



NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

(IB)-181(ND)2020

IN THE MATTER OF:

Vishal Engineering Company (Partnership Firm)

Having registered office at :
2555/3, Bengal Avenue
Ambala Cantt. Haryana - 133001,

... Applicant/Operational Creditor

VERSUS

1. Lexus India Limited

D-815, 2nd Floor,
New Friends Colony,
New Delhi - 110025

... Respondent No.1

2. Ld. Secretary

Ministry of Corporate Affairs,
"A" Wing, Shastri Bhawan, Garage No. 14,
Dr. Rajendra Prasad Road, New Delhi - 110001

... Respondent No.2

Section: 9 of the IBC, 2016

Order Delivered on: 30.01.2023

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Dhrubajit Saikia, Adv. Depaish Tangoriya,
Adv. Sanya Arora

For the Respondent : Adv. Vipin Jai



ORDER

PER SHRI ASHOK KUMAR BHARDWAJ, MEMBER (J)

The salient plea espoused by the Petitioner herein viz. Vishal Engineering Company (Partnership Firm), hereinafter referred to as OC, in the captioned petition filed under Section 16 of the Insolvency and Bankruptcy Code 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 is that the Corporate Debtor has committed default in paying the amount of debt i.e., Rs.22,15,498/-(Rupees Twenty-two lakhs Fifteen thousand four hundred ninety-eight only) and the dates of default are spread between 01.04.2014 to 20.12.2019 (Annexure A-VIII to the petition). To buttress the plea, the petitioner (OC) has placed on record the copies of invoices as Annexure A-VII (colly.) to the petition. In terms of the averments made in the petition, the OC sent a notice under Section 8(1) of IBC, 2016 in prescribed form i.e., form-3 under Rule 5 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules 2016 on 20.11.2019, which was served upon the Respondent (CD) on 22.11.2019. The affidavit filed under Section 9(3)(b) making the statement that there is no notice of pre-existing dispute served by the CD upon the OC is on record.

2. Per contra in the reply filed by it, the CD has espoused that there are various discrepancies in the petition and most of the averments made



therein are apocryphal. According to CD, the petition even fails to confirm with the mandatory requirement of Section 9 of the IBC, 2016 and has been filed with the sole intention to revive stale and dead claims, thus it deserves to be dismissed in limine. There is also denial on the part of Respondent regarding the service of demand notice. Nevertheless, in para 8 of the reply, there is an averment that the petitioner was under mandate to wait for 10 days after serving the demand notice, before filing the present petition. Para 9 of the reply contained the allegations regarding failure on the part of the OC to comply with the conditions agreed upon between the parties qua the delivery of the supply of the good and charging of exorbitant amounts for the goods by the OC. The reply further brought to the fore that the petitioner is not even sure about the amount due to it and defaulted to be paid by the CD.

3. It is also the case of the CD/respondent canvassed in para 12 of the reply that the number of dishonored cheques adds up to approximately Rs. 8,69,205/- the amount which is not even close to the amounts alleged by Operational Creditor as due to it. Para 11 & 12 of the reply reads thus:

“11. It is shocking to see that the Operational Creditor has amended the amounts claimed under principal amount and interest. The Operational Creditor in the original petition had claimed an alleged operational debt of Rs.22,15,498 consisting principal amount of Rs.14,25,921/- and an interest amount of Rs.7,89,577/- upto 31.10.2019. However, in the amended Part-IV, the Operational Creditor has claimed an amount of Rs.22,15,498/- consisting of



principal amount of Rs.16,63,711/- and interest amount of Rs.5,51,787/- up to 31.10.2019. It is thus, abundantly clear that the present Petition has been filed on completely manufactured and baseless facts and figures. The Operational Creditor has failed to give any justifiable reason for such a material change in the principal outstanding amount sought to be claimed from the Respondent.

12. The Applicant in the Petition has alleged that the cheques issued by the Respondent were dishonored with the remark "Payment stopped by Drawer". However, it is interesting to note that the amounts of the allegedly dishonored cheques adds up to approximately Rs.8,69,205/- and the same is nowhere close to either the amount of Rs.14,25,921/- claimed as principal outstanding in Original Petition or the amount of Rs.16,63,711 claimed as the principal outstanding in the Amended Petition.

4. Regarding the amount of interest, the Respondent has contended that there is no contract and agreement, in terms of which the petitioner herein (OC) can claim interest. Referring to the dishonored cheque, the CD (Respondent) has pleaded that the amount is only Rs.8,69,205/-.

5. We have heard the counsels for the parties and perused the record. Sans irrelevant details, the brief facts of the case are that the corporate debtor approached the Operational Creditor in the year 2014 for purchase of different specifications of pet containers and bottles, thus various purchase orders were placed by the CD from 21.04.2014 to 21.08.2017 through E-mails to the OC. Ergo, the OC made the supply of



the commodities(ibid) to the CD and raised the invoices qua the same during the period from 25.04.2014 to 16.03.2018. The OC kept on obtaining balance confirmations from the CD from time to time and vide E-mail dated 22.08.2017, the CD made its ledger statement available to the OC as attachment to the mail. The outstanding amount shown in the ledger, as on 31.03.2017 was Rs.12,40,218/-. During the period of supply, the CD made ad hoc payments in the bank account of the OC, but w.e.f. 04.05.2018 the payment was discontinued. Indubitably, the CD in order to discharge the debt issued various cheques dated 04.04.2018, 14.04.2018, 20.04.2018, 05.05.2018, 09.05.2018, 12.05.2018, 18.05.2018, 22.05.2018, 02.06.2018, 05.06.2018 for Rs.79,014/-, Rs.73,063/-, Rs.1,00,798/-, Rs.94909/-, Rs.85,656/-, Rs.40,932/-, Rs.1,00,000/-, Rs.75,965/- Rs.1,00,000/- & Rs.118328/- respectively in favor of the Operational Creditor which when presented for clearing got bounced, with the remark “payment stopped by drawer”. The copies of the cheques are placed on record as Annexure A-IX to (collectively) with the company petition (IB). The invoice raised by the OC upon the CD after 31.03.2017 are placed on record as Annexure A-VII to the petition. There is no denial of debt due against it or the default committed at its end, by the Corporate Debtor. The broad pleas espoused by it in the reply are:

- (i) The amount being due for the period from 2014 to 2016, the claim is stale;



(ii) Variation between the amounts of dishonored cheque (Rs.8,69,205/-), the one mentioned in the original petition i.e., (Rs.14,25,921/-) and alleged in the amended petition i.e. (Rs.16,63,711/-).

(iii) There is no provision of interest on the amount payable against the supply either in agreement or invoices.

6. As far as the first plea is concerned, we find that the Corporate Debtor issued different cheques in favor of the Operational Creditor in the year 2018 and the Company Petition (IB-181(PB)/2020) was filed on 06.01.2020, thus the same is well within the prescribed period of limitation. It would not be gainsaid that in terms of the provisions of Section 18 of the Limitation Act 1963, the issuance of cheques (ibid) by the Corporate Debtor is an acknowledgment of liability of debt towards the Operational Creditor and the limitation would commence from the dates of the cheques. In *Sesh Nath Singh versus Baidyabati Sheoraphuli Coop. Bank Ltd.* (2021) 7 SCC 313; *Laxmi Pat Surana versus Union Bank of India* (2021) 8 SCC 481 and *Asset Reconstruction Co. (India) Ltd. Versus Bishal Jaiswal* (2021) 6 SCC 366, it could be ruled that Section 18 of the Limitation Act is applicable to the proceedings under IBC. Thus, the issue is no longer res integra. The date of default mentioned in the Company Petition (IB) both in original as well as amendment petition is 04.05.2018. Thus, even if we reckon the period of limitation from the date of default alleged in the petition, the present Company Petition (IB) is within limitation.



As far as the variation in the defaulted amount is concerned, in terms of the order dated 22.02.2022, this Tribunal directed the petitioner to bring on record the precise principal amount of default as well as the interest thereon by filing one-page calculation sheet and also by making requisite amendment in part-IV of the application. The CD never challenged the order dated 22.02.2022 passed by this Tribunal. Thus, we need to go by the amount of debt as mentioned in part-IV of the amended application i.e., Rs.22,15,498/- (Rs.16,63,711/- + Rs.5,51,787/-). Could the CD dispute the debt, there could be occasion for us to analyze the issue. Nevertheless, there is no denial of liability of debt at the end of the CD, thus we need not delve in the issue in depth. As far as the amount of dishonored cheques is concerned, the same is liability accepted and acknowledged by the CD. The CD cannot be heard saying that the OC need to restrict his claim only to the amount qua which the dishonored cheques had been issued. Thus, the total amount of dishonored cheques cannot be relied upon to allege anomaly in the claim espoused by the OC. As far as the plea qua interest is concerned, as can be seen from the invoices placed on record as Annexure A-VII (collectively), in last row of the invoice, it has been specifically mentioned that the interest at the rate of 24% will be charged on the payments, overdue. Such is the condition stipulated in all the invoices placed on record enclosed at page 49 to 68 of the affidavit filed in compliance of the order passed by this Adjudicating Authority (ibid). It is *stair decisis* that in the proceedings under Section 9 of IBC, 2016 this Adjudicating Authority need to see only, “whether



there is debt due against the CD defaulted to be paid, the notice of demanding the payment of the amount involved in default is delivered to the CD and there is absence of pre-existing dispute, brought to the notice of the OC, by the CD”. In the present case we find that both in original as well as amended petition, the amount of debt as well as the date of default have been mentioned specifically. The copy of demand notice dated 20.11.2019 in prescribed form-3 under Rule 5 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules 2016 was duly served upon the CD on 22.11.2019. The CD did not serve any notice under Section 8(2) of IBC, 2016 upon the OC and did not allege any pre-existing dispute. The affidavit filed by the OC under Section 9(3)(b) of the IBC, 2016 stating that no notice had been issued upon the OC/petitioner with respect to any pre-existing dispute is on record as Annexure A-XVI to the Company Petition (IB). It is not even the case of the CD that there existed any dispute, prior to the service of notice under Section 8(1) of IBC, 2016 upon it by the Operational Creditor qua the existence of amount of debt; quality of goods of service or breach of representation or warranty. Even also during the course of arguments, no such dispute was espoused before us. The object of the IBC, 2016 is to ensure that the CD is rescued from distress and put back to its feet. There is no denial that the CD defaulted in making the payment of more than rupees one lakh which was the threshold amount at the time of filing the captioned petition. In the wake, we are left with no option, but to pass an order under Section 9(5)(i) of the IBC, 2016 and admit the present petition. **The petition is**



accordingly admitted. As a result, a declaration is made under Section 13 for the purposes referred to in Section 14 of the IBC, 2016. In terms of the provisions of Section 13(1)(c) read with Section 16(3)(b) of the IBC, 2016, the resolution professional proposed in part-III of the petition filed under Section 9 of the IBC, 2016 read with sub-rule 1 of Rule 6 of the IB(Application to Adjudicating Authority) Rules 2016 namely Mr. Arun Chadha, Address:- 727, Brahmpuri, Meerut, Uttar Pradesh, 250002 Email:- chadharun@yahoo.com IBBI Registration No. IBBI/IPA-001/IP-P00165/2017-18/10334 is appointed as IRP in the matter. The Court Officer/Registrar of this Tribunal/Adjudicating Authority is directed to inform the IRP about confirmation of his appointment forthwith. The term of the Interim Resolution Professional shall continue till the date of appointment of the Resolution Professional under Section 22 of the IBC, 2016 or the development if any under Section 12A of the Code or otherwise, whichever is earlier. The IRP is directed to act in terms of the provisions 13(1)(b) and Section 13(2) read with Section 15 of the IBC, 2016 immediately. In other words, the IRP shall cause a public announcement of initiation of Corporate Insolvency Process qua the Corporate Debtor be made and call for submission of claim under Section 15 immediately. The public announcement shall contain the information stipulated in Section 15(1) of the IBC, 2016. We are sanguine that the IRP shall act in due deference to the provisions of IBC, 2016, particularly Section 12,15,17,18,20 & 21 thereof as also Regulation 6, 6A, 12A, 13, 14, 16A and 17 of the IBBI (Insolvency Resolution Process for Corporate Person)



Regulation 2016. It goes without saying that in the wake of the moratorium, there shall be prohibition of all 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 off 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
- (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.

7. Nevertheless, it is made clear that a license, permit, registration, quota, concession, clearance or similar grant or right (if any) given by the Central Government, State Government, Local Authority, Sectoral Regulator or any Authority constituted under any other law for the time being in force shall not be suspended or terminated qua the CD on the ground of Insolvency subject to the conditions that there is no default in payment of current dues arising for the use of continuation of the license, permit, registration, quota, concession, clearance or similar grant or right during the moratorium period. Besides the supply of essential goods of services to the Corporate Debtor shall not be terminated or suspended or interrupted during the moratorium period, except where



the Corporate Debtor does not pay the dues arising from such supply during the moratorium period or any other explainable situation. The OC will deposit an amount of Rs.2,00,000/- against CIRP account/cost, with IRP provisionally, as finally the provisions regarding the CIRP cost wd. be made in the resolution plan and in the interregnum, the cost need to be met out of income/proceeds of CD as per the decision to be taken by the COC. The amount to be deposited by the OC wd. be refunded by RP/IRP in consultation with COC, at appropriate stage.

Sd/-

**(L. N. GUPTA)
MEMBER (T)**

Sd/-

**(ASHOK KUMAR BHARDWAJ)
MEMBER (J)**