

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court-I)
KOLKATA**

CP(IB) No. 1369/KB/2019

*A petition under section 9 of the Insolvency and Bankruptcy Code, 2016 read
with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016.*

In the matter of:

Kanchana Mukhopadhyay, having address of correspondence- Bingsha Shatabdi, 75/C, Park Street, Kolkata- 700016.

.....Operational Creditor

-Versus-

Emporium Training and Consultancy Private Limited, a company incorporated under the Companies Act, 1956 and being a company within the meaning of Companies Act, 2013 and having Corporate Identification No-U74140WB2007PTC115452 and its registered office at 230/B, A.J.C. Bose Road, 3rd Floor, Kolkata-700020, in the State of West Bengal.

.... Corporate Debtor

Date of Hearing : 29th July, 2022

Date of pronouncing the order: 30th August, 2022

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/ physical):

For Operational Creditor	:	Mr. Shuvashish Sen Gupta, Advocate Mr. Balarko Sen, Advocate Mr. Suvrodal Choudhary, Advocate
For Corporate Debtor	:	Mr. Udit Agarwal, Advocate

ORDER

Balraj Joshi, Member (Technical):

1. This Court convened through hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code) by **Kanchana Mukhopadhyay** (Operational Creditors), seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Emporium Training and Consultancy Private Limited** (“Corporate Debtor”).
3. The Corporate Debtor is a private company incorporated on 01.05.2007. The authorized share- capital of the company is ₹10,00,000/- and the paid-up share- capital of the company is ₹7,50,000/-
4. The total amount claimed by the Operational Creditor is ₹42,75,912/- and the debt fell due from the date of 1.09.2017. The Demand notice under section 8 of the Code was sent on 08.05.2019. the reply to the same was sent on 20.05.2019.
5. ***Submissions on behalf of the Operational Creditor:***
 - 5.1 The case of the Operational Creditor is that in or about 04.05.2007, she had let out Flat No.s 3A and 3B on the 3rd Floor at premises no. 230/B, Acharya Jagadish Chandra Bose Road, Kolkata- 700020 to the Corporate Debtor. From time to time, the Corporate Debtor executed agreements with the Operational Creditor for availing the services upon payment of rents and other ancillary charges and presently the Deed of Lease dated 24th November, 2016 for a term of 9 years is subsisting.
 - 5.2 As per the Contract, the Corporate Debtor was liable to pay a monthly rent of ₹50,784/- along with maintenance charges, at the rate of ₹91,646/- per month and additional charges of ₹7570/- per month towards service charges and along with the applicable Goods and Service Tax.

- 5.3 The Corporate Debtor availed the services of the Operational Creditor in connection with the rented property and the other services in connection thereto.
- 5.4 The Operational Creditor started raising invoices with respect to such rent and maintenance charges which was received and accepted by the Corporate Debtor from time to time without any protest and/or demur and the Corporate Debtor was also paying the same as per the demands raised. However, suddenly from August 2017, the Corporate Debtor had defaulted in the payment of the invoice amounts.
- 5.5 Thereafter, the Operational Creditor repeatedly reminded the Corporate Debtor regarding the default and accordingly, on 08.05.2019, sent to the Corporate Debtor a demand notice under Form 3 of the Code. Such notice was duly received by the Corporate Debtor on 10.05.2019.
- 5.6 After the expiry of the prescribed period of 10 days from the date of the receipt of the said notice, the Corporate Debtor replied to the same on 20.05.2019 without any *bona fide* and genuine defence.
- 5.7 The total amount due and payable by the Corporate Debtor to the Operational Creditor is ₹42,75,912/-.

6. Submissions on behalf of the Corporate Debtor:

- 6.1 The Corporate Debtor has claimed that the document on the basis of which the Operational Creditor has filed the instant petition is not a registered deed and therefore, is not binding upon the Corporate Debtor. Further, the clause 11 of the said Agreement also provides that the Memorandum of Agreement along with Deed of Lease should be registered, which has not been registered yet.
- 6.2 Further, the Corporate Debtor has entered into an agreement with the Operational Creditor on 24.11.2016 under which the Operational Creditor was bound to provide certain facilities and services as mentioned in the said agreement, which the Corporate Debtor had failed to perform from time to time.

- 6.3 The Corporate Debtor had raised a dispute informing certain irregularities in the maintenance of the leased premises and requested them to remove the defects. However, the Operational Creditor did not reply to the said complaints of the Corporate Debtor.
- 6.4 On several occasions the Corporate Debtor had, by way of emails, requested the Operational Creditor to make various repairs and maintain the premises but the Operational Creditor ignored the requests of the Corporate Debtor.
- 6.5 Due to the Operational Creditor's negligence in treatment of the terrace, the Corporate Debtor suffered a loss of ₹1,60,000/- for such repair at their own cost.
- 6.6 On 07.09.2017, the Corporate Debtor wrote a letter to the Operational Creditor raising certain deficiency in maintenance services provided by the Operational Creditor. In the said letter, the Corporate Debtor had also requested the Operational Creditor to take care of those deficiency in services and also informed that the Corporate Debtor shall not pay the maintenance charges till removal of defects.
- 6.7 In reply to the said letter dated 07.09.2017, the Operational Creditor made vague and baseless reply on 22.09.2017, denying all the facts. The Corporate Debtor, then wrote another letter dated 3.11.2017 stating in detail the non – maintenance of the leased premises and failure on part of the Operational Creditor to fulfil their obligations in terms of the Agreement dated 24.11.2016 in spite of several requests and reminders over telephone.
- 6.8 Due to the said failure, the Corporate Debtor was compelled to suspend the payment of charges to the Operational creditor and requested them to comply with the terms of the agreement.
- 6.9 Further, it is submitted that the Operational Creditor has not furnished the affidavit under section 9(3)(b) of the Code which is mandatory according to the law.
- 6.10 Due to the existence of pre-existing disputes, the instant petition should be rejected by the Adjudicating Authority.

Rejoinder on behalf of the Operational Creditor:

7. The Corporate Debtor has failed to disclose any reason for non-payment of the rent along with applicable Goods and Service Taxes (G.S.T.) since 01.08.2017. Hence, the default on the part of the Corporate Debtor is admitted and therefore, the instant application should be admitted in accordance with law.
8. The Corporate Debtor has admitted to the execution of Deed of Lease dated 24th November, 2016 and the Memorandum of Understanding dated 24th November, 2016. The parties herein have duly acted upon the terms and conditions of the said Deed of Lease dated 24th November, 2016 and the Memorandum of Understanding dated 24th November, 2016. The Corporate Debtor had paid the rent as well as the service charges and the maintenance till July, 2017. The non-registration of the Lease Deed will not allow the Corporate Debtor to make any defaults in payment of rent as well as service charges and maintenance charges. In any event, the Corporate Debtor has admittedly defaulted in making payments for the services availed by the Corporate Debtor.
9. The Corporate Debtor has also admitted that the outstanding amount is due and payable for the services provided by the Operational Creditor to the Corporate Debtor and that the same is an Operational Debt as provided under section 5 (20) of the Code.
10. There is no pre-existing dispute regarding the payment of rent, service charges and maintenance charges, and therefore, at this juncture, the existence of the Corporate Debtor in the commercial world is dangerous and this Tribunal may be pleased to initiate a Corporate Insolvency Resolution Process by admitting the application filed by the Operational Creditor herein.

11. The Operational Creditor has also provided common electricity, water, security, fire equipment and maintenance. There is no justification or reasons for defaulting in making payments to the Operational Creditor.
12. The Corporate Debtor has acted upon Lease Deed as well as Memorandum of Understanding and therefore, the Corporate Debtor was obliged to pay rent as well as service charges and maintenance charges. The Corporate Debtor has also not disputed regarding the execution of the Deed of Lease and the Memorandum of Understanding and therefore, the purported defense of the Corporate Debtor is completely *mala fide*, misconceived and has been raised only with an intention to avoid the legitimate payment of the legitimate dues accruing to the Operational Creditor.
13. In a summary proceeding, the Tribunal has the jurisdiction to consider whether there is any default made by the Corporate Debtor. However, in the instant case it is an admitted position that there is a default in payment of the legitimate dues of the Operational Creditor. The Corporate Debtor has defaulted in making payment of rent, service charges and maintenance charges.
14. It is denied that the compliance of the provision under section 9(3)(b) of the Code is required. The Corporate Debtor has duly replied to the demand notice issued under Form 3 of the Code and hence, the scope of filing an affidavit under section 9(3)(b) of the Code does not arise.

Supplementary Affidavit on behalf of the Operational Creditor:

15. The Operational Creditor vide supplementary affidavit dated 09.08.2019, brought on record the certified and stamped copy of the Bank Statements mentioned as Annexure D of the petition, which had not been annexed earlier due to inadvertence.

Analysis and Findings:

16. We had heard the Ld. Counsel on behalf of the Operational Creditor and the Ld. Counsel on behalf of the Corporate Debtor and perused the records.
17. The first question before us is whether the outstanding lease rental will be considered as operational debt under the Code or not. In order to answer this question, we would like to refer to the decision of Hon'ble National Company Law Appellate Tribunal (NCLAT) in the case of ***Anup Sushil Dubey vs. National Agriculture Co-operative Marketing Federation of India Ltd. and Ors.***¹ wherein the NCLAT held that:

“ Therefore, keeping in view, the observations made by the Hon'ble Supreme Court in Para 5.2.1 of Mobilox (Supra), and having regard to the facts of the instant case this Tribunal is of the earnest opinion that the subject lease rentals arising out of use and occupation of a cold storage unit which is for Commercial Purpose is an 'Operational Debt' as envisaged under Section 5 (21) of the Code. Further, in so far as the facts and attendant circumstances of the instant case on hand is concerned, the dues claimed by the First Respondent in the subject matter and issue, squarely falls within the ambit of the definition of 'Operational Debt' as defined under Section 5 (21) of the Code.” (Para 22)

18. Further, the same decision has been reiterated by the Hon'ble NCLAT in the case of ***Jaipur Trade Expocentre Private Limited Vs. Metro Jet Airways Training Private Limited***², it was held that:

¹ Anup Sushil Dubey vs. National Agriculture Co-operative Marketing Federation of India Ltd. and Ors. (07.10.2020 - NCLAT) : MANU/NL/0369/2020

² Jaipur Trade Expocentre Private Limited vs. Metro Jet Airways Training Private Limited (05.07.2022 - NCLAT) : MANU/NL/0422/2022

“In view of the foregoing discussion, we answer the two questions referred to the larger Bench in the following manner:

(1) Judgment of this Tribunal in Mr. M. Ravindranath Reddy (supra) as well as judgment in Promila Taneja's case does not lay down the correct law.

(2) The claim of Licensor for payment of license fee for use of Demised Premises for business purposes is an 'operational debt' within the meaning of Section 5(21) of the Code.”(Para 40)

19. In the light of the foregoing decisions, this Tribunal, therefore, is satisfied that the outstanding lease rental in case of a property so leased for commercial purposes, as in the instant case, will be covered under ‘operational debt’ within the meaning of section 5(21) of the Code.

20. The Corporate Debtor has claimed that the lease agreement, since insufficiently stamped, is inadmissible in evidence. In this regard, we rely on the decision of the Hon’ble Supreme Court in the matter of **Avinash Kumar Chauhan vs. Vijay Krishna Mishra**³

“ 29. In T. Bhaskar Rao v. T. Gabriel and others⁹, (AIR p. 177, para 5)

"5. Section 35 of the Stamp Act mandates that an instrument chargeable with duty should be stamped so as to make it admissible in evidence. Proviso (a) to Section 35 of the Stamp Act enables a document to be received in evidence on payment of stamp duty and penalty if the document is chargeable, but not stamped or on payment of deficit duty and penalty, if it is insufficiently stamped. The bar against the admissibility of an instrument which is chargeable with stamp duty and is not stamped is of course absolute whatever be the nature of the purpose, be it for main or

³ (2009) 2 SCC 532, decided on 17.12.2008

collateral purpose, unless the requirements of proviso (a) to Section 35 are complied with. It follows that if the requirements of proviso (a) to Section 35 are satisfied, then the document which is chargeable with duty, but not stamped, can be received in evidence."

It was further held : (Gabriel case⁹, AIR p. 177, para 7)

"7. It is now well settled that there is no prohibition under Section 49 of the Registration Act, to receive an unregistered document in evidence for collateral purpose. But the document so tendered should be duly stamped or should comply with the requirements of Section 35 of the Stamp Act, if not stamped, as a document cannot be received in evidence even for collateral purpose unless it is duly stamped or duty and penalty are paid under Section 35 of the Stamp Act."

(See also Firm Chuni Lal Tukki Mal v. Firm Mukat Lal Ram Chanda¹⁰ and Chandra Sekhar Misra v. Gobinda Chandra Das¹¹).

30. For the reasons aforementioned, there is no merit in this appeal which fails and is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs."

21. In light of the law laid down by the Hon'ble Supreme Court in **Avinash Kumar Chauhan** (*Supra*), the lease agreement executed between the parties on 24.11.2016 as produced on record, cannot be taken into account while determining the alleged debt.

22. Further, the Corporate Debtor has placed on record, several emails sent to the Operational Creditor, between the period of 17.02.2017 to 07.09.2017, all referring to the inconvenience faced by the Corporate Debtor due to the non-maintenance and non-repair of the leased premises, and requesting the Operational Creditor to take remedial steps regarding the same. The Operational Creditor has in its rejoinder, at page 6 in paragraph 7, admitted to have considered the said emails. Further, the Corporate Debtor has sent

to the Operational Creditor, a letter dated 07.09.2017, wherein, the Corporate Debtor has mentioned that the rent cheques and the interest cheques have been clear as on date, and the maintenance component has not been paid due to non-maintenance on part of the Operational Creditor. The said letter dated 07.09.2017 has been replied to by the Operational Creditor *vide* letter dated 22.09.2017. Further, a legal notice dated 03.11.2017 on behalf of the Corporate Debtor was sent to the Operational Creditor, the discrepancies and defects in the maintenance were again highlighted by the Corporate Debtor.

23. From the conjoint perusal of the abovementioned emails, both the letters and the legal notice as mentioned above, it is clear that the debt in question is disputed. The Corporate debtor, accordingly, has pointed out to the existence of the said dispute in its reply to the demand notice dated 08.05.2019.
24. In this regard, we would like to refer to the decision of the Hon'ble Supreme Court in the matter of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited***⁴ wherein it was held that:

“The scheme of Section 7 stands in contrast with the scheme Under Section 9 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of

⁴ Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (21.09.2017 - SC) : MANU/SC/1196/2017

such a dispute, the operational creditor gets out of the clutches of the Code.” (Para 29)

The Apex Court, in ***Mobilox Innovations Private Limited*** (*Supra*) further held that:

“...Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.” (Para 40)

25. Also, in ***M/s S.S. Engineers vs. Hindustan Petroleum Corporation Ltd. & Ors***⁵, the Hon’ble Supreme Court again held that:

“15. In our considered view, the Adjudicating Authority (NCLT) committed a grave error of law by admitting the application of the Operational Creditor, even though there was a pre-existing dispute as noted by the Adjudicating Authority.

16. When examining an application under Section 9 of the IBC, the Adjudicating Authority would have to examine (i) whether there was an operational debt exceeding Rupees 1,00,000/(Rupees One Lac); (ii) whether the evidence furnished with the application showed that debt exceeding Rupees one lac was due and payable and had not till then been paid; and (ii) whether there was existence of any dispute between the

⁵ Civil Appeal No. 4583 of 2022, decided on 15.07.2022

parties or the record of pendency of a suit or arbitration proceedings filed before the receipt of demand notice in relation to such dispute. If any one of the aforesaid conditions was not fulfilled, the application of the Operational Creditor would have to be rejected”

26. In the instant matter, the Corporate Debtor has established that there were existing disputes in relation to the debt before the receipt of the demand notice by the Corporate Debtor. Further, the Operational Creditor was notified of such pre-existing disputes by the Corporate Debtor in its reply to the said demand notice.
27. Further, the Operational Creditor in the petition has mentioned that the debt fell due from 1st September 2017. However, in the demand notice dated 8th May 2019, the Operational Creditor has claimed that the debt fell due from 1st August 2017. Further, the Operational Creditor has not explicitly mentioned the dated of default in the petition but in the rejoinder, the Operational Creditor has mentioned the date of default to be 1st August, 2017. On the other hand, in the letter dated 22.09.2017, the Operational Creditor has admitted that the Corporate Debtor has deposited the rents for months of June and July of 2017 on 06.09.2017. The Bank accounts of the Operational Creditor also show that cheques were deposited on 06.09.2017. As such, a clear determination of date of default in the instant case is not possible on the basis of the documents on record.
28. Further, the Operational Creditor has claimed that the reply to the demand notice was not sent by the Corporate Debtor within the prescribed time of 10 days. In this regard, the Hon’ble National Company Law Appellate Tribunal (NCLAT), in the matter of ***Subhash Chandra Goyal Sole vs. K B Ispat Private Ltd.***⁶, held that:

⁶ Compny Appeal (AT)(Ins) No. 166 of 2022, decided on 30.05.2022

“f. The respondent has raised the dispute on the issue of the Input Tax Credit in the reply to the demand notice itself. Although they have not replied within 10 days which is directory in nature but has replied in a very short period (Demand notice is dated 01st July, 2019. Reply received from CD by Appellant on 22nd July, 2019). Hence, it meets the criteria of Section 9 of the Code for raising the dispute. As in the circumstances stated above, this is not a moonshine defence.”

In light of the above decision, the late reply to the Demand Notice by the Corporate Debtor in the instant matter is condoned.

29. The Hon’ble NCLAT, in ***Subhash Chandra Goyal Sole*** (*Supra*), has further opined that the Insolvency and Bankruptcy Code is not intended to be a substitute for a recovery forum and that whenever there is existence of real dispute, the IBC provisions cannot be invoked. (*Para n*)
30. Furthermore, the Hon’ble NCLAT in ***Subhash Chandra Goyal Sole*** (*Supra*), has also held that the Code cannot be used whenever the intention is to use the Code as a means for chasing of payment or building pressure for releasing the payments. (*Para n*)
31. In the instant matter, the Operational Creditor has failed to satisfy the Adjudicating Authority regarding the insolvency of the Corporate Debtor and therefore the need to initiate insolvency resolution process against it.
32. Therefore, in light of the abovementioned judgments and circumstances, this Adjudicating Authority is satisfied that the instant petition is liable to be rejected.
33. Consequently, **C.P.(IB) No. 1369/KB/2019** shall stand **rejected**. Needless to say, the Operational Creditor is free to pursue its remedies under any other law, and the dismissal of the present petition shall not stand in the way of such pursuit of remedies.

34. The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
35. Certified Copy of this order may be issues, if applied for, upon compliance of all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 30th day of August, 2022

SM[LRA]