BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH

COURT -III

CP (IB) No.1765/ND/2018

In the matter of
An application under Section 9 of Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy. (Application to Adjudicating Authority Rules, 2016)

And

In the matter of :
M/s EE Limited

......Operational Creditor

Versus

M/s Falcon Business Resources Pvt. Ltd.

...........Corporate Debtor

Order reserved on : 08.04.2022

Order pronounced on : 17.05.2022

Coram :

Sh. Bachu Venkat Balaram Das	:	Member (Judicial)
Sh. Virendra Kumar Gupta	:	Member (Technical)

Appearances (via Video Conference)

For Operational Creditor : *Sh. Uttam Datt & Sh. Tarun Sharma, Advs.*

For Corporate Debtor : *Sh. Saurabh Kalia & Sh. Vardaan Bajaj, Advs.*

ORDER

Per - ***Virendra Kumar Gupta, Member (Technical)***

Brief facts of the case

1. The present application has been filed by Operational Creditor, namely ***M/s EE Limited under*** Section 9 of Insolvency & Bankruptcy Code, 2016. (*hereinafter referred to as "IBC, 2016"*) for initiation of the Corporate Insolvency Resolution Process (*hereinafter referred to as "CIRP"*) against the Corporate Debtor, namely ***M/s Falcon Business Resources Pvt Ltd.***

2. Operational Creditor and Corporate Debtor entered into EE Framework Reseller Agreement Dated 20.03.2015 whereby it was agreed between the parties that Operational Creditor would provide telecom services to customers of Corporate Debtor while they are traveling to U.K. As per the agreement, Operational Creditor will provide sim cards to the Corporate Debtor which it could resell to its customers in India which was to be used by them in U.K.

3. The said Reseller Agreement was valid for a period of 24 months, wherein certain commitment as regard to the volume as well as number of connections had also been made. The parties were also agreed for prices to be charged from customers and sharing of revenue between them. The services were provided between 23.03.2015 to 15.10.2017 for which operational creditor raised several invoices. It is also noted that bills/ invoices raised against the services were to be cleared as soon as they were raised. The corporate debtor has made part payments against the outstanding invoices. Further, the operational creditor has also issued credit notes and waived of certain amounts raised in invoices. However, the outstanding amount has remained pending.

Contentions raised by the operational creditor

4. The Ld. Counsel, after narrating these basic facts submitted that in the present case undisputed liability was more than the threshold limit, hence, without going into other facts and contentions, merely on this basis, the application filed U/s 9 of IBC, 2016 could be admitted. In support of this claim, Ld. Counsel refer to email dated 31.07.2017 and pointed out that even as per the corporate debtor outstanding amount payable was GBP 23,544.13.

Contentions on behalf of the Corporate Debtor

5. Written submission has been made on behalf of the corporate debtor, wherein following points have been made.

6. The alleged debt claimed by the operational creditor being a disputed debt and same was disputed in the reply by the corporate debtor to section 8 notice. It is stated that since the debt claimed by the operational creditor is disputed therefore cannot be adjudicated in a summary proceeding as contemplated under the Insolvency & Bankruptcy Code and it requires evidence to be led by the parties.

7. It is submitted that there is no default on the part of the corporate debtor and no amount is legally due or payable to the operational creditor. It is submitted that the alleged basis of calculating the alleged amount so claimed is not clear and is vague, therefore, the same is emphatically disputed by corporate debtors.

8. That the Operational Creditor is a company registered in England and is in the business of telecom which includes mobile telecom services in the UK. The Corporate debtor is in the business of telecom which includes providing international SIM cards to Indian clients travelling to the UK.

9. That the parties entered into an 'EE Framework Reseller Agreement' (herein referred as "Agreement") dated 26.03.2015, whereby the operational creditor would provide mobile telecom services to the customers of Corporate debtor while they are travelling in the UK. Under this Agreement, operational creditor provides SIM cards to the Corporate debtor which it could resell to its customers in India to be used by them in the UK.

10. That the operational creditor is in breach of contract since the Agreement has been signed. The corporate debtor was not able to use the SIM cards for approximately 5 months after the date of signing of the Agreement. The operational creditor from the first month itself had inflated and sent the wrong invoices. Moreover, operational creditor had provided incomplete and wrong credits to the Corporate Debtor.

11. That the operational creditor disconnected the Sim Cards in January 2017, which even by the contract date is 3 months earlier than the period of March 2018, however notwithstanding the fact that lines could not be used till September 2015 due to unprofessional behaviour and laxity and other defaults at the end of operational creditor.

12. It is submitted that in terms of Clause 20 of the Agreement, the contract can be terminated only by giving 30 days notice. However, Operational Creditor disconnected the lines of the Sim Cards in January 2017 without affording 30 days notice in terms of Agreement. Therefore, the operational creditor breached the Agreement with impunity and is not entitled to claim any benefit or amount under the Agreement. That there was no intimation from the operational creditor before disconnecting the lines which caused huge loss and damage to the

business of the corporate debtor. As promised by the operational creditor to come back in January 2017, the operational creditor never came back to solve the ongoing issues and the disputes persisted between the parties.

13. That the operational creditor has time and again made baseless demands to reinstate network lines. That corporate debtor has continuously apprised the Operational Creditor about all the pending disputes between both the parties. Infact, there was always a follow up issue with operational creditor, as usual sim cards were delivered very late to corporate Debtor almost after 2 months of the effective date of Agreement. Also the account manager has clearly committed that the pricing will be revised in one year which never happened.

14. It is submitted that the operational creditor has not only inflated its invoices, but also owes considerable amount of money in damages to the corporate debtor for subpar service levels, damages for disconnection and business loss the corporate debtor suffered due to operational creditor cutting of its services. The entire dispute between the Corporate Debtor and the Operational Creditor is explained in the reply filed by the Respondent **(Para L of the reply at Page to Page 17).** The Respondent craves leave of this Hon'ble Tribunal to read the said Para as part and parcel of the instant submissions.

15. The chart depicting the emails showcasing the dispute debt is annexed herewith as **Annexure –A.** The compilation of judgments relied upon by the Corporate Debtor are annexed with the instant submissions as **Annexure –B.**

16. It is also submitted that the alleged Power of Attorney placed on record by the operational creditor to authorize Mr. Kaviraj Singh to file the present application is also defective in as much as the same appears to be executed outside India and therefore the same has to be approved from their embassy situated in India. Even in the alleged Power of Attorney the operational creditor has been described as a Private Limited Company, however the Operational Creditor is a division of BT Group plc, a Public Limited Company.

17. In view of the above, it has been prayed that the application may be dismissed with cost.

Rejoinder on behalf of the operational creditor

18. It was contended that a categorical acknowledgment of outstanding liabilities

was made in the email dated 31.07.2017 and 18.09.2017. All other emails exchanged during the said period or thereafter were of vague and general nature, hence, the same could not be said have to controverted this undisputed factual position.

Findings & conclusion

19. We have considered the submissions made by both the sides and material on record.

20. It is noted that as per the arrangement between the operational creditor and the corporate debtor dated 20.03.2015, operational creditor has provided mobile telecom services to the customers of corporate debtor while such customers travel in U.K. For this purpose, operational creditor provided mobile sim cards to the corporate debtor which the corporate debtor sold to its customers in India. It is also noted that certain financial targets were to be achieved over a two-year period of the contract.

21. This application complies with the basic requirements of Section 8/ 9 of IBC, 2016 and rules and regulations made thereunder. The crux of the matter is that whether there exists a dispute between the parties prior to delivery of notice of demand U/s 8 of IBC. If it is so, the other question which arises for our consideration is whether undisputed amount of outstanding liability is more than the threshold limit as prescribed U/s 4 of IBC, 2016. As far as first aspect is concerned, there have been a number of communications between the operational creditor and corporate debtor which make it apparent that there are certain strong differences between the two. Thus, it becomes imperative for us to find out what is the undisputed amount of liability.

22. To find an answer to the above query, we have carefully gone through the emails exchanged between them. As per the email dated 31.07.2017 firstly the corporate debtor has agreed at a sum of £ 23,544.13. Subsequently, an email was written by the corporate debtor on 24.08.2017, wherein various claims have been made. On this basis of this email, the corporate debtor has stated that corporate debtor had not agreed for the amount mentioned in the earlier email referred above.

23. We have noted the contents of the email dated 24.08.2017, it is of general nature, wherein claims for recovery of damages through litigation has been made. However, subsequently an email dated 18.09.2017, GBP 10,000 have been agreed as a full and final settlement by the corporate debtor. In this email, it has also been mentioned that such offer was without any prejudice to the legal rights and claims by the corporate debtor for damages due for loss of business and reputation due to un-professional behaviour on the part of operational creditor. It is now settled that the use of words "without any prejudice" have got no adverse bearing on the acknowledgement of debt. Thus, the use of these words in no manner gives any respite to the corporate debtor.

24. Thereafter, we have also perused an email dated 15.02.2019, which is a verbatim repetition of the email dated 24.08.2017. Hence, in view of its mail dated 18.09.2017, it does not support the claim of the corporate debtor that it had not accepted liability to pay any amount. Further, this email is of general nature and the corporate debtor in this email has not stated that the amount of liability accepted by it in earlier emails dated 31.07.2017 or 18.09.2017 were not payable. Thereafter, correspondences with the counsel of the operational creditor has also happened and finally the legal counsel of the operational creditor vide its email dated 15.02.2019, it has been informed that outstanding dues of GBP 78,296.31 were required to be paid by the corporate debtor and failing to do so would result into initiation of legal proceedings against the risk and cost of the corporate debtor.

25. After carefully considering this chain of communication, we have no hesitation in holding that at two stages, definite liability to pay has been acknowledged and accepted by the corporate debtor. The said liability in both the situations is more than the threshold limit. Hence, having regard to various judicial decisions rendered by the Hon'ble NCLAT that in case of dispute, if the undisputed liability is more than the threshold limit, the application could be admitted.

26. Accordingly, we **admit** this application and order as under.

27. The applicant has not proposed the name of the Insolvency Resolution Professional. Accordingly, this Tribunal, hereby, appoints Insolvency Professional namely, **Mr. Nitish Kumar Chugh** having Registration Number ***IBBI/IPA-001/IP-P01636/2019-20/12529 (Email ID- ca.nitish@gmail.com)***

as Interim Resolution Professional from the list provided by IBBI. The IRP is directed to take charge of the respondent corporate debtor's management immediately. He is also directed to cause public announcement as prescribed under section 15 of the IBC, 2016, within three days from the date of this order received, and call for submissions of claim in the manner as prescribed.

28. The moratorium is declared which shall have effect from this Order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is ordered to prohibit all of the following, namely: -

a. The institution of suits or continuation of pending suits or proceedings against the respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b. Transferring, encumbering, alienating or disposing of by the respondent any of its assets or any legal right or beneficial interest therein;

c. Any action to foreclose, recover or enforce any security interest created by the respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the respondent.

27. The supply of essential goods or services of the Corporate Debtor shall not be terminated, suspended or interrupted during moratorium period. The provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the central government.

28. The IRP shall comply with the provisions of sections 13(2), 15, 17 and 18 of the Code. The directors of the Corporate Debtor, its Promoters or any person associated with the management of the corporate debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for discharging his functions under section 20 of the IBC, 2016. The Operational Creditor is directed to immediately pay an amount of Rs.2,00,000/- to IRP for complying with the above-mentioned provisions read with relevant regulations.

29. The operational Creditor is directed to send the copy of this Order to the IRP with immediate effect, so that he could take charge of the corporate debtor's assets etc., and make compliance with this order as per provisions of IBC, 2016.

30. The Registry is directed to serve a copy of this order on Registrar of Companies, Delhi & Haryana for appropriately updating the status of Corporate Debtor on M/o Corporate Affairs website for information of general public. The RoC as aforesaid shall then file a compliance report in this regard with this Adjudicating Authority.

Sd/-

Bachu Venkat Balaram Das
Member (Judicial)

Sd/-

Virendra Kumar Gupta
Member (Technical)