

301

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

Coram : (1) Shri Madan B. Gosavi,
Hon'ble Member (J)
&
(2) Shri Virendra Kumar Gupta,
Hon'ble Member(T)

CP (IB) No. 272/KB/2019

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

-And-

In the matter of:

SMP Constructions Private Limited, bearing CIN: U45201GJ2002PTC041739 and having its registered office at P-156, Phase-II, GIDC Industrial Estate, Behind MIPCO, Bholav, Bharuch, Gujarat- 392 015;

...Operational Creditor

-Versus-

In the matter of:

Reach Seamless Ltd., having its registered office at 39, Shakespeare Sarani, Premlata Building, 6th floor, Kolkata, West Bengal-700 017 registered under bearing CIN: U27320WB2008PLC128890;

....Corporate Debtor

Counsel appeared:

Ms. Swapna Choubey, Advocate] Operational Creditor
Mr. Udit Agarwal, Advocate]
Mr. Ishan Saha, Advocate] Corporate Debtor
Mr. Dipankar Saha, Advocate]

Date of Pronouncement of Order: 08.01.2020

ORDER

Per Shri Madan B. Gosavi, Member (J):

M/s. SMP Construction Private Ltd. - the Operational Creditor, filed this application under section 9 of the Insolvency & Bankruptcy Code, 2016 (in short, I&B Code) against the Corporate Debtor, **M/s. Reach Seamless Limited** (formerly known as Reshmi Seamless Limited) alleging that Corporate Debtor committed default in paying the operational debt of Rs.60,04,463/-.

2. The following facts are not in dispute-

3. The corporate debtor by work order dated 24.07.2012 offered the operational creditor to complete civil work on its project site at Dahej, Gujarat. Two important relevant conditions for completion of the work were that:- (i) work to be completed around the clock and in least possible time and (ii) it has to be completed on or before 10.12.2012.

4. It is also not in dispute that the operational creditor completed construction work as assigned. It raised total bill of Rs.3,61,69,659/-. Out of that, the corporate debtor paid sum of Rs.3,57,00,408/-. It is say of the operational creditor that the corporate debtor did not refund retention amount of Rs.36,04,216/- including the balance amount towards job done. According to the operational creditor, total sum of Rs.60,04,463/- is due and payable by the corporate debtor. As the corporate debtor committed default in paying the operational debt, it has served on the corporate debtor demand notice dated 26.09.2018 under section 8 of IBC. In spite of receipt of demand notice, corporate debtor did not pay the amount raising some

3d

3d

false dispute. Since the corporate debtor committed default in paying the operational debt, this proceeding is filed to start Corporate Insolvency Resolution Process (in short, CIRP) of the corporate debtor.

5. Operational Creditor did not suggest name of any professional for appointment as the Interim Resolution Professional and requested this authority to appoint the same. It has filed affidavit stating that he did not receive the amount claimed and also did not receive intimation of existence of any dispute from the corporate debtor.

6. Notice of this application is duly served to the corporate debtor. It has appeared through its Deputy Manager (Legal), Mr. Sirshendu Roy Chaudhuri. He filed affidavit-in-reply.

7. We have gone through the affidavit-in-reply. It is seen that corporate debtor has come out with a defence that after the completion of the construction work as per the work order, operational creditor did not hand over construction site due to which good amount of unutilised construction materials, which were lying at the site, went missing and thereby corporate debtor was put to loss of Rs.24 lakhs. According to the corporate debtor, the operational creditor did not settle this dispute till today and filed this application wrongly invoking provisions of IBC. It further contended that in fact, nothing is due and payable by them to the operational creditor. He prayed for rejection of the application.

8. We heard the Ld. Counsels for the operational creditor and the corporate debtor at length. Both of them also filed on record written notes of argument. We have gone through them also.

sd

sd

9. It is seen from the record that the corporate debtor, in affidavit-in-reply, did not contend that claim is time-barred but in written notes of argument, the corporate debtor raised the defence for the first time. The operational creditor has no opportunity to reply the same. Hence, such defence, which is surreptitiously raised by filing written notes of argument, cannot be considered at all. Moreover, on the basis of admitted facts on record, it can safely be concluded that the debt is not time-barred. The corporate debtor itself produced on record letter dated 06.06.2018 wherein, it has been categorically mentioned that, "**1. After the Civil work that you had done at our site at Dahej-II, you had failed to handover the site to us. As a result of which the unused material, i.e. Steel 30 Tons and Cement 200 Tons have not been accounted for by you. Subsequently during our visit to the site the aforesaid materials could not traced by us. (2) Considering the above facts and circumstances we have suffered a loss of more than Rs.24.00 Lakh (Rupees Twenty Four Lakh Only).**"

10. We hold that it is admission of debt under section 18 of Law of Limitation. Even in the year 2015 and in the year 2016 also, the corporate debtor had admitted the debt by way of emails in so many words. Those emails are on record. It is not in dispute that the corporate debtor has with it retention amount of Rs.30 lakhs kept by the operational creditor for successful completion of the work. That amount has not been refunded by the corporate debtor. If at all the corporate debtor's claim of so-called loss of Rs.24 lakhs is considered (about which we have every doubt about its genuineness). Still, the corporate debtor is liable to pay sum of Rs. 6 lakhs to the operational creditor, which, it has failed to pay, in spite of receipt of demand notice. In such situation, we conclude that the default amount of the debt is more than Rs.1 lakh (as per section 4 of IBC) and corporate debtor has to be admitted in CIRP.

sd

sd

11. Ld. Counsel for the corporate debtor relying on the very same letter dated 06.06.2018 (Annexure "A") submitted that by this letter, the dispute about the debt was raised prior to the demand notice dated 26.09.2018 (Annexure "8"). Demand notice was replied pointing out above the dispute. Since there is pre-existing dispute, application is not maintainable. We have considered his argument. Hon'ble Apex Court in the case of Mobilox Innovations Private Ltd. (*supra*) has also explained the term what does mean "existence of dispute" in the following words:

"40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."



12. It is clear that the dispute to be raised by the corporate debtor should be real. In this case, considering the facts on record, we hold that the dispute about the debt as raised by the corporate debtor is not plausible, which requires us to reject this application. Moreover, in view of the facts on record, if we at all consider the disputed amount of Rs.24 lakhs, which, corporate debtor wants us to consider, still it has to pay a sum of Rs.6 lakhs to the operational creditor towards the operational debt and the amount is more than Rs.1 lakh, minimum amount prescribed under section 4 of IBC.

13. We have already noted that there are number of emails exchanged between the parties about the disposal of unused materials. We are not entering into those details. We have already held that if at all the corporate debtor's claim of unutilised material amounting to Rs.24 lakhs is considered by giving it set off, still it has to pay sum of Rs.6 lakhs to the operational creditor as an operational debt. Corporate Debtor committed default in paying the sum. The application is defect-free. In view of the facts and evidence on record, we hold that the application deserves to be admitted. We admit the same by passing the following order:

ORDER

- (i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process in respect of Corporate Debtor, **M/s. Reach Seamless Ltd.** Moratorium order is passed for a public announcement as stated in Sec.13 of the IBC, 2016.
- (ii) The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public

announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

- (iii) Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
- a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) Transferring, encumbering, alienating or disposing of by the corporate debtor 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 corporate debtor 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 possession of the corporate debtor.
- iv) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

Sd

Sd

- v) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vi) The order of moratorium shall affect the date of admission till the completion of the Corporate Insolvency Resolution Process.
- vii) Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Sec.31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- viii) Necessary public announcement as per Sec.15 of the IBC, 2016 may be made by the resolution professional upon receipt of the copy of this order.
- ix) As the Operational Creditor has not suggested any name for the appointment of Interim Resolution Professional (IRP) and requested this Tribunal to appoint, Ms. Sonu Jain of Poddar Court Gate No.2, 18, Rabindra Sarani, Suit no.327, Kolkata-700 001 having registration no. IBBI/IPA-001/IP-P00575/2017-18/11016 and Email Id. casonujain@gmail.com is appointed as the Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan. The IRP is directed to file her consent in form no.2 alongwith the declaration that no disciplinary proceeding is pending against her.
- x) The Operational Creditor to pay to IRP a sum of Rs.50,000/- as payment of his fees as advance, as per Regulation 33(3) of the IBBI




(Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment.

xi) The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016

xii) Registry is hereby directed to communicate the order to the Financial Creditor, Corporate Debtor and to the Interim Resolution Professional by Speed Post and also by email as per provisions of IBC.

Let the certified copy of the order be issued upon compliance with requisite formalities

List the matter on **21.02.2020** for filing progress report.


(Virendra Kumar Gupta)
Member (T)


(Madan B. Gosavi)
Member (J)

Signed on this, the 8th day of January, 2020.

Talukdar