

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH

IB-540(ND)/2018

In the matter of

Rakesh Mehra

D-995, New Friends Colony

New Delhi-110065

...Operational Creditor

Vs.

M.s Saha Infratech Private Limited ,

N101/B, Munshilal Building

New Delhi-110001

.... Corporate Debtor

Order delivered on: 09.07.2018

CORAM:

SMT. INA MALHOTRA, HON'BLE MEMBER (J)

SMT. DEEPA KRISHAN, HON'BLE MEMBER (T)

For the Petitioner: Mr. Samar Singh, Mr. Shreyas Mehrotra, Advocates

For the Respondent: Mr. Avirup Banjamin, Mr. Shambhu Nandi, Advocates

ORDER

PER SMT. INA MALHOTRA, MEMBER (J)

The present petition has been filed under Section 9 of Insolvency Bankruptcy Code (hereinafter referred to as the "Code") praying for initiation

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of Corporate Insolvency Resolution Process against the Corporate Debtor for its inability to liquidate its outstanding dues. The entitlement to receive payment ^{finds} its roots in a contract for rendering services.

2. As per averments, the petitioner, claiming to be an Operational Creditor is engaged in the business of property brokering services, which includes soliciting prospective buyers, negotiating contracts for sale of independent units/ flats in the various upcoming Group Housing Projects being constructed in Delhi and NCR. The Corporate Debtor is engaged in the field of Real Estate Development and constructs flats for sale. They entered into a retainership agreement with the Operational Creditor on 28.12.2015 whereby they undertook to pay a retainer fee of Rs. 2,50,000/- per month to him, payable on or before the 28th Day of each calendar month. The said agreement was for a fixed tenure of two years. Post dated cheques of the aforesaid amount were tendered. It is submitted by the Operational Creditor that the Corporate Debtor that no payment has been made by the Corporate Debtor since June 2017. The Corporate Debtor vide its letter dated 27.11.2017, while admitting its liability had expressed its financial inability to pay the same. They however promised liquidate their debt on market conditions improving.

3. The Operational Creditor issued the demand notice as required under Section 8 of the Code was issued, demanding a sum of Rs. 12,50,000/-, being the principal amount under 5 dishonoured cheques and have also

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claimed interest thereon. The said notice was duly accompanied by the copies of the agreement.

4. In view of the Corporate Debtor's failure to respond or liquidate its liability, the present petition has been filed in the required format praying for initiation of the Corporate Insolvency Resolution Process of the Corporate Debtor. Affidavit in compliance under Section 9 (3) (b) of Code as well as Bank Statements of the Operational Creditor are on record to corroborate their case.

5. On putting in appearance before this Bench, the defence adopted by the Corporate debtor is that the Real Estate Industry has been in doldrums and the Operational Creditor has not generated any business for them that would entitle him to the remuneration as promised. Per contra, learned Counsel for the Operational Creditor has taken us through the agreement executed between the parties. We do not find any stipulation that the remuneration agreed to be paid would be commensurate with any business procured. The said agreement is for a fixed tenure of 24 months for which the retainer's fees was paid vide post dated cheques.

For a better appreciation of the terms of agreement, reliance is placed on the following paragraphs of the said agreement.

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- It is further agreed that by monthly Retainership fees/ fixed commission is payable by the BUILDER to the BROKER is not contingent/ subject to any condition and shall be payable on or before the 28th day of every English calendar month. The Retainership fees is payable even if the BROKER does not bring any new prospective buyer or fails to negotiate any new contract of sale during the said month. The BUILDER shall have no right to object/dispute the amount of retainership fee at any point of time.
- This agreement cannot be terminated by either party hereto before the expiry of 24 months and thereafter, this agreement shall stand terminated automatically unless the parties mutually agree to extended/ renewed the same in writing.

The liability to pay the amount of Rs. 12.5 Lakhs, under the 5 dishonoured cheques was admitted by the Corporate Debtor. Vide their letter dated 27.11.2017, the contents of which are :-

S.No	DATE	PAY NAME	CH.No.	AMOUNT	BANK
1.	28/06/2017	Rakesh Mehra	040977	2,50,000/-	Dena Bank
2.	28/08/2017	Rakesh Mehra	040978	2,50,000/-	Dena Bank
3.	28/08/2017	Rakesh Mehra	045177	2,50,000/-	Dena Bank
4.	28/08/2017	Rakesh Mehra	045178	2,50,000/-	Dena Bank

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5.	28/08/2017	Rakesh Mehra	045179	2,50,000/-	Dena Bank
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6. The only dispute raised in respect of the claim is attributed to bad market conditions as well as practically no business procured by the Operational Creditor. We find the resistance unsustainable in the light of the agreed terms of the contract, where the fixed remuneration was not contingent on the business procured, but was an assured monthly retainership. The liability under a Retainership Agreement cannot be quantified on the basis of the quantum of business generated. There may have been months in the past that the recipient would have procured more business than what justifies his Retainership fees. On the other hand, some months can have a low turn out as during the present period of grievance. The tender of the cheques in terms of the agreement gives rise to a debt which admittedly has not been liquidated. The prayer made by the Operational Creditor therefore merits consideration. Accordingly, the petition is Admitted. A moratorium in terms of Section 14 of Code comes into effect forthwith staying:

“(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;

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(b) transferring, encumbering, alienating or disposing of 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 Securitisation 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.

Further,

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

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“Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

7. The Operational Creditor has not proposed the name of any Interim Resolution Professional. In view of the same, we appoint Mr. R L Bhatia, Registration No. IBBI/IPA-002/IP-N00013/2016-17/10017, email: rlbhatiaadv@gmail.com, Mobile No. 9868008747 empanelled with the IBBI's as an approved IRP. The IRP is directed to take all such steps as are required under the statute, more specifically in terms of Sections 15,17,18,20 and 21 of the Code.
8. The Operational Creditor is directed to deposit a sum of Rs. 2 Lakhs to meet the immediate expenses required for the Resolution Process to be duly accounted for by the IRP.
9. The IRP is directed to file his report within the statutory period.
10. Copy of the order be sent to both the parties as well as to the IRP.
11. Be listed for further consideration on 13th August, 2018.


(Deepa Krishan)
Member (T)


(Ina Malhotra)
Member (J)