

MA/161/KOB/2020

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KERALA**

MA/161/KOB/2020
in
IBA/28/KOB/2019
(Under Section 60(5) of IBC 2016)

Order delivered on: 18th December, 2020

CORAM

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)

Applicant

M/s OCS Group (India) Pvt.Ltd.
Having address A-501, Fifth Floor,
Thane One Corporate Business IT Park,
DIL Complex, Thane (West) Thane-400610 (Mah).

Versus

Respondents

Bijoy Prabhakaran Pulipra (IRP) of
PVS Memorial Hospital Pvt.Ltd
Registered Office at No.
XXV/1484, Kaloor, Cochin,
Ernakulam-682017, Kerala.

Appearance: (through video conferencing)

For applicant	- Shri Jerin Asher Sojan, Advocate
For Respondent	- Shri Bijoy P.Pulipra, PCS (Resolution Professional)

ORDER

This **MA/161/KOB/2020** has been filed by the **M/s. OCS Group of India Pvt Ltd** (hereinafter called as 'Operational Creditor') against The Resolution Professional, of **M/s. PVS Memorial Hospital Private Limited** (hereinafter called as 'Respondent') under Section 60 (5) of Insolvency & Bankruptcy Code, 2016 (hereinafter as 'I&B

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Code') to direct the Resolution Professional to admit and verify the claim of the applicant dated 08.10.2020.

The Brief facts are as under: -

2. The application IBA/28/KOB/2019 for Corporate Insolvency Resolution Process (CIRP) filed by **M/s. OCS Group Ltd** against **M/s. PVS Memorial Hospital Private Limited** under Section 9, of the I&B Code read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 was admitted by this Tribunal on 16.10.2019 and IRP was appointed. Thereafter the Interim Resolution Professional was appointed as Resolution Professional.

3. In the application the applicant stated that the Corporate Debtor failed to pay an amount of ₹1,65,16,359/-for the services rendered by the Operational Creditor. The Corporate Debtor approached applicant to settle the dispute and they proposed to pay ₹75,00,000/- (Rupees Seventy-Five Lakhs Only) as an adhoc amount for settling the dispute on withdrawing the aforesaid Insolvency proceedings and the remaining amount in instalments through post-dated cheques, to which the Applicant agreed. Accordingly, a Memorandum of Settlement was executed on 21.11.2019 and filed before this Tribunal and also on the same day, an amount of ₹ 75,00,000/- (Rupees Seventy-Five Lakhs Only) was paid by the Corporate Debtor through Demand Draft No. 697091 dated 21.11.2019 and also handed over 4 post-dated Cheques to the applicant with the assurances that the said post-dated Cheques will be honoured on its deposit. The details of the post-dated cheques are as under: -

Sl. No.	Cheque No.	Cheque Date	Amount
1	726932	20.01.2020	₹22,00,000/-
2	726933	20.02.2020	₹22,00,000/-
3	726934	20.03.2020	₹22,00,000/-
4	726935	20.04.2020	₹24,16,359/-

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4, The Applicant further stated that, they deposited the aforesaid Cheques on their due dates with the banker. However, all the cheques were dishonoured by the Corporate Debtor's banker with the remarks that "**PAYMENT STOPPED BY DRAWER**". After came to know the Cheques were dishonoured, the Applicant immediately sent a Legal Notice under Sec. 138 of Negotiable Instrument Act (NI Act) and thereafter filed a complaint bearing No. Cr. M. A. 994 of 2020 before the JMFC 1 Court at Thane, [Maharashtra].

5. The Applicant further stated that, after the filing of the complaint under the NI Act, due to COVID-19 Pandemic, the Court did not issue the summons to the Corporate Debtor so far.

6. The Applicant further stated that the Applicant is in the process of taking out Contempt Proceedings against Corporate Debtor and directors and M/s. Kerala Transport Company. However, they understood that the Resolution Professional in the Case of Corporate Debtor was accepting the Claims of the Operational Creditor till 01.10.2020. Therefore, on conference call and by an Email dated 06.10.2020, the Applicant requested the Ld. Resolution Professional for accepting the claim of the Applicant as an exceptional case. The Applicant stated that they were unaware of Interim Resolution Process (CIRP), as the Applicant was under the impression that the Ld. RP has made an Application withdrawal of the Corporate Insolvency Resolution Process in compliance of Order dated 02.12.2019 passed by this Hon'ble Tribunal in MA No. 27/KOB/2019 in IBA/28/KOB/2019. The Corporate Debtor flouted and made breach of the undertaking given by them before the Tribunal.

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7. It is further stated that in response to the Applicant's E-mail at 06.10.2020, the Ld. Resolution Professional has sent a reply on 06.10.2020 stating that he cannot accept the claim of the Applicant unless and until the Applicant obtains order from this Tribunal.

8. The Applicant stated that the Applicant has provided their special services to the Corporate Debtor, which the Corporate Debtor had accepted before this Tribunal and also issued post-dated Cheques in pursuance of the Joint Memorandum of Compromise. However, they failed to fulfil their commitment in gross breach of the undertaking given and/or order passed by this Tribunal on the Joint Memorandum of Compromise dated 21.11.2019. Accordingly, the Applicant's claim is not satisfied till date and therefore, the Applicant is entitled to submit their claim Affidavit before the Ld. Resolution Professional to recover their claim amount from the Corporate Debtor. The Applicant further stated that the Applicant had already preferred their Claim Affidavit before the Resolution Professional.

9. Since the Ld. Resolution Professional refused to accept the claim of the Applicant, Applicant approached this Tribunal for giving direction to the Ld. Resolution Professional for accepting its claim and, if, this Tribunal feels that the Applicant has delayed in approaching the Tribunal, then in such circumstances, the Applicant prayed to this Tribunal for condoning the delay in filing the present Application. They have submitted that the delay in submitting the claim including making this Application is not intentional or wilful but the same was beyond the control of the Applicants for the reasons stated hereinabove. It is submitted that the interest of justice, equity and good conscience demands that this Hon'ble Tribunal may be pleased to condone the delay in submitting the claim

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10. The Applicant further stated that the liquidation process is yet to be finalized and, therefore, no prejudice will be caused if the claim of the Applicant is admitted and adjudicated.

11. To fortify the arguments, the applicant referred to the following case laws:

(i)Shah Brothers Ispat Pvt Ltd. V. P.Mohanraj and Ors [Company Appeal (AT)(Insolvency) No.306 of 2018

(ii)Ajay Kumar Bishnoi V. Tap Engineering [MANU/TN/0284/2020]

12. The learned Resolution Professional in his reply stated that the Applicant had erroneously stated that Corporate Debtor is in liquidation. However, the Corporate Debtor is presently undergoing Corporate Insolvency Resolution Process. The Respondent had received the Resolution Plan from the Prospective Resolution Applicant and the plan is under consideration of the Committee of Creditors. The Respondent had approached this Tribunal filing MA/28/KOB/2019 to issue necessary directions with regard to the filing of Form FA submitted by Dr. N. P. Kamalesh in TIBA11/KOB/2018 and Form FA submitted by OCS Group (India) Private Limited in IBA/28/KOB/2019 based on the settlement arrived at with the Promoters of PVS Memorial Hospital Private Limited (Corporate Debtor). In view of the ambiguity in Section 12A and Regulation 30A of IBBI as well as on account of the Appeal pending before the National Company Law Appellate Tribunal this bench vide order dated 02.12.2019 directed the Respondent to file Form FA of both the applicants in view of the settlement arrived between the parties. However, the Hon'ble NCLAT, New Delhi, vide its order dated 03.12.2019 in Appeal No. 1130&1131 directed the NCLT Kochi to pass appropriate orders in terms of the decision of the Hon'ble Supreme Court in **"Swiss Ribbons Private. Ltd. & Another. vs. Union of India & Others. [2019 SCC**

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Online SC 73'] taking into consideration the other factors including the claim, if any, made by other parties. Accordingly, the Resolution Professional had filed MA/35/KOB/2019 before this Tribunal praying to allow or disallow the withdrawal application in Form FA submitted by Operational Creditors based on the directions made by the Hon'ble NCLAT on the basis of merits of the matter. After perusing the whole case records and also considering the directions of the Hon'ble NCLAT, this Bench on 09.12.2019 directed the Resolution Professional to continue the Corporate Insolvency Resolution Process initiated against the Corporate Debtor and also directed the Operational Creditors to file their claim, if any, with the Resolution Professional. From the above, it is evident that the Respondent had not delayed the filing of Form FA before the Adjudicating Authority.

13. The Resolution Professional stated that the facts stated regarding settlement arrived at between the parties and the sister concern M/s. Kerala Transport Company issued a cheque which was dishonoured and the applicant filed a case under Sec.138 of NI Act is not disputed. The Applicant now approached this Tribunal to issue directions to the Respondent to accept the claim of Rs. 90,16, 359/- (Rupees Ninety Lakhs Sixteen Thousand Three Hundred and Fifty-Nine Only) along with the interest of Rs. 74,06,738.62/- (Rupees Seventy-Four Lakhs Six Thousand Seven Hundred and Thirty-Eight and paise Six Two Only). The Applicant cannot seek remedy under two different enactments for the same cause of action as it would amount to double jeopardy which is prohibited under the Constitutional Law. As per the records of the Corporate Debtor, in terms of the Memorandum of Settlement and Joint Memorandum of Compromise filed before this Hon'ble Tribunal, no such liability subsists. Therefore, the claim submitted along with the Application is not admissible. The Applicant had neither submitted the claim Form to the Respondent nor contacted the Respondent

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regarding the submission of claim till 06.12.2020. It is also stated that the Ld. Counsel for the Applicant had appeared for all the hearings before the Hon'ble NCLAT in the Appeal No. 1478 filed by one of the promoters of the Corporate Debtor against the order dated 09.12.2019 passed by this bench to continue the Corporate Insolvency Resolution Process initiated against the Corporate Debtor. The Respondent had uploaded all the orders and directions issued by this Tribunal and the Hon'ble NCLAT with regard to the CIRP, in his official website, due to the non-availability of active website of the Corporate Debtor and that it is publicly available to all. Hence, it is incorrect and improper to state that the Applicant was unaware of the Corporate Insolvency Resolution Process initiated against Corporate Debtor and the contention in that regard are not tenable.

14 From the above, it is evident that the delay in the submission of the claim is not due to any inadvertence on the part of the Respondent but due to the ignorance of the Applicant and the ignorance cannot be pleaded as a defence to escape from the rigors of law. Hence, the Respondent stated that the allegations made by the Applicant that the Respondent had intentionally suppressed the matter regarding commencement of CIRP and the submission of claim from the Applicant is wrong and hence they denied the same.

15. This Tribunal carefully gone through the averments made by the applicant in the M.A and Resolution Professional and the reply and have perused the whole documents placed on record. The following are the observations of this Bench: -

16. This MA is filed by the Operational Creditor in IBA/28/KOB/2019 with the prayer to direct the Resolution Professional to receive, admit and verify the claim of the Applicant dated 8.10.2020. The RP in its reply submitted that the applicant filed a

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case before the JMFC-II Court at Thane, Maharashtra under Section 138 of the Negotiable Instrument Act, due to bouncing of the cheques issued by the Corporate Debtor and simultaneously filed this MA before this Tribunal, amounts to double jeopardy which is prohibited under the Constitutional Law. Therefore on 20.11.2020 this Tribunal directed the applicant to file an affidavit before this Tribunal stating that they will withdraw the case filed before JMFC-II Court, Thane within a week. On 16.11.2020 the Learned counsel for the applicant instead of filing the aforesaid memo withdrawing the case before the JFMC, Thane he has submitted some case Laws.

17. In this connection it may be noted that the Applicant cannot file cases before the Civil Court and this Tribunal for the same purpose, that will definitely amount to double jeopardy, which is prohibited under the Law. Moreover, even though the learned counsel was directed to withdraw the case pending before the JMFC-II, Thane, in order to consider his claim by the Resolution Professional, he has not followed that direction, instead, he produced certain citations, which are not relevant to the issue involved in this matter. Since the Applicant has not withdrawn the case pending before the JMFC-II, Thane (Maharashtra), this Tribunal cannot direct the Resolution Professional to consider their case during the Insolvency Process.

18. Hence this **M.A is dismissed**. However, the dismissal of this M.A will not stand in the way of the Resolution Professional in considering the claim put forward by the applicant, provided they withdraw the case filed before the JMFC-II, Thane (Maharashtra) and produce the order of that court allowing withdrawal of case filed before that court. The Resolution Professional can decide the date by which the applicant has to produce the orders of JMFC-II, Thane (Maharashtra) as the Resolution Process is in the completion stage, because a Resolution Applicant has already been selected by the CoC.

Dated this the 18th day of December, 2020

Sd/-
(Ashok Kumar Borah)
Member (Judicial)