

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 1452/MB-VI/2019

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF

Mukta Arts Limited

[CIN- L92110MH1982PLC028180]

Registered Office: Mukta House, Behind Whistling
Woods Institute Filmcity Complex, Goregaon (East)
Mumbai-400065, Maharashtra.

...Operational Creditor

V/s

Mickey Mehta Health Beyond Fitness Private Limited

[CIN- U85100MH2007PTC175914]

Registered Office: D2, Captain Colony, Opp. Sobo-
Central Mall, Haji Ali, Tardeo, Mumbai - 400034
Maharashtra.

...Corporate Debtor

Pronounced: 21.03.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Operational Creditor : Adv. Lopa Munim & Adv. Arati R.

Corporate Debtor : Adv. Nilima C. Sarvagod i/b Narvankar Legal
Chambers

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. BACKGROUND

1.1 This C.P. (IB) No. 1452/MB/C-VI/2019 (Application) was filed on 12.04.2019 by Mukta Arts Limited, the Operational Creditor (OC), under section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Mickey Mehta's Health Beyond Fitness Private Limited, the Corporate Debtor (CD). The debt in the present Application arises from a Leave and Licence Agreement entered into between the OC and the CD in respect of Flat Nos. 2 and 3 (Premises) situated in the society known as 'Bait-Ush-Sharaf Cooperative Housing Society Limited' (Society). As on 05.04.2019, the total amount of the debt due and in default by the CD is Rs. 58,01,810.00/- comprising of Rs.41,44,143.00/- towards principal amount; Rs.16,15,024.00/- towards interest thereon at the rate of 18 % p.a. from the due date of licence fees, from April, 2016 till 05.04.2019; and Rs. 42,643.00/- towards unpaid electricity charges. The OC states that CD is also liable to pay interest at the rate of 18% per annum from 06.04.2019 till actual realisation by OC. The first default occurred in the month of April, 2016 which is continuing till date. In the circumstances, the OC prays that the Corporate Insolvency Resolution Process (CIRP) be initiated in respect of the CD.

2. CONTENTIONS OF OC

- 2.1 The OC is the owner of the premises of the Premises, in the Society and the CD entered into a Leave and License Agreement dated 18.09.2011 with OC in respect of the Flats for a period of 36 months commencing from 01.09.2011 till 31.08.2013. Under the said Agreement, the CD agreed to pay monthly license fee of Rs.1,50,000/- for the use of the said Premises during the first 12 months i.e. from 01.09.2011 till 31.08.2012 and further agreed to pay increased monthly license fee increased by 5% for next 12 months i.e. from 01.09.2012 till 31.08.2013. Further, the CD agreed for an increased monthly license fee increased by 5% for next 12 months i.e. from 01.09.2013 till 31.08.2014.
- 2.2 The OC and CD had further executed Addendum dated 03.12.2014 to the said Agreement and mutually agreed to extend the term of the said agreement by 3 years i.e. from 01.09.2014 to 31.08.2017. Under the said Addendum, the CD agreed to pay the monthly revised licence fees as mutually agreed between both the parties.
- 2.3 The OC submits that the CD had occupied and used the Premises; however, failed to pay the monthly licence fees on time as per agreed terms. The OC through its Executive Director issued letters dated 07.02.2015 and 04.12.2015, calling upon the CD to pay the outstanding dues immediately and also requested to vacate the Premises. Pursuant thereto, the CD made part payment of licence fees for the month of April, 2016 to the extent of Rs.59,058/- out of monthly

compensation of Rs.1,99,691/-; however, committed default in payment of the remaining licence fee for the month of April, 2016 to the extent of Rs.1,40,633/-. The CD then continued its default in payment of monthly licence fee from the month of May, 2016 till November, 2017 and, thereafter, vacated the Premises.

- 2.4 It is submitted by the OC that the Director of the CD, Mr. Mickey Mehta in his WhatsApp messages exchanged with the Executive Director of OC between July, 2018 to October, 2018 (attached to the Application) had assured to pay the outstanding dues.
- 2.5 Subsequently, a Demand Notice dated 12.11.2018 in Form 3 was issued to the CD as prescribed under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules) on behalf of the OC, thereby calling upon the CD to repay the unpaid operational debt of Rs.54,68,689/-, outstanding as on 24.10.2018, in full, together with interest thereon at the rate of 18% p.a. from 25.10.2018, within 10 days from the receipt of the said Demand Notice. The OC submits that along with the said demand notice, the copies each of the Agreement dated 18.09.2011, Addendum thereto, computation of debt amount, unpaid invoices for the months of April, 2016 to November, 2017, extracts of proof of payment made towards electricity charges and reconnection charges in respect of the Premises and ledger account were enclosed.
- 2.6 The demand notice was received by the CD on or about 15.11.2018. The said demand notice was replied by the CD through its Advocate

vide unsigned and undated reply, which was received by the Advocate of the OC on 27.11.2018. In the said reply, the CD sought to deny its liability. The OC submits that the CD committed default in payment of licence fees from April, 2016 onwards when debt fell due and the said default continues till date. In view of the above, it is submitted that as on 05.04.2019, an amount of Rs.58,01,810/- is outstanding against the CD with interest from April, 2016 till 05.04.2019 at the rate of 18% p.a. The copy of the bank certificate for non- receipt of the outstanding amount is attached to the Application.

3. CONTENTIONS OF CD

Although the CD was represented, their Counsel was absent almost throughout the proceedings; however, the CD had filed affidavit-in-reply. Hence, the matter is considered for decision based on their pleadings. The CD has admitted having executed the Agreement dated 18.09.2011 and taken the Premises for its commercial use. However, it states that the Application is instituted to recover amounts that CD is not liable to pay and contests OC's claim on two grounds.

- 3.1 The CD raised an objection of pre-existing dispute and further states that due to non-maintenance and poor conditions of the Premises, CD was forced to discontinue their operations. The CD sent many emails on several occasions to the OC reporting various issues including sparks from light switches, leakage issues and severe waterlogging, etc., in respect of the Premises. Due to OC's neglect to rectify and/or

resolve such issues, the Premises were rendered unfit for occupation and hence the CD was forced to discontinue their operations and vacate it.

- 3.2 The CD submits that since the CD used the premises for conducting fitness programs and gym activities, the neglect of the OC in maintaining the Premises severely affected its potential to derive maximum benefit from its operations; its prospects depend on word of mouth publicity; and any defect or blemish in the premises reflect poorly on the credentials of the CD severely damaging its business prospects.
- 3.3 The CD emphasises on Clause 20 of the Agreement which records that if the Premises is damaged or destroyed or are unfit for occupation and use for the purpose for which they are taken, then, licence shall stand terminated. Under the said Clause 20, Licensors (i.e. the OC) were also liable to refund the Security Deposit to Licensee (i.e. the CD). The CD further submitted that the OC has brazenly breached aforesaid terms and is liable to compensate it on account of loss incurred by it due to OC's neglect in maintaining the Premises.
- 3.4 Another ground on which the CD objects to this Application is that the stamp duty liable to be paid upon execution of the Agreement is in deficit and despite CD's repeated requests, the OC failed and/or neglected to make such payment towards stamp duty. According to the CD, as the Agreement is not duly stamped/ registered in accordance with law, the OC is precluded from relying on the

Agreement in the present Application without first curing the said crucial defect.

4. REJOINDER BY OC

- 4.1 The OC clarified that the objections raised by the CD are borne out from the fact that the CD exhausted the entire tenure of the licenced period and overstayed for almost three more months up to November, 2017 in the Premises, after the expiry of the licence period and the same is evident from paragraph 13 of the affidavit-in-reply. The OC has accordingly raised its invoices till November, 2017.
- 4.2 The OC states that Clause 20 of the Agreement speaks of termination in the event of force majeure which renders the premises unfit for occupation and use for the purpose they are taken in which event the licence shall forthwith stand terminated. It denies its liability to refund the alleged security deposit to CD, and contends that it is the CD which is liable to pay the lawful dues of arrears of licence fee to the OC. It further submits that the CD has failed to substantiate the quantum of alleged loss. The OC also states that the CD has not taken up the alleged defences prior to service of statutory demand notice or invoice. The dispute raised by the CD is a patently feeble argument and is spurious and illusory unsupported by evidence and liable to be rejected.
- 4.3 Further, the issue of the deficit stamp duty is sought to be raised for the first time by the CD in its reply and it would not discharge the CD from making payment of the lawful debt in the above Application. The

OC denies that it is precluded from relying on the Agreement without first curing the defect of stamp duty and registration as alleged. The OC also relied upon the judgement passed by Hon'ble NCLAT in *Jaipur Trade Expocentre Pvt Ltd. Vs. Metro Jet Airways Training Pvt. Ltd.* [CA(AT)(Insolvency) 423/2021], wherein it was held that the claim of the licensor for payment of licence fee for use of demised premises for business purpose falls within the meaning of "operational debt" under Section 5(21) of the IBC. The OC for the issue whether reliance can be placed on an unregistered agreement for determining the debt and default relies on the judgement of the Hon'ble Bombay High Court in WP No. 7087/2008 in *Vimlaben Gosalia and Anr. Vs. Veena Dushyant Malgonnkar*, wherein it was held that absence of registration or even agreement being not in writing would not render an agreement to be invalid. The invoices relied upon by the OC beyond doubt prove the debt and default by the CD. The CD has not specifically set out either in its unsigned reply to OC's statutory demand notice or in its affidavit-in-reply, which invoice is disputed and not payable by it, nor quantified its alleged loss.

- 4.4 The OC states that the CD has not taken up any of its defences contained in its reply to statutory notice and in its Affidavit in reply in its previous WhatsApp chats with the representative of the OC with regard to its outstanding dues. On the contrary, the Director/ representative of CD has admitted the debt / dues to the OC and agreed to make payments thereof and has pleaded its inability to pay

due to its tight resources and sought time to pay. The CD is now raising a false dispute to evade its liability towards the OC's claim in this Application. The CD never vacated possession of the Premises at any time prior to November, 2017 on account of alleged failure and / or neglect of the OC in maintaining the premises and continued possession even after lapse of the period of Agreement. It vehemently denied that for the alleged reason, the OC cannot claim any standing licence fees for the period during which the Premises were allegedly not occupied by it for the alleged failure and / or neglect. The OC states that the CD never raised such a dispute before service of statutory demand notice upon it. It is apparent that the false defence now taken up for the first time is an afterthought to oppose this Application in order to evade payment of legitimate dues to the OC.

5. ANALYSIS AND FINDINGS

5.1 We have heard the Ld. Counsel for the OC and considered the pleadings advanced by both the OC and the CD. The CD has not denied execution of the Agreement with the OC and taking the Premises for commercial use. The main defence taken by the CD in its reply is that there existed disputes as regards waterlogging, leakage, sparks from light switches, etc. The CD has stated that it vacated the Premises owing to the damaged and destroyed condition of the Premises. The CD claimed that it had sent several emails to the OC flagging these issues. However, the CD has not adduced any evidence regarding this alleged pre-existing dispute. We find that in

the absence of any evidence to substantiate the existence of pre-existing dispute by the CD before the issuance of demand notice, it is nothing but an afterthought to evade payment of its debt and liability towards the OC. Hence, this issue is found against the CD.

5.2 The claim raised by the OC with respect to Rs.41,44,143/- towards principal amount of unpaid licence fees; Rs.16,15,024/ towards interest thereon at the rate of 18% p.a. from the due date of licence fee for the respective months till 05.04.2019 and Rs. 42,643/- towards unpaid electricity charges, is sufficiently proved and debt is determined in accordance with the provisions of the IBC. The invoices attached by the OC and the copy of the bank certificate for non- receipt of the outstanding amount dated 26.03.2019 from the banker of the OC make it clear that the CD has not credited any amount towards the outstanding licence fees since 14.04.2018.

5.3 With regard to the issue of deficient stamp duty paid by the OC, we are of the opinion that it does not render the document invalid and that we shall not be wrong in relying upon it, especially when the existence of operational debt and default are established by the invoices raised upon the CD for the period for which the Premises were in the possession of the CD. The WhatsApp chats wherein the liability is admitted by the CD and the bank certificate evidence non-payment of outstanding dues. Going by the principle laid down by the Hon'ble Supreme Court in *Innoventive Industries Ltd. Vs. ICICI Bank & Anr.* [(2018) 1 SCC 407], although in a matter regarding financial debt, so

long as the debt is due and payable and is proved to our satisfaction, unless interdicted by some law, we are inclined to admit the Application. Deficiency or insufficiency of stamp duty relating to the execution of a deed need not be looked into by us in an application under Section 9 of the IBC, as the proceedings are summary in nature. We do not have any power to determine sufficiency or deficiency of stamp duty payable on any instrument while dealing with a proceeding under the IBC. This position of law is well settled now. Hence, this issue goes against the CD.

5.4 Upon consideration of Clause 20 of the Agreement, we find that it relates to events of *force majeure* that would render the Premises unfit for occupation. Again, the CD has produced no evidence regarding any security deposit paid by it to the OC and hence the counter claim raised by the CD with respect to refund of security deposit in event of termination has no substance. In any case, a counter-claim is no defence in a Section 9 application of the IBC. Moreover, OC has annexed the notice dated 04.12.2015 sent by it to the CD terminating the Agreement and asking the CD to vacate the Premises. However, by CD's own admission, it retained possession up to November, 2017. We find that the defences raised by the CD in the reply are unsubstantiated by any evidence.

5.5 From the above discussions, it has come out that there was a default by the CD in payment of operational debt to the OC far exceeding the threshold limit under Section 4 of the IBC as in force on the date of

filing of this Application. Thus, this Application is maintainable. The Application is complete and has been filed in the prescribed form. There is nothing to show that the unpaid operational debt has been paid by the CD as on today. The dispute raised by the CD was post the demand notice sent by the OC. In view of the above, this matter is fit for admission under Section 9(5)(i) of the IBC.

ORDER

In view of the above discussions, this Application bearing C.P. (IB) No. 1452/MB/C-VI/2019 filed by Mukta Arts Limited, the OC, under section 9 of the IBC for initiating CIRP in respect of Mickey Mehta's Health Beyond Fitness Private Limited, the CD, is **admitted**.

We further declare moratorium u/s 14 of IBC, with consequential directions as follows:

- I. We prohibit-
 - a) the institution of suits or continuation of pending suits or proceedings against the CD including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) transferring, encumbering, alienating or disposing of by the CD 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 CD in respect of its property including any action under

the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the CD.

II. That the supply of essential goods or services to the CD, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for the liquidation of the CD under section 33 thereof, as the case may be.

IV. That the public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.

V. The Operational Creditor has not proposed the name of any Insolvency Professional (IP) to act as Interim Resolution Professional (IRP). Hence, we appoint **Mrs. Neeraja Kartik**, a registered IP with Registration Number IBBI/IPA-001/IP-P01445/2018-2019/12137 and email neerajakartik@gmail.com, as the IRP having her Authorisation for Assignment valid up to 19.11.2024, to carry out the

functions under the IBC, the fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.

VI. During the CIRP Period, the management of the CD shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

VII. In exercise of the powers under Rule 11 of the NCLT Rules, 2016, we order the OC to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the OC on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).

VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the CD.

IX. A copy of this order may also be forwarded to IBBI for their record.

X. The Registry is directed to immediately communicate this order to the OC, the CD and the IRP by way of email and WhatsApp, not later than two days from the date of this Order.

XI. Compliance report of the order by Designated Registrar is to be submitted today.

**Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)**

**Sd/-
K. R SAJI KUMAR
MEMBER (JUDICIAL)**

//LRA/Akshata Shah//