

(2024) 04 NCLT CK 0012**National Company Law Tribunal, Mumbai Bench Court V****Case No:** C.P. (I.B) No. 621/MB/2022

CBRE South Asia Pvt. Ltd

APPELLANT

Vs

Sapphire Cable and Services Pvt.
LtdRESPONDENT

Date of Decision: April 5, 2024**Acts Referred:**

- Companies Act, 2013 - Section 433, 434
- Insolvency and Bankruptcy Code, 2016 - Section 7, 8, 9, 9(3)(c)
- Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 - Rule 5

Hon'ble Judges: Reeta Kohli, Member (J); Madhu Sinha, Member (T)**Bench:** Division Bench**Advocate:** Lakshyaved R. Odhekar, Raghavi Sharma**Final Decision:** Dismissed

Judgement

Reeta Kohli, Member (Judicial)

1. This Company Petition is filed by CBRE South Asia Pvt. Ltd. (hereinafter referred as "the Petitioner/Operational Creditor") on 16.12.2021 seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as "CIRP") against Sapphire Cable and Services Pvt. Ltd. (Earlier known as Reliance Next Link Pvt. Ltd.) (hereinafter called "Corporate Debtor") by invoking the provisions of Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "the Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for committing default in payment of an Operational Debt of Rs. 1,07,98,235/- (Rs. 1,07,98,235/- being the Principal Amount due in terms of the invoices raised along with interest @ 24% p.a.).

Brief Facts and Submissions by the Operational Creditor:-

1. The Operational Creditor and the Corporate Debtor entered into a Master Facility Agreement dated 09.11.2011 and 15.04.2013.

2. Based on the Master Facility Management Agreement, the Corporate Debtor raised regular work orders on the Operational Creditor vide the following Work Orders bearing No.-

- RA3/4500014007 dated 31.01.2015
- RA3/4500018724 dated 29.04.2015
- RA3/4500022631 dated 23.07.2015
- RA3/4500022631 dated 23.07.2015
- RA3/4500026277 dated 14.10.2015
- RD5/4500027194 dated 30.10.2015
- RD5/4500036895 dated 10.06.2016
- RA3/4500031476 dated 05.02.2016
- RD5/4500032146 dated 18.02.2016
- RD5/4500034298 dated 31.03.2016
- RA3/4500034975 dated 28.04.2016
- RA3/4500038086 dated 13.07.2016
- RD5/4500038531 dated 23.07.2016
- RA3/4500042137 dated 21.10.2016

It is stated that all the work orders are duly signed by the Corporate Debtor and bear its stamp as well as signature of the Authorized Signatory.

3. The Corporate Debtor used to maintain running account with the Operational Creditor and based on the invoices raised by the Operational Creditor, the Corporate Debtor used to make payment. The 31 pending invoices are of various dates, ranging from the first invoice dated 29.11.2014 and last invoice being dated 31.05.2017. The said invoices were issued both in the erstwhile and present name of the Corporate Debtor.

4. The said invoices were issued to the Corporate Debtor, both in their erstwhile name as well as in their present name and accordingly 2 ledger statements of accounts were maintained. Additionally, these invoices could not be certified by the concerned engineer in the absence of submission of compliance and statutory documents.

5. It is the case of the Operational Creditor that the print out of all invoices have been taken from the system maintained by the Operational Creditor and the original signed invoices are already handed over to the Corporate Debtor. Furthermore, the Corporate Debtor had never denied the invoices.

6. It is the further case of the Operational Creditor that in spite of rendering all necessary services to the Corporate Debtor, the Corporate Debtor failed to make the full payment of the same. The amounts received in partial payment of the invoices can be identified from the Statement of Account maintained by the Operational Creditor.

7. The Corporate Debtor failed to make the payment even after various reminder emails sent in this regard and the following two Legal Notices-

- Legal Notice dated 13.02.2017 under sections 433 and 434 of the Companies Act, 2013 raising a claim of Rs. 61,57,687/- with interest @ 24% p.a. from the date of the invoices till the realization of payment. This particular Legal Notice was towards the facility management services provided till 30.09.2016.

- Legal Notice dated 20.08.2018 raising a claim of Rs. 35,60,866/-with respect to 10 pending invoices along with interest @ 18% p.a. till the date of recovery. These 10 invoices pertain to the period from January 2015 to February 2017 and bear the following dates 27.01.2015, 29.03.2016, 30.06.2016, 26.09.2016, 29.09.2016, 05.11.2016, 29.11.2016, 28.12.2016, 30.03.2017 and 28.02.2017.

8. In its Reply dated 29.04.2017 to the First Legal Notice Dated 13.02.2017, the Corporate Debtor stated that the claim of Rs. 61,57,687/- with interest @ 24% p.a. from the date of the invoices till the realization of payment, raised by the Operational Creditor is exorbitant and premature and that the Operational Creditor shall approach the Corporate Debtor for reconciliation and settlement of disputed outstanding. This itself amounts to admission of debt.

9. Further, the Operational Creditor through numerous e-mail correspondences to the Corporate Debtor reminded the release of the payment amount.

10. Since only partial payment was made and the Operational Creditor was running into losses, the Operational Creditor sent a Demand Notice dated 08.11.2019 in Form 3 under Section 8 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The said Demand Notice was for Rs. 1,07,98,235/- (Rs. 1,07,98,235/- being the Principal Amount along with interest @ 24% p.a.) (The interest component is clearly mentioned in all the invoices at the bottom). The said demand notice was received by the Corporate Debtor on 11.11.2019 on their registered address and on 18.11.2019 on another address as per the tracking report of the Indian Postal Services official website. After the said notice was received, the Corporate Debtor did not make payment of the said debt due and nor did he show any

notice/proof of any dispute/arbitration/proceedings etc.

11. The Operational Creditor categorically stated that even if some of the invoices are earlier in time, the present petition was filed in 2021 and there are invoices of the year May of 2017. Thus in view thereof, even though the Petition ought to have been filed by May, 2020, however, the courts/tribunals were not functioning due to National Lockdown caused by Global Pandemic of Novel Corona Virus. In view of the Supreme Court Judgement vide order dated 10.01.2022 in Miscellaneous Application No. 21 of 2022 in Suo Moto Writ Petition No. 3 of 2020, which extended the limitation period up to 90 days from 01.03.2022 if limitation would have expired between 15.03.2020 and 28.02.2022, this present petition is well within the limitation period.

Submissions by the Corporate Debtor:

- The Corporate Debtor completely disputes that the total outstanding amount of Rs. 1,07,98,235/- being the Principal Amount due in terms of the invoices raised along with interest @ 24% p.a. is due and payable.
- The Operational Creditor contended that the Corporate Debtor had engaged in services of the Operational Creditor for housekeeping and support services. The invoices are for the period from 29.11.2014 to 31.05.2017. As per the various invoices, the amount was to be paid within 7 or 30 days from the date of issuance of invoice. Thus, the period of limitation for each invoice will commence upon the expiry of such 7/30 days (as the case may be). Thus, all the invoices would be barred by law of limitation. Considering the date of the last invoice also, that is, 31.05.2017, the limitation for filing present Company Petition expired in the year 2020 itself. As per the case management system, the present Company Petition was filed on 16.12.2021 and hence stands barred by limitation.
- It is the case of the Corporate Debtor that even if it is assumed though not admitted that some of the invoices are well within limitation yet they would not stand the test of pecuniary jurisdiction of 1 crore to be satisfied, for admission of Section 9 Petition.
- The Operational Creditor through its legal notice dated 13.02.2017 claimed an amount of Rs. 61,57,687/- from the Corporate Debtor. The Operational Creditor had claimed in its petition that it had received certain payments from the Corporate Debtor, last of which was received on 30.07.2018. Thereafter, the Operational Creditor issued another Legal Notice dated 20.08.2018 and claimed the remaining alleged amount of Rs. 35,60,866/- from the Corporate Debtor. The Operational Creditor had provided no documents on record to prove how its alleged claim had increased from Rs. 35,60,866/- to Rs. 1,07,98,235/-. This unsubstantiated act was merely to cross the minimum threshold limit of 1 crore.

- The invoices or Work Orders raised by the Operational Creditor do not bear the signature of the parties (except one invoice dated 01.02.2016). Furthermore, none of the invoices are signed nor certified by the Engineer as required by the Work Order. The Operational Creditor had also failed to produce the complete Bank Statement of the financial institution in compliance with the requirement under Section 9(3)(c) of the Code along with the Company Petition. Hence, in entirety, this Petition is defective and liable to be dismissed.
- The Corporate Debtor also submitted that that the Operational Creditor had failed to discharge the burden of proving that the subject invoices were duly received by the Corporate Debtor and/or remained unpaid.
- Furthermore, as per Clause 4.4. of the Master Facility Agreements, the Operational Creditor was to submit relevant documentary proof and statutory documents including a self-certified declaration as to statutory compliance, inter alia, in relation to services provided, which the Operational Creditor had failed to submit.
- The Operational Creditor had gone a step ahead and claimed interest @ 24% over and above the principal amount of the alleged debt. This claim of interest is not provided for in the Work Orders and hence not maintainable.
- Lastly, the Corporate Debtor relied on the following 3 judgments to substantiate its arguments:-
 - a. The Hon'ble NCLAT in the case of **Neeraj Jain, Director of Flipkart India Pvt. Ltd. v. Cloudwalker streaming Technologies & Anr. [Company Appeal (AT)(Insolvency) No. 1345 of 2019]** held that Bank Statement is a crucial document to help establish which amounts have been received and its lack thereof merits rejection of Section 9 Application.
 - b. The Hon'ble NCLAT in the case of **Ramco Systems Ltd. v. Spicejet Ltd. 2019 SCC OnLine NCLAT 354** held that in the absence of specific evidence relating to invoices forwarded by the Appellant, the Adjudicatory Authority had rightly refused to entertain application under Section 9 which requires strict proof of debt and default.
 - c. The Hon'ble Supreme Court in the case of **Rajendra Narottamdas Sheth and Anr. v. Chandra Prakash Jain and Anr. [(2002) 5 SCC 600]** held that the primary obligation of making out a prima facie case of default is on the financial creditor. There is no necessity for the corporate debtor to provide any information at the stage of admission of the application under section 7 of the Code, as the burden of showing non-payment of a legally recoverable debt, which is not time barred, is on the Financial Creditor.

Findings

A. It is the case of the Operational Creditor that the Principal amount of Rs. 1,07,98,235/- is pending qua 31 invoices raised by it, ranging from the first invoice dated 29.11.2014 and last invoice being dated 31.05.2017. These invoices were raised in pursuance of the Work Orders raised by the Corporate Debtor. The Work Orders in turn were raised as per the Master Facility Agreement dated 09.11.2011 and 15.04.2013 entered into between both the parties.

B. The Operational Creditor in order to satisfy the Limitation Period requirement relies on the Supreme Court Judgement in which vide order dated 10.01.2022 in Miscellaneous Application No. 21 of 2022 in Suo Moto Writ Petition No. 3 of 2020, the Court extended the limitation period up to 90 days from 01.03.2022, if limitation would have expired between 15.03.2020 and 28.02.2022.

C. On the other hand, it is the case of the Corporate Debtor that all the invoices raised by the Operational Creditor are time barred as on the date of filing of this Petition which is 16.12.2021. Furthermore, even if, in case, certain invoices satisfy the mandatory requirement of Limitation Period, they would fail to satisfy the pecuniary jurisdiction of this Tribunal. It is the further case of the Corporate Debtor that payments have been made to the Operational Creditor from time to time thus resulting in reduction of amount from Rs. 61,57,687/- in the Legal Notice dated 13.02.2017 to Rs. 35,60,866/- in the second Legal Notice dated 20.08.2018.

D. After close perusal of all documents placed on record and appreciating the arguments of both the parties, it is clearly evident that only two invoices in the present petition satisfy the mandatory limitation requirement. These 2 invoices are dated 30/03/2017 and 31/05/2017 amounting to Rs. 5,11,917 and Rs. 6,11,097 respectively. The limitation period qua these two invoices is satisfied due to Supreme Court Judgement vide order dated 10.01.2022 in Miscellaneous Application No. 21 of 2022 in Suo Writ Petition No. 3 of 2020, extended the limitation period up to 90 days from 01.03.2022 if limitation would have expired between 15.03.2020 and 28.02.2022.

E. However, the amount of these two invoices are Rs. 5,11,917 and Rs. 6,11,097 respectively. Both the invoices are subjected to interest imposition @ 24% p.a. on failure to make payment of invoice amount within 7 days of the invoice date. Thus even after addition of interest amount, the cumulative of the two invoices is Rs. 23,68,567 till the date of filing of this petition which is 16.12.2021, which is far less than the mandatory pecuniary jurisdiction of Rs. 1 crore.

F. In view of the fact that the mandatory minimum threshold requirement is not satisfied in the present case and also in view of the fact that the case is barred by limitation, the present petition deserves to be dismissed.