NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1347 of 2023 & I.A. No. 4682, 4779, 4781 of 2023

IN THE MATTER OF:

Apurva Kamdar Suspended Designated Partner of PCK Corporation LLP **...Appellant**

Versus

Hotel Horizon Pvt. Ltd. & Anr. **...Respondents**

Present:

For Appellant	**:**	**Mr. Atul Singh, Adv.**
For Respondents	**:**	**Mr. Pulkit Kapoor, Adv. for R2/IRP**

O R D E R

(Hybrid Mode)

Per: Justice Rakesh Kumar Jain: (Oral)

23.07.2025: This appeal is directed against the order dated 16.06.2023, passed by the National Company Law Tribunal, Mumbai Bench IV, by which CP (IB) No. 1281/MB-IV/2020 filed by Hotel Horizon Pvt. Ltd. (Operational Creditor/OC) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') against PCK Corporation LLP (Corporate Debtor/CD) for the resolution of an amount of Rs. 1,47,92,962/- has been admitted and Sunil Kumar Bansal was appointed as the IRP.

2. The Appeal has been filed by the Suspended director of the CD under Section 61 of the Code.

3. The brief facts of this case are that the OC is the owner of a land and building situated at Juhu Tara Road, Juhu Mumbai. The OC leased out Unit No. 1 admeasuring 1368 sq. ft. area situated on the 2nd floor of the 'C' wing of the said building to the CD by a registered leave and license agreement

dated 15.11.2017 for a period of 5 years for running a restaurant under the name of “The Kattlery”.

4. The OC agreed to grant license to the CD for a period of 5 years commencing from 01.11.2017 and ending on 30.10.2022. As per the said agreement, the CD was to pay the license fee, CAM charges, all other utilities as well as interest on delayed payment in a timely manner, however, the CD failed to pay the same, therefore, the OC issued the notice under Section 8 of the Code on 27.12.2019 which was duly replied by the CD on 19.01.2020. Thereafter, the OC filed the application under Section 9 of the Code on 15.05.2020.

5. In part IV of the application, the OC claimed the defaulted amount of license fee of Rs. 1,05,57,540/-, CAM Charges of Rs. 1,88,238/-, HVAC Running Cost of Rs. 8,16,568/-, Infrastructure Charge of Rs. 5,68,000/-, water consumption charges of Rs. 2,29,581/- and Interest on delayed payments of Rs. 24,33,035, all aggregating to Rs. 1,47,92,962/-. The claim of license fee includes Rs. 84,99,540 being license fee for the unexpired lock in period of 3 years.

6. While contesting the application, the CD has mainly taken the stand of frustration of contract, inter alia, on the ground that the leave license agreement executed on 15.11.2017 was for a particular business. The stand of the CD is that he was to do business of Kettlery, however, since master franchise agreement was terminated by the franchisee on 12.11.2018, therefore, it had become impossible for the CD to continue with the said business under the name of ‘Kettlery’, therefore, he informed the OC vide letter dated 01.03.2019 about the frustration of the contract and also handed

over the keys of the premises on 14.03.2019. It is also the stand of the CD that it is basically a civil dispute which could have been agitated before the Civil Court instead of pushing the CD into CIRP by filing the application under Section 9.

7. The Tribunal, however, admitted the application filed by the OC while referring to clause 14.3 of the said agreement and also relied upon a decision of the Hon'ble Bombay High Court in the case of Indiabulls Properties Pvt. Ltd. Vs. Treasure Developers Pvt. Ltd., CP No. 496 of 2013.

8. Counsel for the Appellant has vehemently argued that the Tribunal has committed a patent error in admitting the application under Section 9 despite the fact that the agreement entered into by the CD with the OC had become impossible to perform in view of the fact that the master franchisee was terminated by the franchisee. He has, therefore, referred to Section 56 of the Indian Contract Act, 1872 (in short 'Act') to argue that if the agreement becomes impossible to carry out then it becomes void. In order to substantiate his argument, he has referred to some clauses of the said agreement. It is submitted that the leave and license agreement dated 15.11.2017 was entered into for a particular business. The term 'business' is defined in clause 1.2 which read "business shall mean restaurant under the brand of the kettlery which shall be operated in the name and style of the kettlery only from the licensed unit". He has further referred to clause 2 of the said agreement pertaining to grant of license. The said clause read as under:-

2. GRANT OF LICENSE

The Licensor hereby grants to the Licensee and the Licensee hereby accepts from the Licensor the license to use and occupy the Licensed Unit i.e. Unit No.1 admeasuring 1368 square feet carpet area (wall to wall) on the 2nd floor of the Galleria of the said Hotel and as shown, bounded in red on the floor plan annexed hereto as **Annexure "B"** and more particularly described in the **Second Schedule** hereunder written, subject to the Licensee observing and complying with all the terms, conditions and covenants herein contained. It being the express intention of the Parties that the license agreed to be granted by the Licensor to the Licensee to use and occupy the Licensed Unit shall be for the purposes of running the Business only on the terms and conditions as specified in this Agreement.

The Licensee acknowledges having inspected the Licensed Unit and having satisfied itself in all respect in relation thereto including as to the location, area and state thereof. The Licensee unconditionally accepts the area of the Licensed Unit stated hereinabove as true and correct and shall not be entitled to call the same into question at any time.

9. Thereafter, he drew our attention to clause 3.2 which pertains to lock in period and termination. The relevant part of the said clause is as under:-

3.2 Lock-in Period and Termination

(a) Save as otherwise expressly provided, the Licensee shall not have an option to terminate this Agreement for a period of 36 months from the Handover Date (**"Lock-in Period"**).

(b) In the event the Licensee terminates this Agreement during the Lock-in Period or the Licensor terminates this Agreement on account of breach of any terms and conditions of this Agreement by the Licensee, then in either case, without prejudice to all other rights and remedies available with the Licensor under these presents and/or in law or in equity, the Licensor shall be entitled to recover and the Licensee shall be liable to pay the License Fees for the un-expired term of the Lock-in Period and forthwith handover quiet, vacant, peaceful and undisputed charge and custody of the Licensed Unit to the Licensor. Such sum may be recovered by the Licensor from the Security Deposit and/or CAM Deposit to the extent possible. Upon termination the consequences as mentioned in Clause 20 shall follow.

10. Counsel for the appellant has also very fairly referred to clause 14.3 ('b' and 'o') which also read as under:-

(b) The Licensee agrees and undertakes that the Licensee shall use the Licensed Unit for the purpose of its Business only and for no other purpose whatsoever. The Licensee shall carry on its Business only in respect of the products and under the brand/trade name as specified in **Annexure "D"** and the Licensee shall therefore not be entitled to sell and/or display any other products and/or use any other brand/trade name whatsoever without the prior written consent of the Licensor.

(o) The Licensee further agrees that during the entire License Period there will be no change in the Business model and/or the brand which the Licensee has agreed to undertake from the Licensed Unit.

11. Counsel for the appellant has contended that as per clauses of the said agreement, referred to above, agreement between the parties was totally frustrated, therefore, he had not only communicated the same to the OC on 01.03.2019 in writing but had also handed over the keys of the premises on 14.03.2019. In support of his submissions, he has also relied upon a decision of the Hon'ble Supreme Court in the case of Satyabrata Ghose Vs. Mugneeram Bangur and Company & Anr., (1953) 2 SCC 437 in regard to the frustration of the contract while referring to Section 56 of the Act.

12. No one has appeared on behalf of the OC. Counsel for the IRP has appeared and submitted that the OC has been non-cooperative and non-responsive to its communication.

13. Be that as it may, the only issue involved in this case which requires adjudication is as to whether the leave and license agreement as read by the CD has caused frustration of the contract between the parties or there is a provision in the said agreement as per which the CD still could have used the premises for any other business?

14. No doubt that busines has been defined as the business of kettlery as we have already mentioned but there is no dispute that the premises was let out by the OC to the CD for five years alongwith a condition of lock in period of three years. Clause 14.3 (b) categorically provides that the CD still could have used the premises for any other brand but with the prior consent of the licensor and the very fact that there is a provision in the said agreement to the benefit of the CD to use the premises for any other brand is itself sufficient

to knock down the case of the CD that the leave and license agreement has not totally been frustrated. The judgment relied upon by the CD is not applicable to the facts of this case.

15. In view thereof, we do not find any error committed by the Tribunal who has also interpreted the same provision in the impugned order for the purpose of coming to the conclusion that there was a debt and default on the part of the CD for which the application filed under Section 9 of the Code has rightly been admitted.

16. No other point has been raised.

17. In view of the aforesaid facts and circumstances, we do not find any merit in this appeal and the same is hereby dismissed though without any order as to costs.

I.As, if any, are hereby closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Justice Mohammad Faiz Alam Khan]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Sc/RR