

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT NO. V**

CP (IB) 3525/MB/2019

Under Section 9 of the I&B Code, 2016

In the matter of

Shree Pathology Laboratory

B/3, Gurunanak Society, Near Fire Brigade
Office, Opp. Prem Nagar, Kopri, Thane – 400
603

...Operational Creditor/ Petitioner

v/s

Bigdream Ventures Private Limited

701/C1, Brahma BaraveVill, Madhav Srishti,
Near Godrej Hill, Kalyan west, Barave, Thane
– 421 301

...Corporate Debtor

Order delivered on: 10.08.2020

Coram:

Hon'ble Shri. Chandra Bhan Singh, Member (Technical)

Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)

For the Operational Creditor/Petitioner:

Mr. Tarun Arora, Advocate i/b Arora & Bedi Associates.

For the Corporate Debtor:

Mr. Ishaan Patkar i/b Jindagi Shah, Advocates.

Per: Suchitra Kanuparthi, Member (Judicial)

ORDER

1. This is an application being CP (IB) 3525/MB/2019 filed by Shree Pathology Laboratory, Operational Creditor/Petitioner, under section 9 of Insolvency & Bankruptcy Code, 2016 (**Code**) against Bigdream Ventures Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**).

SUBMISSIONS BY THE PETITIONER

2. The Petitioner is a partnership firm. This Application is filed by Dr. Santosh Babusaheb Khairnar, Partner of the Petitioner duly authorised to file the present Application.

3. The Petitioner has claimed an amount of Rs. 11,03,150/- plus interest @12% p.a. from the Corporate Debtor.

4. A brief history of the transaction between the Petitioner and the Corporate Debtor is as follows. The Petitioner is engaged in providing services of pathology laboratory. The Corporate Debtor engaged in managing, running and operating hospitals and providing various medical services including and limited to OPD, IPD, ICU and other critical medical facilities.

5. The Corporate Debtor approached the Petitioner to provide certain pathology services on a regular basis while operating and managing one hospital namely, ArogyamMulti-Speciality Hospital (**Arogyam**). It was mutually agreed by the Petitioner and the Corporate Debtor that for the pathology services provided, the Petitioner shall issue a monthly-statements containing the details and same shall be immediately paid, in full, upon the receipt.

6. For appointing the Petitioner as a designated pathology laboratory linked to the Arogyam, the Corporate Debtor demanded interest free refundable deposit of Rs. 9,00,000/-. On 08.11.2017, the Petitioner transferred the said amount to the Corporate Debtor, the said transaction is reflected in the ledger account of the Petitioner maintained by the Corporate Debtor. The said deposit was made on mutually agreed term that it shall be refunded upon the termination of professional relationship.

7. Thereafter, during the tenure of professional relationship (i.e. from November, 2017 to June, 2019), the Corporate Debtor was regularly sent the various samples of patients for pathological observations to the Petitioner. And the Petitioner started raising the monthly-statements of samples tested on a regular basis which were accepted by the Corporate Debtor without any demur.

8. Contrary to mutually agreed terms, the Corporate Debtor started making delayed payment. The liability was accepted by the Corporate Debtor vide a ledger account of the Petitioner which is maintained by the Corporate Debtor, reflects a sum of Rs. 11,03,150/- is due and payable to the Petitioner.

9. On account of non—payment of the dues, the Petitioner approached the Corporate Debtor and intended to end the professional relationship and demanded the deposit and payment of the outstanding dues.

10. After several reminders made by the Petitioner to the Corporate Debtor, the Corporate Debtor on 24.04.2019 issued a cheque of Rs. 10,00,000/-

towards the settlement of full amount of deposit and outstanding dues, which was returned back on 23.07.2019, with an endorsement "funds insufficient".

11. On 05.08.2019 the Petitioner issued Demand Notice demanding a sum of Rs. 11,03,150/- plus interest @12% p.a. under Section 8 of the Code. However, there was no reply from the Corporate Debtor for the Demand Notice and the Petitioner has filed affidavit as required under Section 9(3)(b) of the Code stating that there was no notice of dispute given by the Corporate Debtor.

SUBMISSIONS BY THE CORPORATE DEBTOR IN REPLY

12. The Corporate Debtor filed a reply to the petition raising following contentions;

- a. The Petitioner is not registered under the Partnership Act, 1932.
- b. There is no contractual relationship between the Petitioner and the Corporate Debtor. The Petitioner is merely managing the business another legal entity i.e. "Aarogyam Multi-speciality Hospital Pvt. Ltd.". the contractual relationship is between the Petitioner and Aarogyam Multi-speciality Hospital Pvt. Ltd. and not between the Petitioner and the Corporate Debtor. The monthly statements raised by the Petitioner are on Aarogyam Multi-speciality Hospital Pvt. Ltd. and not on the Corporate Debtor. The ledger account is in the books of Aarogyam Multi-speciality Hospital Pvt. Ltd. and not of the Corporate Debtor.
- c. No evidence at all has been produced about any contractual relationship between the Petitioner and the Corporate Debtor.
- d. Assuming but not admitting that the Corporate Debtor is in any way liable for payment of debts of Aarogyam Multi-speciality Hospital Pvt. Ltd., an action at law can only be maintained by the Petitioner against Aarogyam Multi-speciality Hospital Pvt. Ltd. and not directly against the Corporate Debtor, since there is no guarantee or indemnity provided by the Corporate Debtor to the Petitioner in respect of debts of Aarogyam Multi-speciality Hospital Pvt. Ltd.
- e. The relationship between the Aarogyam Multi-speciality Hospital Pvt. Ltd. and the Petitioner is that of joint venture partners. Any claim arising from this relationship cannot fall within the definition of "operational debt" in section 5(21) of the Code.
- f. There is no dispute that the pathological services were provided by the Petitioner to third party. That being so, the Petitioner simply cannot maintain the action against the Corporate Debtor who has not received any services at all.

- g. Assuming the relationship between Aarogyam Multi-speciality Hospital Pvt. Ltd. and the Petitioner is not that of partnership joint venture, but that of simple fee sharing or "referral", then the claim of the Petitioner would in any case be prohibited by the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 notified vide the Notification dated 11.03.2002 issued under the Indian Medical Council Act, 1956;

"6.4 Rebates and Commission:

*6.4.1 A physician shall not give, solicit, or receive nor shall he offer to give solicit or receive, any gift, gratuity, commission or bonus in consideration of or return for the referring, recommending or procuring of any patient for medical, surgical or other treatment. **A physician shall not directly or indirectly, participate in or be a party to act of division, transference, assignment, subordination, rebating, splitting or refunding of any fee for medical, surgical or other treatment.***

6.4.2 Provisions of para 6.4.1 shall apply with equal force to the referring, recommending or procuring by a physician or any person, specimen or material for diagnostic purpose or other study/work. Nothing in this section, however, shall prohibit payment of salaries by a qualified physician to other duly qualified person rendering medical care under his supervision"

- h. The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 have been enacted under the power granted to the Indian Medical Council under Section 33(m) and under the provisions of Section 20A which require the Indian Medical Council to prescribe standards of professional conduct. A fee sharing arrangement is prohibited by law and any contract to that effect is unenforceable under Section 23 of the Indian Contract Act, 1872. Assuming but not admitting that the relationship between the Petitioner and Aarogyam Multi-speciality Hospital Pvt. Ltd. is of a simple "referral fee" or "fee sharing", the same would be "legally enforceable" debt and thus an application under Section 9 of the Code is not maintainable.

SUBMISSIONS BY THE PETITIONER IN REJOINDER

13. The Petitioner in its rejoinder made submissions as follows;
- a. The Petitioner is a registered partnership entity.
 - b. The Corporate Debtor and Aarogyam Multi-speciality Hospital Pvt. Ltd. entered into registered agreement that was effective from 09.05.2016. as per the contractual clauses of the said agreement, the Corporate Debtor was to manage the Aarogyam Multi-speciality

Hospital Pvt. Ltd. for the consideration. Further, as per the said agreement, the accounting was to be continued in the books of the Aarogyam Multi-speciality Hospital Pvt. Ltd. but the expenses, the payment of taxes and actual profit and loss was to be borne by the Corporate Debtor.

- c. The Memorandum of Understanding (**MOU**) was entered into between the Petitioner and the Corporate Debtor and the same was not shared to the Petitioner.
- d. The monthly statements were to be paid by the Corporate Debtor and not by the Arogyam, as impliedly admitted by the payments made by the Corporate Debtor, in admission of the liability as reflected in the bank statement and the financial statement maintained by the Petitioner and filed with the Statutory Authorities.
- e. The trade deposit to secure the business was made to the Corporate Debtor and not the Arogyam and the same is clearly reflected in the bank statement and the Financial Statements maintained by the Petitioner and filed with Statutory Authorities.
- f. The Corporate Debtor issued the Cheque dated 24.04.2019, bearing no. 071302 in discharge of the liability towards the monthly statements and the repayment of the deposit. Furthermore, four cheques bearing nos. 067009, 067015, 067016 and 067019 amounting to Rs. 50,000/- each were issued to the Petitioner in discharge of the liability.

14. The sharing of professional fees, as alleged in the reply did not arise and is denied in totality. There was bulk business that was being offered by the Corporate Debtor to the Petitioner for which a discount on the catalogue price was offered.

FINDINGS

15. Upon perusal of the above submissions and hearing the professional appearing for the Petitioner and counsel for the Corporate Debtor, the bench opines as follows:

- a) The petitioner was an unregistered partnership firm and had made all requisite applications for obtaining the certificate of registration and has obtained the registration certificate from Registrar of Firms.
- b) There has been certain business relation between the petitioner and thus amounts were paid by the Corporate Debtor to the

Petitioner, even though the bills/invoices were actually raised in the name of Arogyam Hospitals who actually engaged the pathological services of the petitioner at the behest of the Corporate Debtor.

- c) It is evident that the Invoices are not raised against the Corporate Debtor.
- d) But advance of Rs 9 lakhs was given by the petitioner to the Corporate Debtor, Cheque of Rs 10 lakhs was 24.04.2019, which was returned with an endorsement that funds are insufficient.
- e) The facts also reveal that Arogyam Hospital was run by the Corporate Debtor, but there is no contractual relationship between the petitioner and corporate debtor as the basis of claim is in the name of Arogyam Hospitals.
- f) There might have been certain understanding between the petitioner, Corporate Debtor and Arogyam Hospital towards the management and payment of monies to the petitioner, but however, Arogyam Hospitals have issued a public notice dated 10.08.2019, cautioning the public at large against any claims, expressly declaring that they are not liable for any such claims.
- g) The medical Council rules further prohibit such practise of referral fee on commission basis and therefore such contracts are void and unenforceable contracts.
- h) The medical council rules are as follows:

Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 notified vide the Notification dated 11.03.2002 issued under the Indian Medical Council Act, 1956;

"6.4 Rebates and Commission:

*6.4.1 A physician shall not give, solicit, or receive nor shall he offer to give solicit or receive, any gift, gratuity, commission or bonus in consideration of or return for the referring, recommending or procuring of any patient for medical, surgical or other treatment. **A physician shall not directly or indirectly, participate in or be a party to act of division, transference, assignment, subordination, rebating, splitting or refunding of any fee for medical, surgical or other treatment.***

6.4.2 Provisions of para 6.4.1 shall apply with equal force to the referring, recommending or procuring by a physician or any person, specimen or material for diagnostic purpose or other study/work. Nothing in this section, however, shall prohibit payment of salaries by a qualified physician to other duly qualified person rendering medical care under his supervision"

i) Further we need to look at the definition of an Operational Debt as defined under section 5(21) of the IBC reads as below;

"a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority".

j) Be that as it may, the petitioner has not been able to establish a contractual relationship with the corporate Debtor, as the very basis of claim namely the Invoice is in the name of Arogyam Hospital(third party) and as such the claim does not tantamount to a debt under Sec 5(21) of I & B code. The claim of fee at best could be a referral fee which is untenable in law and opposed to principles and guidelines, as laid down by Medical Council of India.

16. In view of the above discussions the Petition is dismissed but without cost.

17. The Registry is directed to communicate this order to both the parties.

SD/-

Chandra Bhan Singh
Member (Technical)

SD/-

Suchitra Kanuparthi
Member (Judicial)