

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 1677(ND)/2019

In the matter of:

M/S BRAND REALTY SERVICES LTD.

HAVING ITS REGISTERED OFFICE AT:-

S-8 & S-2, DDA SHOPPING COMPLEX,

OPPOSITE POCKET-1, MAYUR VIHAR, PHASE-1

EAST DELHI, DELHI-110091

...Operational Creditor

V/s

M/S SIR JOHN BAKERIES INDIA PVT. LTD.

HAVING ITS REGISTERED OFFICE AT :-

SHOP NO. 19, GROUND FLOOR,

CSC-2, ZONE E-13, DDA CENTRAL MARKET,

I.P. EXTENSION, PATPARGANJ,

EAST DELHI, DELHI -110092

.....Corporate Debtor

SECTION: U/S 9 of IBC, 2016

Order delivered on: 22.07.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

For the Petitioner: Mr. R S Lakhman

For the Respondent: Mr. Nishant Awana, Mr. Arpit, Ms. Mansi, Mr. Sahil



ORDER

Per Mr. Abni Ranjan Kumar Sinha (Member Judicial)

1. The Applicant/Operational Creditor (hereinafter referred as Operational Creditor) is filing the present application against the Respondent/Corporate Debtor (hereinafter referred as Corporate Debtor) under Section 9 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code") read with Rule 6 of the IBC, 2016 initiate corporate insolvency resolution process in respect of Corporate Debtor.
2. The Operational Creditor M/s Brand Reality Services Ltd. by way of the instant application is seeking for initiation of Corporate Insolvency Resolution Process in the case of M/s. Sir John Bakeries India Pvt. Ltd.
3. The brief facts leading to filing of the instant application are as under:
 - i. The Operational Creditor is a consultant cum investor with the Corporate Debtor and also provided advisory services on various matters of Business promotions, Marketing, Store Layouts, General Working etc.
 - ii. The Corporate Debtor approached the Operational Creditor asking for investment and consultancy services pertaining to setting up a brand new retail outlet at GF-28, 29 & 30, Eros Market Place Mall, Shakti Khand II, Indirapuram, U.P. Accordingly, the Operational Creditor invested some amount and also supplied the consultancy services including efforts for overall planning, etc. in setting up a new retail outlet of the Corporate Debtor at GF-28, 29 & 30, Eros Market Place Mall, Shakti Khand II, Indirapuram, U.P.
 - iii. Hereinafter, the Operational Creditor and the Corporate Debtor entered into an Agreement dated 28.11.2014 that was further ratified vide an Account Settlement Agreement dated 15.06.2018.
 - iv. As per Clause 2 of the Account Settlement Agreement dated 15.06.2018, the Corporate Debtor agreed to pay the remaining



commission to be cleared amounting to the tune of Rs.33,94,000/- vide Post Dated Cheques (hereinafter referred to as "PDCs"). However, before presentation of the said cheques, the Corporate Debtor approached the Operational Creditor and requested the Operational Creditor to hold the presentation of the cheques before the banker of the Operational Creditor and further agreed to do RTGS instead of Post Dated Cheques. Acting on the representation made by the Corporate Debtor, the Operational Creditor held the cheques and did not present the same. It is pertinent to mention that the Corporate Debtor has neither taken steps to transfer the amount via RTGS nor replace the cheques till date.

- v. It was further agreed in Clause 3 of the Account Settlement Agreement dated 15.06.2018 that the Corporate Debtor will pay a fixed commission of Rs.56,500/-per month w.e.f. April 2018 for a period of 66 months and accordingly issued 66 Post Dated Cheques to the Operational Creditor.
- vi. It was assured by the Corporate Debtor that the PDCs will be honoured as and when the same shall be presented by the Operational Creditor, inter alia, the Corporate Debtor has the financial capability to honour the said cheque and there arises no question of default in making payments.
- vii. It is pertinent to mention that the default occurred when the cheques bearing no.001711,001712 and 001713 dated 15.02.2019,15.03.2019 and 15.04.2019 respectively for Rs.56,000 each in terms of Clause 3 of the Account Settlement Agreement dated 15.06.2018 drawn on HDFC Bank have returned unpaid to the Operational Creditor on 18.04.2019 due to reason of "Stop Payment" and the Corporate Debtor has taken no steps to make the payment.
- viii. Under the circumstances, the OC through its counsel served a legal notice dated 30.04.2019 asking them to comply with the terms of the Account Settlement Agreement dated 15.06.2018.



However, the CD did not respond to the legal notice served to them on 30.04.2019.

- ix. The Operational Creditor was constrained to send a demand notice dated 30.04.2019 under the provisions of IBC, 2016 demanding payment in respect of unpaid operational debt which was duly served on the Corporate Debtor by speed post as well as by e-mail. The Corporate Debtor replied to the demand notice on 25.05.2019 that was outside the stipulated period of 10 days.
 - x. The Operational Creditor submits that no part of the claim is barred by the law of limitation. The cause of action arose in favour of the Operational Creditor and against the Corporate Debtor to pay the above-mentioned amount on the April, 2018 when the operational debt became due and payable. Further, the cause of action arose in February, 2019 when the cheques bearing no. 001711, 001712 and 001713 dated 15.02.2019, 15.03.2019 & 15.04.2019 respectively were dishonoured. The cause of action is a continuing one and subsists as long as the debt amount payable by the Corporate Debtor to the Operational Creditor is not paid.
 - xi. In light of the foregoing facts and circumstances, the Operational Creditor, therefore, hereby prays that the insolvency proceedings may be initiated against the Corporate Debtor under the provisions of the IBC, 2016 in light of failure on part of the Corporate Debtor in light of failure on part of the Corporate Debtor to make payment of the operational debt to the tune of Rs. 54,94,874/- as elucidated in the working sheet.
4. On receipt of summons, Corporate Debtor appeared and filed reply in response to the demand notice stating that he has not enclosed the required documents and in the absence of that he denied any liability. The facts of the reply are that the Corporate Debtor had never admitted any debt being due or payable to the Operational Creditor. Further, Mr. Kamal Manchanda was a director of the Respondent Company for a brief period of time and as such had access to signed



cheques, crucial documents, etc. of the Corporate Debtor Company and the cheques (of HDFC Bank) placed on record as ANNEXURE – E (from page 73 to 94 of the above noted application) belong to the bank in which Mr. Manchanda was an authorised signatory at the relevant time and the said cheques were stolen by Mr. Manchanda in order to use them. Further, in support of the settlement agreement dated 15.06.2018, it is stated that during that period certain settlement talks were underway which could never be materialised and the settlement talks were not per se the Applicant Company but with respect to other companies. Further, it was informed by Mr. Abhishek Kumar that Mr. Manchanda was coercing him to sign one sided agreements. Accordingly, the settlement/exit talks ended inconclusive and Mr. Manchanda exited the Respondent Company. Further, the account of the Respondent Company stands settled with the Applicant Company in terms of Settlement Letter dated 19.12.2017 and as such, there remains nothing which is due and payable by the Respondent Company and in support of that Corporate Debtor enclosed the letter dated 12.12.2017 as annexed R-3 Colly of this reply and in terms of settlement a payment of Rs. 21,66,511/- (Rupees Twenty One Lakhs Sixty Six Thousand Five Hundred and Eleven Only) was made towards full and final settlement of all claims by the Respondent Company to the Applicant Company and Agreement dated 28.11.2014 was came to an end. After full and final payment of all the claims (which was also accepted by the Applicant) of Rs. 21,66,511/- (Rupees Twenty One Lakhs Sixty Six Thousand Five Hundred and Eleven Only) to the Applicant, there was no logical reason for the Respondent Company to acknowledge and agree to pay a further sum amount of Rs. 33,94,000/- (Rupees Thirty Three Lakhs Ninety Four Thousand Only) to the Applicant Company. Further there were many bills which were cleared by Mr. Manchanda being the director of the respondent company and the bogus bills were presented by the applicant. Further, there was deficiency in the service provided by the Operational Creditor. Further,



there is a pre-existing dispute between the parties regarding the existence of personal debt.

5. The facts mentioned in the rejoinder filed on behalf of the Operational Creditor is that the Corporate Debtor in para 14 of the reply admits that the settlement agreement dated 15.06.2018 were executed by Mr. Abhishek and also find that the same agreement was not binding on the parties. The agreement clearly establishes that an amount of Rs. 33,94,000/- (Rupees Thirty Three Lakhs Ninety Four Thousand Only) is remaining to be cleared and the amount is payable in 66 months pursuant to Clause 3 of the said agreement. Further, the Police Complaint filed by the Corporate Debtor on 12.07.2019, is an after-thought in order to create a false record. Further, Mr. Manchanda has presented his resignation as director of Corporate Debtor company vide letter dated 15.06.2018, the date on which the account was settled and the said resignation letter was accepted by the Corporate Debtor on 16.06.2018 signed by the Director Mr. Abhishek Kumar. Further, the Corporate Debtor made following payments after the date of the settlement agreement dated 15.06.2018 i.e., Rs. 1,00,000/- on 15.12.2018, Rs. 1,00,000/- on 29.12.2018 and Rs. 50,000/- on 02.01.2019 towards GST and Rs. 5,00,000/- towards GST on 30.03.2019. Further, due to inordinate delay and default in the payment of GST, the GST payment was made by the OC in the month of March, 2019. Further, the reply filed by the Corporate Debtor does not show any dispute in relation to any bills of Operational Creditor.

6. We have heard the Ld. Counsel for the Operational Creditor as well as Corporate Debtor. Ld. Counsel for the Operational Creditor in course of his arguments submitted that the Operational Creditor was a consultant investor with the Corporate Debtor and the agreement dated 28.11.2014 was entered into between the parties. Pursuant to the agreement, the Operational Creditor made investment of Rupees Twenty Five Lakhs with the Corporate Debtor in the forum of refundable security deposit. The Operational Creditor also provided consultancy and advisory services to the Corporate Debtor against which invoices



were duly raised by the Operational Creditor from time to time. He further submitted that under clause 9 of the said agreement, the Corporate Debtor had agreed to pay to Operational Creditor a total amount equivalent to 5% of the sales subject to a minimum of Rs. 75,000/- per month and accordingly, 100 Post Dated Cheques were also agreed to be issued in favour of the Operational Creditor for an amount of Rs. 51,180/- each and the monthly commission shall be paid w.e.f. June, 2015 to September, 2023. He further submitted that on 19.12.2017, the Corporate Debtor sought to settle the financial debt/loan of Rs. 25,00,000/- by making the payment of Rs. 21,66,511/- and the Operational Creditor was agreed to this settlement and accepted the cheque dated 20.12.2017 bearing no. 000075 for the aforesaid amount and that was paid to the Operational Creditor. He further submitted that the letter dated 19.12.2017 annexed as Annexure R-3 by the Corporate Debtor is forged because it has not been signed by the Operational Creditor. He also placed reliance on the judgments of Hon'ble Apex Court in the matter of **K.C. Kapoor v. Radhika Devi [1981 AIR 128]** and submitted that that the pleadings are not to be construed as a hyper technical manner. He further submitted that pursuant to the agreement, the Corporate Debtor has made payment on several occasions.

7. On the other hand, Ld. Counsel for the Corporate Debtor in course of his arguments submitted that there was a prior settlement in pursuance of which the payment was being made and received by the Operational Creditor but the Operational Creditor has not disclosed that settlement dated 19.12.2017 which was alleged to have been said on prior of to 15.06.2018. He further submitted that in pursuance of the said agreement dated 19.12.2017, a cheque of Rs. 21,66,511 was given to the Operational Creditor for full and final settlement of his claims and the agreement dated 28.11.2014 came to an end. He further submitted that the Corporate Debtor has raised an objection on existence of dispute in reply to the demand notice dated 25.05.2019 and the Operational Creditor was directed to serve all the documents to



the Corporate Debtor which were attached with and relied on in the demand notice, however, the Operational Creditor never served the documents on the Corporate Debtor. He further submitted that the Corporate Debtor denied the alleged settlement agreement. He also raised all the facts mentioned in the reply. He further submitted that the Corporate Debtor is an insolvent company and its assets are more than its liabilities and has an adequate cash flow and insolvency can be initiated against Corporate Debtor to recover its dues. He also placed reliance on the decisions of ***Mobilox Innovations Pvt. Ltd Vs. Kirusa Software Pvt. Ltd. (2018) 1SCC353, Transmission Corporation of Andhra Pradesh Ltd Vs. Equipment Conductors and Cables Ltd. (2018)14SCALE176, Innoventive Industries Ltd. Vs. ICICI Bank (2018)1SCC407, Atul Roy Vs. M/s. Technofac Contracts Pvt. Ltd. and Anr. 2018 OnLine NCLAT218 and Nisheet Ranjan Vs. Letstark Tech Pvt. Dated 31.05.2018 in CP(IB) No. 32/CHD/HRY/2018.***

8. In the light of the aforesaid submissions, we have gone through the averments made in the application, reply, rejoinder as well as documents enclosed with the application and we find that it is admitted case of the applicant that the present application is filed for the breach of the terms and conditions of the settlement agreement entered in between the parties on 15.06.2018. We further find that this settlement agreement is to settle the amount which according to the case of the applicant was due in terms of the agreement dated 28.11.2014. Therefore, it can be said that the present application is not against the invoices raised in terms of the agreement dated 28.11.2014 rather it is a breach of terms and conditions of the account settlement agreement dated 15.06.2018. We further find that before filing this application, the applicant sent a Demand Notice dated 30.04.2019 and it is the case of the applicant that the said Demand Notice was delivered to the CD/Respondent on 04.05.2019 which would be evident from the tracking report enclosed at page no. 116 of the paper book and we further find that the respondent sent a reply to the demand notice on



25.05.2019, which would be evident from the page no. 117 of the paper book.

9. From the perusal of the reply to the Demand Notice, we find that the CD in the reference to the reply to the Demand Notice mentioned that CD has received the Demand Notice on 17.05.2019 but in support of that no document has been produced by the applicant to show that the CD has received the Demand Notice on 17.05.2019 and not on 04.05.2019, as per the tracking report, therefore, we have no option but to hold that the reply to the Demand Notice was not sent within the time prescribed under Section 8 (2) of the IBC which shows that "*The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor, existence of a dispute, if any or repayment of unpaid operational debt*" therefore, we are of the considered view that the CD has failed to raise the dispute within the time prescribed under Section 8 (2) of the IBC, therefore, we find, force in the contention raised on behalf of the OC that the CD has not raised the dispute under Section 8 (2) of the IBC within the time prescribed under law.
10. Now, coming to the next question as we have already considered in the aforementioned para that the claim of the applicant is based not on the basis of the agreement dated 28.11.2014 by which the OC has raised the invoices rather the claim is based upon the account settlement agreement dated 15.06.2018 and on the basis of that, Ld. Counsel for the OC submitted that there is a violation of terms and conditions of the settlement agreement dated 15.06.2018 and so there is default in the payment of amount and for that the applicant has filed the present application for initiation of CIRP for default in payment of OC, therefore, we would like to consider whether the terms and conditions of the settlement agreement comes under the definition of Operational Debt or not? Therefore, we would like to refer the definition



of Operational Debt, Default and Debt and the same are quoted below:

Section 5 (21)

“operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the 6[payment] 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;

Section 3 (11)

“debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 3 (12)

“default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not 1[paid] by the debtor or the corporate debtor, as the case may be;

11. When we shall read all three definition together then it can be said that definition of debt as defined under the IBC does not mean the operational debt only rather it includes financial debt as well as liability or obligation in respect of a claim which is due from any person and default means non payment of debt, but in order to trigger Section 9 of IBC an Operational Creditor is required to establish a default for non payment of Operational debt as defined in Section 5(21) of IBC , which means a claim in respect of the provision of goods or services including employment or a debt in respect of the 6[payment] of dues arising under any law for the time being in force and if a person fails



to establish that, then they can not initiate CIRP under Section 9 of the IBC.

12. Now it is the settled principle of law that National Company Law Tribunal is not recovery court rather when a default of either financial debt or operational debt occurred in that case, financial creditor or operational creditor may file an application for initiating corporate insolvency resolution process u/s 7 or section 9 respectively.
13. In the light of that facts, when we shall consider the case in hand then we find that the settlement agreement on the basis of which the present application is filed by the applicant does not come under the definition of operational debt. At this juncture, we would also like to refer a decision of NCLT Allahabad Bench in “Company Petition (IB) No. 343/ALD/2018 in the matter of M/s Delhi Control Devices (P) Limited Vs. M/s Fedders Electric and Engineering Ltd.” decided on 14.05.2019, in which the NCLT Allahabad bench held that “unpaid instalment as per the settlement agreement cannot be treated as operational debt as per Section 5 (21) of IBC. The failure or Breach of settlement agreement can’t be a ground to trigger CIRP against Corporate Debtor under the provision of IBC 2016 and remedy may lie elsewhere not necessarily before the Adjudicating Authority”. and similar view is followed by this Bench in IB No. 507/ND/2020

IN THE MATTER OF NITIN GUPTA and also in Company Petition
(IB) No.2817 /ND/2019

In the matter of Trafigura India Private Limited Versus TDT Copper Limited

14. In the light of that decisions and provisions which we have referred in the aforementioned para, when we shall consider the case in hand then we are of the considered view that the case of the applicant is covered with the aforesaid decisions, therefore, we are of the considered view that default of instalment of settlement agreement does



not come within the definition of operational debt, hence, we are not inclined to admit the application rather we are of the view the present application is liable to be dismissed.

14. Accordingly, it is therefore,

ORDERED

that the application is hereby **DISMISSED**.


(K.K. VOHRA)
MEMBER (T)


(ABNI RANJAN KUMAR SINHA)
MEMBER (J)