

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

C.P. No. 4395/IBC/MB/2019

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 read with
Rule 4 of the Insolvency and
Bankruptcy (Application to
Adjudication Authority) Rule 2016)

In the matter of

**Plutusone Hospitality Private
Limited**

Having registered office at: Unit No.
403, 'B2' wing, 4th Floor, Kanakia
Boomerang, Chandivali Farm Road,
Yadav Nagar, Chandivali, Andheri
(East), Mumbai-400072

.....**Financial Creditor**

Vs

Busabong&Co. Private Limited

(CIN: U55101MH200PTC129574)

Registered office at: B-2, Usha Sadan
Colaba Post Office, Colaba Mumbai-
400005

.....Corporate Debtor

Order delivered on: 26.07.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Applicant: Mr. Shyam Kapadia, Advocate

For the Respondent: Mr. Nausher Kohli, Advocate

Per: Shri Chandra Bhan Singh, Member

ORDER

1. This Company petition is filed by *Plutosone Hospitality Private Limited* (hereinafter called “Financial Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *Busabong & Co. Private Limited* (hereinafter called “Corporate Debtor”) alleging that the Corporate debtor committed default in making payment to the Financial Creditor. This petition has been filed by invoking the provisions of Section 7 Insolvency and bankruptcy code (hereinafter called “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs. 7,02,682/- (Rupees Seven Lakhs Two Thousand Six Hundred and Eighty-Two only).
3. The submissions by the Financial Creditor are as follows:-
 - i. On December 8, 2017, the Corporate Debtor and Financial Creditor entered into a Restaurant Operations and Services Agreement (“ROSA”) wherein it was agreed that Plutosone would finance, furnish and equip restaurants in Mumbai which were to be operated by Corporate Debtor under their proprietary mark “Busago” and / or “Busaba” (“Restaurant”).
 - ii. Under the ROSA, the Corporate Debtor was appointed as an operator in the said Restaurants to provide operations, management assistance and technical assistance as would be required in the said Restaurants. As per the ROSA, Plutosone was required to pay for the Capital

Expenditure and Security Deposit for each of the Restaurants and Corporate Debtor was to arrange for the working carking capital and cash flows to operate and manage up to five restaurants within the city of Mumbai for a five year term.

- iii. Further, as per the ROSA, Corporate Debtor and Financial Creditor had identified, negotiated and executed rental agreements with respect o three Restaurants in the following premises, which the Financial Creditor contributed fully towards:
 - (a) 10, A wing Ground Floor, City Park Building, Hiranandani, Powai;
 - (b) S1036, Ventana Shopping Complex, Hiranandani Estate, Ghodbunder Road, Thane, and
 - (c) G24, R Gallewria, Runwali Greens, Mulund Goregaon Link Road, Bhandup.
- iv. It is also pertinent to note that under Article II- Section 4 (Capital Expenditure) of the ROSA, the Financial Creditor was to provide the capital expenditure of up to Rs. 35,00,000/-per outlet towards to its set up and functioning.
- v. However, the petitioner mentions that as on date the Financial Creditor has in fact incurred more than Rs. 35,00,000/- for two of the three outlets. The financial Creditor was not obligated to do so in accordance with Article II Section 4 (Capital Expenditure), but in good faith the Financial Creditor granted the Corporate Debtor an additional of Rs. 3 lakhs for the Powai outlet and Rs. 4 lakhs approximately for the Thane outlet, as capital expenditure.

- vi. Under Article II- Section 4 (Working Capital), it was agreed between the parties that the Working Capital shall be arranged by the Corporate Debtor from the Operating Account (as defined in the ROSA). However, in the event the Corporate Debtor requires additional working capital, the Financial Creditor was to provide the same *“in any manner as may be mutually agreed between the parties”*.
- vii. Thus, from the above, it is clear that the Corporate Debtor was obligated to return the Working Capital, that may be granted by the Financial Creditor to the Corporate Debtor, in priority to any other payments whether under the ROSA or otherwise.
- viii. Further, in an around March 2018, the Corporate Debtor owed an amount of Rs. 6,26,006 (Rupees Six Lakhs Twenty-Six Thousand and Six Only) to the Financial Creditor, as receivable under the ROSA.
- ix. As mentioned earlier that under the ROSA, it was agreed between the parties that the Corporate Debtor was obligated to return the Working Capital, that may be granted by the Financial Creditor to the Corporate Debtor, in priority to any other payments whether under the ROSA or otherwise.
- x. Further, despite various reminders (issue inter alia for the present Financial Debt), the Corporate Debtor has failed to repay the outstanding amount of Rs. 7,02,682 (Rupees Seven Lakhs Two Thousand Six Hundred and Eighty-Two only) to the Financial Creditor.
- xi. On November 27, 2019, the Financial Creditor called upon the Corporate Debtor to repay the outstanding amount of Rs. 7,02,682/- (Rupees Seven Lakhs Two Thousand Six Hundred and Eighty-Two only) within 7 days.

- xii. Thus, as the Corporate Debtor has no ability to make payments to the Financial Creditor, no payments have been made by the Corporate Debtor to the Financial Creditor. Thus, constraining the Financial Creditor to approach this Tribunal for initiating CIRP against the Corporate Debtor.
- xiii. In light of above, it is submitted that the Corporate Debtor has become insolvent and cannot repay its debts. Accordingly, the Financial Creditor humbly prays before this Tribunal to initiate Corporate Insolvency Resolution Process under the Code against the Corporate Debtor.

4. The submissions of the Corporate Debtor are as follows:

- i. In 2016, with a view to expand its business, the Respondent was in talks with one Mr. Deepak Mishra, the Chief Executive Officer of Greenfield Advisory Pte. Limited ("Greenfield") and one Mr. Saumyendra Mehra, the Chief Operating Officer of Greenfield for investing in the Respondent.
- ii. Post completion of negotiations, the Respondent and Pacatolus entered into an Investment Agreement dated July 14, 2016 ("Investment Agreement"). By virtue of the Investment Agreement, Pacatolus acquired 22% of the shareholding in the Respondent.
- iii. In an around 2017, discussions were held between the Respondent and Pacatolus to open more restaurants under the Trademark and different avenues of financial for setting-up restaurants were explored between Greenfield and/or Pacatolus and the Respondent.
- iv. In terms of the ROSA, restaurants were set up at Powai, Mulund, and Thane respectively. The premises wherein

these restaurants were operating were rented in the name of the Financial Creditor under 3 different lease and Licence Agreements. The Corporate Debtor was not a party to anyone of these 3 agreements.

- v. As stated hereinabove, as per terms agreed under the ROSA, until the restaurants set up thereunder achieved break even, it was the Financial Creditor's duty to provide working capital to the Corporate Debtor to manage and operate the restaurants.
- vi. Pursuant to a series of e-mails, the Financial Creditor duly remitted the Working Capital on April 20, 2018 as requested for by the Respondent and in compliance with its obligations under the ROSA. The Working Capital remitted to the Respondent on April 20, 2018 was calculated on the basis of the statements submitted by the Corporate Debtor to the Financial Creditor. The Working Capital remitted to the Corporate Debtor included the costs towards rent and commissions.
- vii. On June 25, 2018, Corporate Debtor addressed a further e-mail to Mr. Saumyendra Mehra forwarding the cash flow position of the Respondent which reflected negative balance and therefore, called upon him to remit further Working Capital. The Corporate Debtor further recorded that when cash flow positions were forwarded earlier in April, 2018.
- viii. Between March 13-15, 2019, the Corporate Debtor addressed a series of e-mails to the Financial Creditor and Greenfield recording that the Corporate Debtor has been duly sending MIS reports to Greenfield as also the Corporate Debtor. Further, there seems to be a disconnect on the interpretation of Working Capital under the ROSA.

The Corporate Debtor specifically recorded that the Financial Creditor and Greenfields interpretation of Working Capital by only taking into account some expenses and not others is incorrect. It was categorically recorded that as per the terms of ROSA, the Financial Creditor was to provide Working Capital until the restaurants break even and that the said working capital has not been provided to the Corporate Debtor. By a further e-mail dated 15.03.2019, the earlier e-mail chain referred to and annexed herein above in April, 2018 under which correspondence the Financial Creditor had in fact remitted Working Capital. With this email, the Corporate Debtor called upon the Financial Creditor and Greenfield to explain why the Working Capital is not being remitted in compliance with the ROSA.

- ix. On March 14, 2019, the Financial Creditor issued a demand notice to the Corporate Debtor. It is pertinent to note that in this demand notice, the Financial Creditor claimed an unpaid Operational Debt of Rs. 1,38,07,142/- from the Corporate Debtor.
- x. On April 12, 2019, the Corporate Debtor's advocates issued a detailed notice of dispute in response to the demand notice dated March 29, 2019 *inter alia* re-iterating the true and correct facts as stated hereinabove. The Corporate Debtor's advocate denied the existence of an 'Operational Debt' as incorrectly claimed by the Financial Creditor.
- xi. On September 19, 2019 the Financial Creditor issued a Demand Notice on the basis of which it has filed the present petition (Demand Notice).

- xii. The aforesaid Demand Notice was duly responded by the Corporate Debtor through its Advocate vide a letter dated September 30, 2019 (Notice of Dispute). By the Notice of Dispute, the Respondent's Advocate one again brought to the Financial Creditor's notice the pre-existing disputes as have risen between the Financial Creditor and Corporate Debtor under the ROSA and as narrated hereinabove. The Respondent's Advocate denied the existence of any debt as incorrectly claimed by the Financial Creditor under the Demand Notice. The Corporate Debtor's Advocate recorded that there exists no relationship of creditor-debtor between the Financial Creditor and Corporate Debtor and that there is no 'Operational Debt' as defined under Section 5(21) of the Code that is due or payable by the Corporate Debtor to the Financial Creditor. They also recorded that under the ROSA, it was the Corporate Debtor who was rendering services for day to day operations, management assistance and technical assistance services for the restaurants, whereas the Financial Creditor's role was to provide timely finance, towards operational and working capital, until the 3 restaurants opened pursuant to ROSA, would break even. Therefore, they stated that the entire basis of the Demand Notice is unfounded as the Financial Creditor does not qualify as an "operational creditor' under the Code or even otherwise. The Corporate Debtor also recorded that the pre-existence of dispute between the Financial Creditor and Corporate Debtor as defined under Section 5(6) of the Code is evident.
- xiii. For the reason set out, the respondent submits that the present petition under section 7 of the Act shall be dismissed against respondent in interest of justice.

Findings

1. This petition has been filed by M/s Plutustone Hospitality Private Limited, Financial Creditor against M/s Busabong and Company Private Limited, respondent under Section 7 of the IBC, 2016 for a total amount of Rs. 7,02,682/-
2. As per the Financial Creditor, a Restaurant Operations and Services Agreement (ROSA) was signed between the parties on 08.12.2017. As per the Agreement, the investor would finance, furnish and equip restaurants whereas the respondent operating partner was to provide day to day Operations and Management Services for the running of the business.
3. The Bench notes that the total claim of the petitioner is based on Article 2 Section 4 of the Agreement regarding working capital which is reproduced hereinunder:

Article 2, Section 4: Capital Expenditure

“...The Capital Expenditure to be incurred by the Investor with respect to each of the Restaurants is capped at Rs. 35,00,000/-, excluding goods and service tax. Provided however, the Operating Partner shall use reasonable endeavours to minimize the actual Capital Expenditure for each Restaurant. In the event the Capital Expenditure exceeds the aforesaid amount, the Investor may, at its discretion, approve and incur the same...”

Working Capital

*“...The Operating Partner acknowledges and covenants that it shall, from the date of this Agreement and throughout the Terms of tis Agreement, provide and arrange for working capital and cash flows sufficient in the Operating Account **to ensure the uninterrupted efficient operations and effective continuance of operations of the Restaurants as required (“Working Capital”)**. Provided however, if the Operating Partner requires the Working Capital for the initial period till a restaurant has achieved break even,*

the Investor shall provide the same in a manner as may be mutually agreed between the Parties. It is hereby agreed that the Operating Partner shall be obligated to return the amount of money provided by the Investor in priority to any other payments whether under this Agreement or otherwise...

4. The Financial Creditor mentions that under this arrangement it had provided total loan of about Rs. 7.02 lakhs, the break up of which has been given by the Financial Creditor at Annexure 1 (A) of the petition. The Bench notes that all the three premises from where the restaurants were operating was rented in the name of the Financial Creditor under Leave and Licence Agreement and the Corporate Debtor was not a party.
5. The Bench note that as per Annexure 1(A) of the petition that the total claim as mentioned, is a claim to Rent Commission and Maintenance. None of which amounts to a Financial Debt. The Bench also notes that all the above averments as mentioned in Annexure 'A' of the petition relates to the payment which have been made to third party and not to the respondent. There is no disbursement to the respondent. Therefore, it is a clear case that no money has been received by the Corporate Debtor in its account. Therefore, about Rs. 7.02 lakhs has not come into the account of the Corporate Debtor but has been paid by the Financial Creditor. It can be clearly seen that there has been no disbursement of debt/monies to respondent and the petitioner has failed to produce any bank statement showing that this amount has gone into account of respondent.

6. In fact, the Bench notes that in any case as per the 'ROSA' it was for the Financial Creditor to furnish and equip the restaurant. In fact, the Bench is of the view that Article 2 Section 4 never mentions that it is working capital loan, it only says that in the event Operating Partners requires the Working Capital for initial period till a Restaurant has **achieved break even**, the Investor shall provide the same in a manner as may be mutually agreed between the parties. It is clear from the above that it was not a loan and till the achievement of the 'break even' the investor was to provide the Working Capital.
7. The Bench notes that in the ROSA, the petitioner has been referred to as investor. As per Article 7 of the ROSA the arrangements of payment is by way of Revenue Share as per mutual Agreement between the parties depending on the Revenue Generated by the restaurants. The Bench notes that the petitioner is trying to make out a case not as an Investor in the restaurant project but as a creditor which is contrary to the documents executed between the parties.
8. The Corporate Debtor has clearly brought out that these restaurants never 'broke even' and therefore, there was no obligation on the part of the respondent to pay any amount which has been provided by way of working Capital.
9. In view of the above, the Bench does not have any iota of doubt that the amount which is being claimed as a Financial Debt is not a Debt at all and at best is a payment due after the restaurant business 'breaks even'. Since none of the restaurants after this arrangement 'broke even', the

respondent rightly did not return the so called working capital to the petitioner side. Therefore, the amount claimed of Rs. 7,02,682/- does not qualify as a Financial Debt under Section 5(8) of the Code and is not default under Section 3(12) of the Code.

10. In view of the above, the Bench dismisses the above company petition bearing no. 4395 of 2019.

Sd/-

CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

Sd/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)