction amount, subject to minimum of Rs. 2.00 lakhs plus service tax payable on receipt of sanction letter.
- 5.3 Upon rendering the services as the financial advisor towards raising fund through strategic investment as mandated the first invoice raised by the Operational Creditor for an amount of Rs. 2,00,000/ plus applicable taxes totaling to Rs. 2,30,000/-, which was paid by RTGS by the Corporate Debtor and was duly received by the Operational Creditor.
- 5.4 Thereafter, on 09 November, 2017 the second invoice was raised by the Operational Creditor amounting to Rs.3,12,500/- plus applicable GST RS. 56,250/- totaling to Rs. 3,68,750/-.
- 5.5 However, on 16 January, 2018 part payment of Rs.1,50,000/- was received from the Corporate Debtor against the invoice dated 09 November, 2017.
- 5.6 Demand Notice under section 8 of the Code was served on the Corporate Debtor on 23 August, 2019 demanding payment of Rs. 2,37,765/-. The Corporate Debtor has failed to release the outstanding dues even after repeated requests over emails and telecommunications.
- 6. *Submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor.***
- 6.1 Without prejudice to the other submissions, there is no outstanding debt due and payable to the purported Operational Creditor on the basis of facts on record.
- 6.2 The 'inception fee' of Rs.2,00,000 plus Service Tax paid by the Corporate Debtor upon signing of the Assignment Letter dated 06 January, 2017 was

specifically stipulated to be an ‘adjustable’ amount against the total ‘success fee’. Against the total invoiced amount of Rs. 3,68,750/-, a total payment of Rs. 2,30,000/- (Rs.200,000/-+Service Tax) plus Rs. 1,81,250/- (Rs. 150,000/-+TDS) i.e., a total sum of Rs.4,11,250/- has been made by the alleged the Corporate Debtor.

- 6.3 Upon adjusting the ‘inception fee’ amount against the total invoiced amount, no amount is due and payable. On the contrary, a sum of Rs.42,500/- is refundable to the Corporate Debtor by the Operational Creditor.
- 6.4 Further, the invoice does not stipulate any interest on the outstanding sums, as such the entire interest of Rs.50,265/- is without any basis whatsoever.
- 6.5 The entire consideration under the terms of the Service Contract was in the nature of ‘success fee’. ‘Success fee’ connotes that such payment was contingent upon successful disbursement of funds in the Corporate Debtor. In the present case, the fund infusion in the form of equity never culminated although an initial term sheet had been signed. The same was communicated to the Operational Creditor. Accordingly, no amounts ever fell ‘due’ so as to constitute an Operational Debt within the meaning of Code.
- 6.6 In *Jayesh N. Sanghrajka v. MA of Aristo Developers P. Ltd.*¹, at Paragraph 38 the Hon’ble NCLAT has held that *Success fee is in the nature of contingency and speculative, and cannot form part of the provisions of the Code*. Further, the Hon’ble Gujarat High Court in *MP Advisors v. Intas Biopharma*², passed that *‘Success fee’ is not payable till completion of each milestone, ending in signing of definitive agreement and sanction of the amount*. In absence of the same, there is no crystallized debt.
- 6.7 Also, it is pertinent to mention that the entire demand notice itself is defective. The demand Notice dated 22 August, 2019 is in Form 4- but without invoices. The Demand Notice was also sent via email, to which the Corporate Debtor *vide* its e-mail dated 23 August, 2019 disputed the invoiced amount. Hence, this tantamount to raising a pre-existing dispute.

¹ (2021) 131 taxmann.com 237 (NCLAT)

² Company Petition No.61 of 2011 @ prs. 27, 30

6.8 The Form 5 is also incomplete, since it does not contain the affidavit under Section 9(3)(b) of the IBC.

Analysis and Findings

7. We have heard the Ld. Counsel appearing for both the sides and perused the pleadings. On cursory glance of the records, the preliminary issue that arises is ***whether the threshold barrier is met?***
8. From, the records it is evident that the default is of Rs.2,37,765/- (Rupees Two Lakh Thirty Seven Thousand Seven Hundred Sixty Five only) [*Principal – Rs.1,87,500 and Interest - Rs.50,265/-*]; and the Petition has been filed on **15 June, 2020**. Whereas, the Hon'ble NCLAT in ***Royal Manpower Services v. Faridabad Autocomp System Pvt. Ltd.***³ has held that the revised minimum *threshold of Rs. 1 Crore is applicable from the date of filing of petition* and not from the date of registration of petition
9. As per the notification dated 24 March, 2020 by the Ministry of Corporate Affairs, the Central Government has specified *one crore rupees as the minimum amount of default for filing CIRP application under Section 7 or 9 of the Code.*⁴
10. Further, the Ld. Counsel for the Corporate Debtor has placed on reliance of ledger account of Operational Creditor and it is submitted that the inception fee Rs. 2 lakhs plus GST were supposed to be an adjustable amount against the payment towards fee. As per the Clause 4 bullet no.2 of the agreement, it has been very clearly mentioned that the said amount shall stand adjusted with payment towards inception fee. The second component of the charges comprise of success fees of 2.5% plus service tax of the amount sanctioned shall be payable and further on payment has also been given which is to said to be 25% at the time of signing and acceptance of the initial terms sheet and the balance of the signing of the shareholder agreement for induction of first tranche of equity. The third component of professional fees which is also amounting to 2% of the sanction amount subject to minimum of Two Lakhs

³ Company Appeal (AT) (Insolvency) No. 370 of 2023 & I.A. No.1245 of 2023

⁴ F. No. 30/9/2020-Insolvency

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plus service tax which is towards the induction of the credit facility.

11. From the above, it is seen that the initial payment of Rs. Two Lakhs of inception fee was supposed to be adjusted against the payment towards success fee. Admittedly, an arrangement of investment of Rs. Five Crore was made by the operational creditor
12. Ld. Counsel for the Operational Creditor has also not sought any amount towards the indication facilities and therefore the conclusion has only arisen regarding the adjustment of inception fee.
13. From the wording of the agreement, it is clear that the said inception fee was indeed supposed to be adjusted against the success fee and same forms a part of the Success fee , which as per the decision of Hon'ble NCLAT in *Jayesh N. Sanghrajka v. MA of Aristo Developers P. Ltd.*⁵, at Paragraph 38 that the *Success fee is in the nature of contingency and speculative, and cannot form part of the provisions of the Code.*
14. In view of the above, fact and circumstances, and on both the counts i.e. the Threshold as well on the issue of Success fee, the petition is hereby *rejected*. The Petitioner is, however, at liberty to pursue other available means under the law .
15. Copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The order is pronounced on 07th day of August, 2023

SA, LRA

⁵ (2021) 131 taxmann.com 237 (NCLAT)