

**IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK**

CP (IB) No. 34/CB/2019

In the Matter of:

Section 9 (1) of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

-And-

In the Matter of:

Dr. Arvind Prakash Savant, Block 8/18, Priyadarshini Parisar, Nehru Nagar, (West) Bhilai, District Durg, Chhattisgarh-490 020;

... Petitioner/ Operational Creditor

-Versus-

BSR Superspeciality Hospitals Limited, 15-Commercial complex, Nehru Nagar (East), Bhilai, District Durg, Chhattisgarh-490020.

...Respondent/Corporate Debtor

Coram:

Shri P. Mohan Raj : Member (Judicial)

Shri Kaushalendra Kumar Singh : Member (Technical)

Appearances (through video conferencing)

For the Petitioner : Mr. Manish Nag Das, Adv.

For the Respondent : Mr. S.K. Acharya, Adv.

Order pronounced on: 03.01 .2024

ORDER

1. This application has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 to initiate Corporate Insolvency Resolution Process, (CIRP) against the respondent a Company registered under the provision of Companies Act, 1956.

2. **The brief case of the petitioner is as follows:** -The petitioner is a pediatrician and was appointed as a Medical Director of the respondent company/hospital with effect from 25.07.2007 and served as such till his resignation dated 24.10.2018. Initially, his monthly salary was fixed at Rs.60,000/- per month. It was enhanced periodically and at the time of relieving the respondent hospital on 24.10.2018, his remuneration was Rs.2,10,000/-. From April 2016, the respondent was irregular in payment of monthly salaries to the petitioner. Then after negotiation, an agreement was entered under the caption Declaration dated 04.06.2018. Under the declaration agreement, the respondent agreed to clear the arrears of salaries of Rs.51,36,980/- in five installments from June 2018 to October 2018. But the respondent not honored the declaration agreement. Then the petitioner, in one month advance submitted his resignation dated 25.09.2018, which was accepted by the respondent on 24.10.2018. The petitioner sent statutory demand notice dated 02.01.2019 claiming the arrears of salary of Rs.67,86,582/-to the respondent. The notice was received and acknowledged by the respondent by his letter dated 20.01.2019. By that letter, the respondent asked for certain documents. The petitioner sent the documents required by the respondent on 08.02.2019. Thereafter no reply to the statutory notice is given by the respondent. Hence this petition.

3. **The brief case of the respondent is as follows:** The amount claimed by the petitioner is never admitted by the respondent. It is a disputed claim. Petitioner failed to take into account the leave availed by him and the TDS deductions. As per the

calculation of the respondent, the petitioner is entitled to receive only a sum of Rs.21,38,839/- In the declaration the amount was mentioned as Rs.51,36,980/-. It is stated that the petitioner had obtained the signature of representative of the respondent on duress using the situation when the respondent hospital doctors were on strike. This Adjudicating Authority has no jurisdiction to decide the disputed claim. The civil court alone can resolve the issues, after considering the leading evidence on the disputed questions. The petitioner misused his position as a medical director, created false and fabricated ledger in order to suit his convenience. The Petition is to be dismissed.

4. Analysis and Findings:

5. This petition was filed on 15.03.2019. After the completion of pleadings, when the matter was posted for hearings, the parties entered into settlement agreement dated 22.11.2019 and the petitioner sought permission to withdraw the petition, accordingly this Adjudicating Authority on 26.11.2019 disposed of this petition after granting liberty to the petitioner to revive the petition in the event of respondent not complying the settlement conditions. The respondent failed to honor the settlement conditions and not paid any amount. Then the petitioner has filed an Application Rst. (IB) No. 1/CB/2022 for restoration of main petition. This Adjudicating Authority by an order dated 18.08.2022 allowed the restoration application. In consequence this petition is restored on file

6. The petition is filed by the former employee against his employer since the employer committed default in payment of his monthly salaries. The petitioner filed this petition on the basis of declaration agreement dated 04.06.2018 entered between the parties by which the respondent agreed to pay the arrears salary of Rs.51,36,980/- in five monthly instalments from June 2018 to October 2018. When the respondent failed to pay the agreed amount, this petition has been filed. On the respondent side opposed the petition stating that dispute exist and signature of the respondent's

representative was obtained by duress for higher amounts, and the petitioner is entitled only to Rs. 21,38,839/- after deducting the TDS and leave salary. Thus, the respondent not disputed the debt but only disputed the quantum of debt.

7. It is to be noted that this petition was filed on 15.03.2019, therefore the pecuniary threshold limit was Rs.1 Lakh as envisaged under section 4 of IBC 2016, before the notification No.S.O.1205 (E), dated 24,03,2020.

8. In respect of section 9 IBC 2016, what are all the points to be determined by the Adjudicating Authority before admission is set out by Apex court in **Mobilox Innovations Private Limited vs Kirusa software Private Limited AIR 2017 SC 4532** as follows:

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

*(i) Whether there is an “operational debt” as defined exceeding Rs 1 lakh?
(See Section 4 of the Act)*

*(ii) Whether the documentary evidence furnished with the Application shows that the aforesaid Debt is due and payable and has not yet been paid?
And*

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational Debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.)

9. The claim in this petition arises on account of non-payment of salaries of petitioner, it means due/debt for the service rendered. In the declaration, the

respondent admitted to pay the salary arrears of Rs.51,36,980/- to the petitioner in five monthly instalments from June 2018 to October 2018. As already stated, the respondent admitted in the written counter that the amount payable is only Rs.21,38,839/-. This is above the threshold amount. It is settled law that at the time of admission, there is no need to determine the exact due amount payable by the corporate debtor. In this regard the Hon'ble NCLAT in **Nandamuri Meenalatha V M/s. Quality Steels and Wire Products Company Appeal (AT) (CH) (INS.) No. 11 of 2023 04.07.2023** had observed as follows:

80. It must be borne in mind that an 'Exact Sum of Claim' of an 'Operational Creditor' is not relevant for an 'Admission' of an Application. Of course, during the course of Corporate Insolvency Resolution Process, the exact Claim Amount, can be determined, by an Interim Resolution Professional / Resolution Professional', and in the instant case, Parties are free to approach the 'Interim Resolution Professional' / 'Resolution Professional, in the course of Corporate Insolvency Resolution Process')

10. Also, this Adjudicating Authority is of the considered view that under the insolvency framework, it is already settled that under the provisions of the Insolvency & Bankruptcy Code, 2016, the aspect of existence of "Default", takes a prime seat, and the reasons supposed to be projected by the opposite side viz., fraud, siphoning off, forgery and fabrication is of no avail unless supported by substantial evidence. The Hon'ble NCLAT in **Mr. Joseph Jayananda v. M/s. Navalmar (UK) Ltd & Others [Company Appeal (AT) (Ins.) No. 718/2020; 07.04.2021; para 8]** observed as follows:

8. Given the above discussion, we find that the Corporate Debtor owes a debt of more than Rupees One Lac, i.e. above the threshold limit, and it committed default in discharging the same. It also appears that there was no pre-existing dispute. The Corporate Debtor's main contention is that the amounts paid by the Operational

Creditor and its financial statements do not match. It is not for the Adjudicating Authority to ascertain, investigate, or fix the exact amount of liability at the admission stage. After the admission of the petition, it is the duty of the Resolution Professional to collate the claims and ascertain the liability."

11. In view of the aforesaid discussion and the judgements referred to above, this Adjudicating Authority, without delving into the exercise of determining the exact quantum of the Operational Debt is of the considered view that there exists an operational debt above the threshold limit of Rs.1 Lakh and the same is due and payable by the Corporate Debtor. Hence, the first two mandatory conditions regarding the existence of 'Debt' above the pecuniary threshold limit and its 'default' are answered in the affirmative.

12. The respondent stated in the counter that the claims of the petitioner is disputed claim hence this Authority has no jurisdiction to entertain the petition, but did not reveal what is the dispute existing. The dispute meant by the respondent is only regarding the quantum of debt amount, Since the admitted amount itself is more than threshold limit this contention is not acceptable.

13. The petitioner submitted his resignation dated on 25.09.2018, one month ahead. In the resignation letter he explained everything why he could not continue in service. There he mentioned that as on date a sum of Rs.62 Lakhs is due towards salary and TDS for the year 2017-18 was also not deposited. The respondent accepted the resignation without any demur, it shows that there was no pre-existing dispute. After the receipt of the statutory notice also, the respondent did not raise any dispute.

14. The Hon'ble Supreme Court in **Mobilox Innovations Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353**, have clearly laid down the law that the 'existence of dispute' must be Pre-Existing i.e, it must exist before the receipt of the Demand Notice or invoice as the case may be. In 'Mobilox Innovations' (Supra) the Hon'ble Supreme Court has observed as follows:

33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default i.e, on non payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an ovoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)) What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing-i.e it must exist before the receipt of the demand notice or invoice, as the case may be.....”

15. As already referred, after filing this petition the parties entered into settlement agreement by which the respondent agreed to pay of Rs.51,36,980/- as full and final settlement in five equal monthly instalments. The respondent did not honor his commitments. It lead to revival of this petition. On the respondent side argued that in the settlement agreement dated 22.11.2019, the petitioner admitted that he has filed this petition for recovery of outstanding amount, hence this petition is liable to be dismissed since IBC 2016 is not for recovery. The counsel for respondent further submitted that since the petitioner himself admitted in the settlement agreement that the petition is filed for recovery, under section 58 of Evidence Act 1872, the admitted facts need not be proved, hence the petition is hit by section 65(1) IBC 2016.

16. This contention of the respondent is not sustainable. In the earlier referred case **Mobilos Innovations Private Limited**, the Apex court laid down that the Adjudicating Authority has to examine three points before admitting the petition

under section 9 IBC 2016, the conditions laid down there are exhaustive. Further the proceeding under section 7 & 9 IBC 2016 are not proceeding in rem from the beginning, these proceedings are lis in personam till the admission of the petition, after the admission only it becomes rem. If the contention of the respondent is accepted then section 12A of IBC 2016 become almost redundant, which permit the petitioner to withdraw the petition after receiving the debt amount. Apart from this the admission made in certain circumstances under section 23 of Evidence Act 1872. Section 23 of Evidence Act is not relevant. For ready reference the provision of the said sections reproduction hereunder:

23. Admissions in civil cases, when relevant. —In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation. —Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

17. According to the said section if any admission is made on express condition that evidence of it is not to be given; or by implied condition. Regarding the implied condition the court has to infer from the circumstances whether admission was made under the implied condition or not. The courts shall always infer that implied condition was existed, if it is made for the purposes of or in the course of a settlement of compromise of a disputed claim; In this case, also the said statement was recorded in the settlement agreement during the settlement to put an end to the litigation. In the scenario the objection made in this regard has no legal backing, hence this objection is turned down as unsustainable.

18. On the respondent side argued that the date of default is differently mentioned in section 8(3) statutory demand notice dated 02.01.2019 *Annexure 16 of petition* and in part IV of the petition. In Form 3 demand notice in column No. 2(b), it is mentioned the date of default occurred in October 2018. In Form 5 of petition in part IV (2) the date of default is mentioned as 30.06.2018. The petitioner mentioned specific date, month and year in petition but in the demand notice only month and year are mentioned specific date is not mentioned. In the situation the actual date of default committed by respondent is 30.6.2018. This date is correctly mentioned in the petition. The absence of mentioning the exact date in the demand notice does not amounts to given two different dates by the petitioner. It is true there is omission to mention specific date of default in demand notice, but month and year are given hence it is not fatal to the petition. Further the respondent not raised this question in its- pleading, first time raised during the argument, hence in the absence pleading this objection is unsustainable. The NCLAT-Chennai in *Mr. Manmohan Singh Jain Vs. M/s. State Bank of India & another (Company Appeal (AT) (CH) (INS) No. 97 of 2021)* held that non-mentioning of specific date of default in part IV of petition is not fatal, to the application and on the sole ground, the application cannot be rejected. The petition cannot be dismissed mere taking a technical impediment.

19. Thus, having regard to the conspectus of facts of the present case and the judgements cited (supra), this Adjudicating Authority is of the considered view that the corporate debtor is in default of payment of the outstanding operational debt above the pecuniary threshold owed to the applicant and the mandatory requirements as prescribed under Section 9 (5) (i) of the Code, 2016 are satisfied. Therefore, the present Company application (C.P No. (IB)- 34/CB/2019) stands admitted and the CIRP is hereby initiated against **BSR Superspeciality Hospitals Limited**,

20. The petitioner in part III of the petition has proposed the name of **Mr. Anuj Bajpai** registration No. IBBI/IPA-001/IP-P00311/2017-2018/10575, having contact office at 1006, Raheja Centre, 10th floor, Nariman Point, Mumbai-400 021, Email:

anuj@headwayip.com Cell No.9768055550/9920061236, an insolvency Professional to become interim Resolution Professional (IRP) of the Corporate Debtor, he also filed his consent in FormNo.2 and that no disciplinary proceedings are pending against him.

21. We therefore consider it a fit case for admitting the petition, and for initiation of Corporate Insolvency Resolution Process in respect of the corporate debtor.

22. In view of the aforesaid observations, we hereby admit the petition and pass the following Orders.

(i) The Corporate Debtor **BSR Superspeciality Hospitals Limited**, is admitted in the Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016.

(ii) The moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 is declared for prohibiting all of the following in terms of section 14(1) of the Code.

(a) *the institution of suits or continuation of pending suits or proceedings against the corporate debtor 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 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*

(d) *the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

(iii) The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of section 31 or passes an order for liquidation of Corporate Debtor under section 33 of the Insolvency & Bankruptcy Code, 2016, as the case may be.

(iv) As suggested by the Operational Creditor, we appoint **Mr. Anuj Bajpai** registration No. **IBBI/IPA-001/IP-P00311/2017-2018/10575**, having contact office at 1006, Raheja Centre, 10th floor, Nariman Point, Mumbai-400 021, Email: anuj@headwayip.com Cell No.9768055550/9920061236, to act as an Interim Resolution Professional (IRP) of the corporate debtor to carry out the functions as per the Code, subject to his possessing a valid Authorisation for Assignment (AFA) in terms of 7A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations 2016. He shall conduct the Corporate Insolvency Resolution Process as per the provisions of Insolvency and Bankruptcy Code, 2016 r.w. Regulations made thereunder.

(v) The IRP so appointed shall make a public announcement of initiation of Corporate Insolvency Resolution Process (CIRP) and call for submission of claims under Section 15 as required by Section 13(1) (b) of the Code.

(vi) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended, or interrupted during the moratorium period. The corporate debtor to provide effective assistance to the IRP as and when he takes charge of the assets and management of the corporate debtor.

(vii) The IRP shall perform all his functions as contemplated, *inter-alia*, by sections 17, 18, 20 & 21 of the Code. It is further made clear that all personnel connected with Corporate Debtor, its Promoter or any other person associated

with management of the Corporate Debtor are under legal obligation under section 19 of the Code extending every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter or any other person required to assist or co-operate with IRP, do not assist or co-operate the IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.

(viii) The IRP shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' and manage the operations of the Corporate Debtor as a going concern as a part of obligation imposed by section 20 of the Insolvency & Bankruptcy Code, 2016.

(ix) The Operational Creditor is directed to pay an advance of Rs.2,00,000/- (Rupees Two Lakh Only) to the IRP within two weeks from the date of receipt of this order for the purpose of smooth conduct of Corporate Insolvency Resolution Process (CIRP) and IRP to file proof of receipt of such amount to this Adjudicating Authority along with First Progress Report. Subsequently, IRP may raise further demands for Interim funds, which shall be provided as per Rules.

(x) The Registry is directed to communicate a copy of this order to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional and to the concerned Registrar of Companies, of IBBI after completion of necessary formalities, within three working days and upload the same on website immediately after pronouncement of the order.

(xi) The IRP shall also serve a copy of this order to the various departments such as Income Tax, GST, State Trade Tax, and Provident Fund etc. who are likely to have their claim against Corporate Debtor as well as to the trade

unions/employee's associations so that they are informed of the initiating of CIRP against the Corporate Debtor timely.

(xii) The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of this order.

23. Interim Resolution Professional shall file 1st Progress Report within six weeks from the date of this order.

24. Thus, the corporate debtor **BSR Superspeciality Hospitals Limited**, CP (IB) No.34/CB/2019 is admitted into CIRP.

25. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

KAUSHALENDRA KUMAR SINGH
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Kaushalendra Kumar Singh
Member (Technical)

PANDIAN MOHAN RAJ

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MOHAN RAJ
Date: 2024.01.03 15:59:59 +05'30'

P. Mohan Raj
Member (Judicial)

Signed on this, 03rd day of January 2024.

Supriya_P.S