NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1298 of 2022 & L.A. No. 3970 of 2022

IN THE MATTER OF:

Make India Smart Pvt. Ltd. **...Appellant**

Versus

Safeway Insurance TPA Pvt. Ltd. **...Respondent**

Present:

For Appellant: Mr. Davesh Bhatia, Mr. Sadre Alam, Advocates.

For Respondent: Mr. Siddharth Praveen Acharya, Mr. Lakshay Sharma, Mr. Bhuvnesh Vyas, Advocates.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is filed by the Operational Creditor, namely, Make India Smart Pvt. Ltd. under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') being aggrieved against the order dated 14.10.2021 by which an application filed under Section 9 r/w Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 (in short 'Rules'), bearing CP (IB) No. 1025/ND/2018, against Safeway Insurance TPA Pvt. Ltd. (Corporate Debtor), for the resolution of an amount of Rs. 1,80,18,889/- excluding interest for the default having occurred on 12.05.2017, has been dismissed.

2. The brief facts of this case are that the Appellant/OC, being service provider rendered services for making smart cards whereas the CD is an insurance third party administrator (insurance TPA) which availed the services of the Appellant for issuance of insurance smart cards in the rural areas.

3. As per the Appellant, three separate agreements were entered into between the parties on 24.01.2013, 01.03.2013 and 24.12.2013 by which the CD availed the services of the Appellant for issuance of smart cards for rural population in several districts under the Rashtriya Swasthya Bima Yojana Scheme (RSBY Scheme) launched by the Government of India. The agreement dated 24.01.2013 was pertaining to the districts of Rohtak & Ambala, the agreement dated 01.03.2013 was regarding several districts of Rajasthan and agreement dated 24.12.2013 was pertaining to districts of Murshidabad and Nadia.

4. It is alleged that the CD continuously made the payments on the invoices raised by the Appellant but it stopped making payments on 12.05.2017.

5. The Appellant issued demand notice under Section 8 of the Code on 18.01.2018 by which the amount of Rs. 1,80,18,888/- was demanded. The CD replied to the notice on 15.02.2018 in which it raised number of disputes which were to be settled, because of poor quality of services provided by the Appellant in the state of Rajasthan and West Bengal.

6. It was also the case set up by the CD that the agreements contained a clause that payment shall be made by the CD to the Appellant back to back as per the payment received by them from the Insurer.

7. The CD also filed reply to the petition filed under Section 9 of the Code in which similar issues were raised about the poor quality of services which envisages pre-existing dispute and also that the payment was to be made to the Appellant on receipt from the Insurer.

8. The Tribunal after taking into consideration the clause regarding payment similarly existing in all the agreements, came to a conclusion that the default in payment of the amount would start only when CD would receive the payment from the Insurer. The date of default has been given by the Appellant as 12.05.2017 but it has been found that the CD has not committed the default because the payment was not received from the insurer, therefore, the application was dismissed on the ground that the element of default is not fulfilled. However, the Tribunal also observed that the Appellant shall be at liberty to resort to other legal remedies (other than IBC) for recovery of money, if any.

9. Aggrieved against the order dated 14.10.2021, the present appeal has been preferred in which Counsel for the Appellant has submitted that audited financial statements of the CD continued to reflect the amounts due of the OC and in this regard, the Appellant has made reference to the financial statements for the year ending 31.03.2015, 31.03.2016 and 31.03.2017. It is also submitted that Respondent has not denied the debt and the only ground on which the application has been dismissed is that the default has not been proved. It is submitted that the Tribunal has accepted the bald statement of the CD and believed the same that the amount has not been received whereas according to the Appellant, as per information obtained under the RTI of the Government, the payment has been made to National Insurance Company (NIC) on or before 31.03.2018. It is also submitted that the defence taken by the Respondent was a moon shine defence and that the creditor cannot be made to wait for the recovery of its money.

10. On the other hand, Counsel appearing for the Respondent has submitted that the payment was contingent, depending upon the receipt of funds from the insurer (back to back basis). First payment : 35% of the bill amount after 15 working days of the first month's bill, less collected field amounts. Second payment: 35% of the first month's bill and 35% of the second month's bill in the subsequent month, subject to state share payments. Third payment: 25% of the first month's bill and 35% of the second month's bill in the subsequent month, subject to state payments. It is submitted that the default alleged to have occurred on 12.05.2017 is without any basis because the default would arise only if the funds though received are not remitted. It is also submitted that the services rendered by the Appellant were below standard or substandard because the National Insurance Company had imposed a penalty of Rs. 26,17,462/- on the Respondent due to fake claims arising from the Appellant's enrolment data in Baran District. It is also submitted that the Appellant issued fabricated cards with the total liability of Rs. 20 lakhs which was not found in Government kits but billed by M/s B.M Info Tech & Tecsol Infosystems Pvt. Ltd. (sub vendor of Appellant) which led to financial adjustments against the Appellant's payments and damage to the Respondent. It is also submitted that because of the fabricated smart cards in Nadia District, the district administration issued show cause notice for the immediate change of the vendor i.e Appellant and therefore, vendor was changed which lead to additional financial liability.

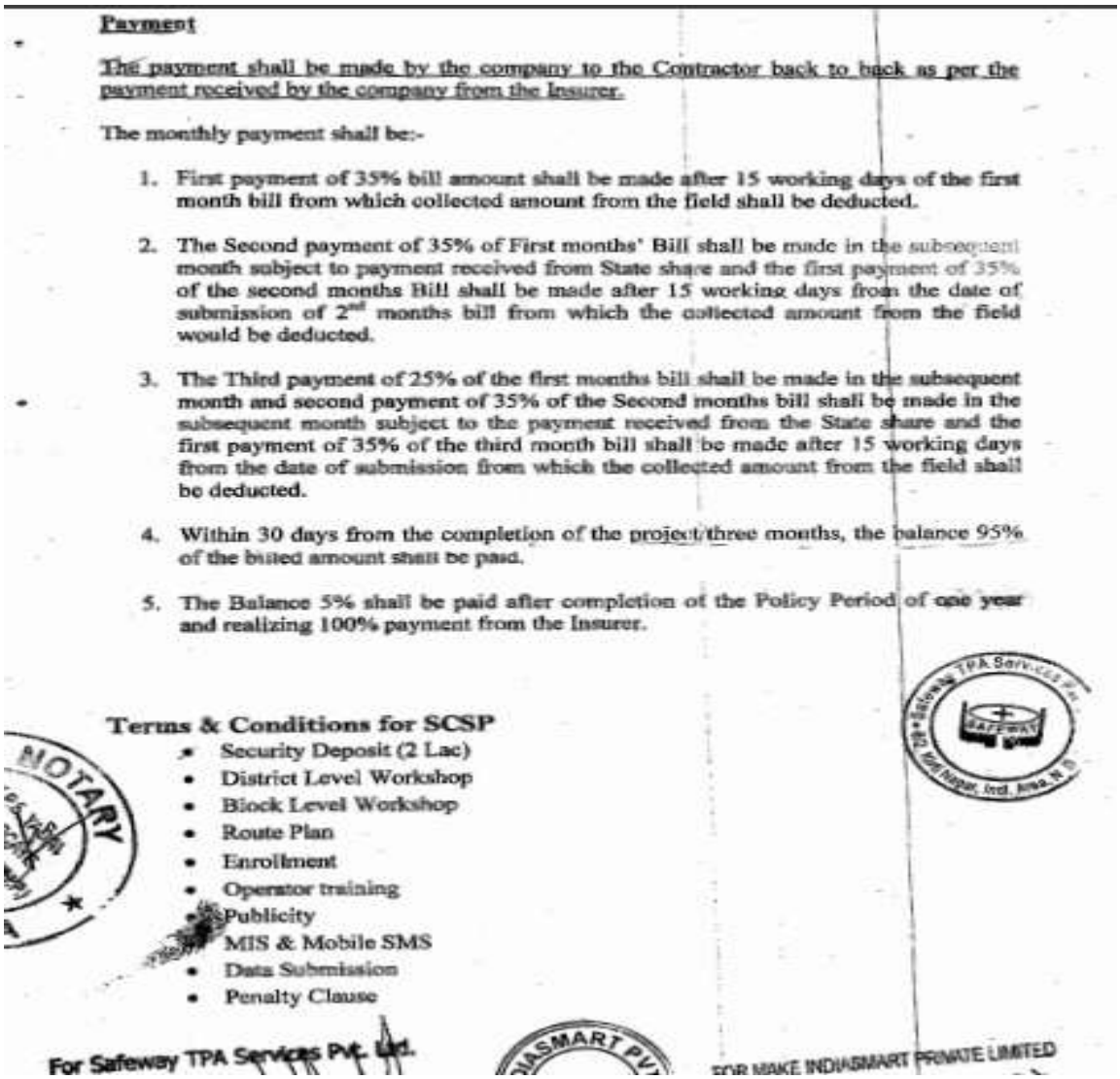
11. Basically, it is submitted that the service rendered by the Appellant were very poor because of which the Respondent has suffered losses etc.

12. We have heard Counsel for the parties and perused the record with their able assistance.

13. The Rashtriya Swasthya Bima Yojana (RSBY) is a health insurance scheme that aims at providing health insurance coverage to the poor families of India. It provides cashless insurance coverage for hospitalization in both private and public hospitals. The cost of the insurance premium is borne by both the central (75 percent) and state (25 percent) governments. Initially, the scheme was launched by the Ministry of Labour and Employment, but was transferred to the Ministry of Health and Family Welfare on 1 April, 2015.

14. Admittedly, three agreements were entered into between the Respondent as a company and the Appellant as the contractor on 24.01.2013 for districts Rohtak and Ambala, on 01.03.20213 for several districts of Rajasthan and on 24.12.2013 for the districts of Murshidabad and Nadia in West Bengal. The Respondent/Company was registered as 3rd party administrator under Section 3 of the Insurance Act, 1938 and in terms of RSBY agreement, the Respondent was entitled to appoint such number of intermediaries including the smart card provider for the effective implementation of the RSBY and for fulfilment of its obligations under the RSBY agreement. The company thus agreed to appoint the Appellant (contractor) for the purpose of enrolment of the beneficiaries and to issue smart cards to them on the terms and conditions of the agreement.

15. Since the issue involved is of non-payment of the admitted debt which has been found to be premature by the Tribunal, therefore, it would be relevant to refer to the 'Payment' and 'Terms and conations' which is reproduced as under:-



Payment

The payment shall be made by the company to the Contractor back to back as per the payment received by the company from the Insurer.

The monthly payment shall be:-

1. First payment of 35% bill amount shall be made after 15 working days of the first month bill from which collected amount from the field shall be deducted.
2. The Second payment of 35% of First months' Bill shall be made in the subsequent month subject to payment received from State share and the first payment of 35% of the second months Bill shall be made after 15 working days from the date of submission of 2nd months bill from which the collected amount from the field would be deducted.
3. The Third payment of 25% of the first months bill shall be made in the subsequent month and second payment of 35% of the Second months bill shall be made in the subsequent month subject to the payment received from the State share and the first payment of 35% of the third month bill shall be made after 15 working days from the date of submission from which the collected amount from the field shall be deducted.
4. Within 30 days from the completion of the project three months, the balance 95% of the billed amount shall be paid.
5. The Balance 5% shall be paid after completion of the Policy Period of one year and realizing 100% payment from the Insurer.

Terms & Conditions for SCSP

- Security Deposit (2 Lac)
- District Level Workshop
- Block Level Workshop
- Route Plan
- Enrollment
- Operator training
- Publicity
- MIS & Mobile SMS
- Data Submission
- Penalty Clause

For Safeway TPA Services Pvt. Ltd.

FOR MAKE INDIASMART PRIVATE LIMITED

16. Since, the parties are bound by the terms and conditions of the agreement in which it has been clearly stipulated that the payment shall be made by the company to the contractor back to back as per the payment received by the company from the Insurer. There is no evidence brought on record by the Appellant that the payment has been received by them from

the insurer i.e. NIC except that the information collected under the RTI which is in regard to the payment by the Govt. to NIC but there is no evidence that it was further paid the respondent.

17. Thus, in view thereof, there was no default on the part of the Respondent and hence, the Tribunal has rightly dismissed the application of the Appellant because the application under Section 7 or 9 of the Code can be admitted only if the debt and default both are proved to be in existence.

18. Thus, in view aforesaid facts and circumstances, we do not find any merit in the present appeal and the same is hereby dismissed, however, without any order as to costs.

I.As, if any, pending are hereby closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

New Delhi

29th August, 2025.

SC