

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

C.P. (IB) No.276/BB/2019
U/s 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

Between:

M/s. K.K. Ropeways Limited

Regd. Off: Jabli,
Kasauli, Solan,
Himachal Pradesh.

- Petitioner/Operational Creditor

And

M/s. Billion Smiles Hospitality Pvt. Ltd.

Regd. Off: No.14,
Brunton Cross Road,
Richmond Town,
Bangalore – 560 025.

- Respondent/Corporate Debtor

Order Pronounced on: 27th April, 2021

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present (through Video Conference):

For the Petitioner : Shri Manu Kulkarni a/w
Shri Madhur Kalyanshetty

For the Respondent : Shri Rohan Kothari

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P. (IB) No.276/BB/2019 is filed by M/s. K.K. Ropeways Limited U/s 9 of the IBC, 2016 R/w Rule 6 of the I&B (Application to Adjudicating Authority) Rules, 2016, by *inter alia* seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Billion Smiles Hospitality Private Limited on the ground that it has committed default for a total amount of Rs.22,39,927.43/- (Rupees Twenty-Two Lakhs Thirty-Nine Thousand Nine Hundred Twenty Seven only).

2. Brief facts of the case, as mentioned in the Petition, are as follows:

- (1) M/s. K.K. Ropeways Limited (herein after referred to as 'Petitioner / Operational Creditor') was incorporated under the Companies Act, 1956 bearing the CIN: U35202HP1992PLC012339 and having its Registered Office situated at Jabli, Kasauli, Solan, Himachal Pradesh. Its Authorised Capital is Rs.20,00,000/- and Paid-up Capital is Rs.10,00,190/-. The Company is involved in manufacture of railway and tramway locomotives and rolling stocks.
- (2) M/s. Billion Smiles Hospitality Private Limited (herein after referred to as 'Respondent / Corporate Debtor) was incorporated on 17.08.2006 under the Companies Act, 1956 bearing the CIN: U55101KA2006PTC040230 and having its Registered Office situated at No.14, Brunton Cross Road, Richmond Town, Bengaluru-560025. Its Authorised Share Capital is Rs.6,50,00,000 and Paid-up Capital is Rs.6,21,78,890. The Company is involved in running hotels, camping sites and other provisions of short stay accommodations.
- (3) When the Corporate Debtor was desirous of occupying and operating a food court under the name and style of 'UPSOUTH' in the complex owned by the Operational Creditor, situated at 'Savoy Greens', the Operational Creditor offered the same and thus a Lease / Rent Agreement dated 09.03.2015 ('Lease Agreement') was entered. And space offered is of approximately 250 sq. ft. built up area translated to 1125 sq. ft. of super area to be called 'Shop 2' at the ground floor along with an additional area of approximately 200 sq. ft. of super area in the basement along with 92 sq. ft. of washing area in semi-open condition of the complex situated at 'Savoy Greens'. In terms of Agreement, the Corporate Debtor was obliged to pay the Operational Creditor a minimum guarantee of Rs.40,000/- per month upto sales of Rs.6,00,000/- per month on or before the 10th working day of each calendar month in advance

in terms of Clause 2.1 and 2.4 of the Agreement. Further, in terms of Clause 5.4 of the said Agreement, the Corporate Debtor was obligated to pay charges of water and electricity within 10 days of receipt of bill from the Operational Creditor. Further, the Corporate Debtor was obligated to pay CAM charges of Rs.39,375/- per month with effect from the opening of the food counter.

- (4) It is alleged that the Corporate Debtor since the inception of the Agreement used to commit default in payment of charges and failed to honour its commitment from the beginning. On 20.06.2017, the Operational Creditor received a letter from the Corporate Debtor stating that they were desirous of terminating the said Agreement and moving out of the premises on or before 22.09.2017 and further requested the Operational Creditor for adjustment of the rent and arrears from the Security Deposit. In response to the said letter, Operational Creditor issued several emails asking the Corporate Debtor to clear all the outstanding dues before moving out of the premises. However, the Corporate Debtor failed to clear its dues. In view of the Corporate Debtor's failure to repay the outstanding dues amounting to Rs.13,24,723/- (after adjusting the security deposit), the Operational Creditor issued a letter / notice dated 25.08.2017, invoking the Arbitration Clause. Pursuant to the appointment of the Arbitrator, an Award dated 29.11.2018 of Rs.26,33,022/- was passed in favour of the Operational Creditor.
- (5) On failure of all efforts of the Operational Creditor to realise the outstanding debt, the Operational Creditor got issued a Demand Notice dated 21.02.2019. The Corporate Debtor failed to repay to the said Demand Notice. However, it failed to respond demand notice and did not pay outstanding amount till date.
3. Heard Shri Manu Kulkarni, learned Counsel for the Petitioner, and Shri Rohan Kothari, learned Counsel for the Respondent **through Video Conference**. We have carefully perused the pleadings of the Parties,

extant provisions of the Code, Rules made there under and the Law on the issue.

4. Shri Manu Kulkarni, learned Counsel for the Petitioner, while reiterating various averments made in the Application, as briefly stated supra, has further submitted that since CD has committed default of awarded amount in question, it is a fit case to be admitted. He has relied upon the Judgment rendered by Hon'ble Supreme Court in *K. Kishan Vs. Vijay Nirman Company Private Limited (2018) 17 SCC 662*.
5. Shri Rohan Kothari, learned Counsel for the Respondent, has filed Objections dated 17.04.2021 by *inter alia* contending as follows:

(1) The present Petition is wholly misconceived, not maintainable in law or on facts, and is liable to be dismissed in limine. The alleged operational debt claimed herein is not an undisputed or admitted liability, and hence this Petition ought not to be admitted. The Petition does not make out an intelligible claim in respect of the total amount of outstanding debt and is inconsistent in the specific amount claimed. The defaulted amount alleged to have arisen in the Award dated 29.11.2018 passed in arbitration proceedings, bearing case reference No. DAC/1854/12-17, by the Ld. Arbitrator, Delhi International Arbitration Centre (DIAC). And the Award was passed *ex-parte*. When the Respondent was notified of the *ex-parte* award passed against it, the Respondent filed an Appeal u/s 34 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi, impugning the award, which is still pending. Further, the Respondent herein has sought to procure documents pertaining to the said appeal as well as documents necessary to rebut the claim of the Petitioner herein. However, the said documents are presently in New Delhi and due to the present Covid-related situation, the said appeal and documents connected therewith could not be produced along with the present reply.

- (2) It is settled law that a Petition u/s 9 of the Code is not maintainable when the arbitral award in question is disputed by way of a Section 34 appeal and the said appeal is pending. They have relied upon the Judgment rendered by Hon'ble Apex Court in *K. Kishan v. Vijay Nirman Co. (P) Ltd., (2018) 17 SCC 662*.
- (3) The amount claimed under the present Petition by the Operational Creditor is more than the amount claimed in Demand Notice issued by the Petitioner to the Respondent under Rule 5 of the IBC Rules, 2016. The Petitioner, in its demand notice dated 21.02.2019, has alleged that the total amount of debt (or amount claimed to be in 'default') is Rs.22,39,927.43/-. However, the total amount of debt claimed under Part IV of the present Petition is Rs.23,02,523/-. A further discrepancy is present in the Record of Default with the Information Utility produced by the Petitioner along with Affidavit dated 09.03.2021. In this record of Default, the amount of default appearing due is Rs.28,75,314.58/-. The discrepancies in the amounts claimed by the Petitioner show that the Demand Notice invoking the provisions of the Code is defective, as is the present Petition. Therefore, the Petition must be dismissed.
- 6.** As stated supra, the basic facts with reference to leasing of premises, default arise out of Lease Agreement, not paying awarded amount, etc. are prima facie are not in dispute. Only short point for consideration in the instant Petition is whether the Petition is maintainable for execution of Award in question. The Award was passed out of rental dispute, and in the normal circumstances, such disputes have to be settled by approaching Rent controller Courts/Authorities constituted for said purpose. However, they have invoked Arbitration Clause available in their Agreement and got exparte Award in question. Aggrieved by the said Award, the Respondent is stated to have filed an Appeal, which is stated to be pending before the Hon'ble Delhi High Court. In this regard, it is relevant to point the recent judgement

rendered by the Hon'ble Supreme Court, in *Gujarat Urja Vikas Nigam Ltd Vs. Mr. Amit Gupta and others (2021) SCC Online, SC 194*, wherein, it is *inter alia* clarified about general jurisdiction of NCLT/NCLAT, under Section 60(5)(c) of IBC in the following terms:

“67. The institutional framework under the IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple fora....., Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, in doing so, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other Courts, Tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of Corporate Debtor. The nexus with the insolvency of the Debtor must exist.”

Therefore, the Petitioner, invoking of provisions of the Code for implementation of Award and to recover awarded amount is against object of the Code. The Petitioner has not furnished any data prima facie showing that the Respondent has become insolvent, so as to get defence/response from the Respondent.

7. As stated supra, aggrieved by the Award in question, the Respondent has taken steps to carry the matter to the Higher Judicial forum, whereas, the Petitioner failed to take appropriate legal steps to execute the Award in question, except invoking provisions of Code by issuing Demand Notice dated 21.02.2019, wherein, the Petitioner had demanded the Respondent to repay the un-paid operational debt in default, within 10 days. However, the Present Petition has been filed only on 20th June, 2019, after a period of lapse of about 4 months from the date of demand notice that too for implementation of Award dated 29th November, 2018. Therefore, the Petitioner has invoked provisions

of the Code, which are supposed to be invoked for bonafide and genuine/justified reasons, in a casual way. And the Petitioner has not explained reasons for delay in not taking appropriate legal steps for implementation of Award, as per law, and it is not the case of Petitioner that there is no other legal remedy available except invoking the provisions of the Code.

- 8.** As detailed supra, both the Learned Counsels relying on the same judgement in support of their case, viz., *K. Kishan Vs. Vijay Nirman Company Private Limited (2018) 17 SCC 662*. By reading of this judgement, what we understand is that operational dispute in question cannot be called un-disputed as long as Arbitration Award is under challenged U/s 34 of Arbitration and Conciliation Act, 1996. Wherein it is *inter alia* held that the object of Code, in so far as Operational Creditors are concerned, to put the insolvency process against Corporate Debtor only in clear cases where a real dispute between the parties to debt owed does not exist.. Further filing of S. 34 of Act against an arbitral award shows that a pre-existing dispute which culminates at the first stage of proceedings in an award, continues even after the award at least till the final adjudicatory process U/s 34 & 37 of Act has taken place. Therefore, the operational debt in question deemed to be a dispute, as the Respondent stated to have filed Appeal against the Award in question, as detailed supra. Though material papers with regard to filing of Appeal are not furnished due to Covid situation, we took into consideration of the statement of the Respondent that they have filed Appeal against the Award and it is still pending adjudication.
- 9.** So far as the contentions of Respondent that there is discrepancy in the amount claimed in demand notice, in the instant Petition, in service Record of Default with the Information Utility produced by the Petitioner along with Affidavit dated 09.03.2021 etc. are concerned, they are un-tenable as amount awarded in award is not in dispute, and the interest accrues on award amount due to passage of time.

10. For the aforesaid reasons, circumstances of the Case, and the law on the issue, we are of considered opinion that filing of the instant Petition is filed on misconception of fact and law, and it is solely filed for recovery of amount awarded in Arbitration, and thus it is liable to be dismissed.

11. In the result, C.P. (IB) No.276/BB/2019 is hereby dismissed. No order as to costs.

Sd/-

**ASHUTOSH CHANDRA
MEMBER TECHNICAL**

Krishna

Sd/-

**RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL**