

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.1281/MB-IV/2020

Under Section 9 of the IBC, 2016

In the matter of

HOTEL HORIZON PRIVATE LIMITED

[CIN: U55101MH1968PTC014157]

...Operational Creditor

v/s.

PCK Corporation LLP

[AAJ-4834]

...Corporate Debtor

Order Delivered on: 16.06.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Operational Creditor:

Mr. Atul Singh, Ld. Counsel.

For the Corporate Debtor:

Mr. Shivam Bhagwati, Ld. Counsel.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by HOTEL HORIZON PRIVATE LIMITED (“the Operational Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of PCK Corporation LLP, the Corporate Debtor.

1.1. The Company Petition is filed on 15/05/2020 claiming an amount of Rs.1,47,92,962/- in default. The Part IV of Form 5 does not specify the date of default instead it states the details of invoices and its due date, which ranges from 07.11.2018 to 31.03.2019.

2. The Operational Creditor is the owner of a land and building situated at Juhu Tara Road, Juhu Mumbai on which the Operational Creditor is constructing a hotel inter-alia comprising of hotel facility, food and beverages outlets, retail outlets, offices etc.

2.1. The Operational Creditor and the Corporate Debtor had entered into a registered lease and license agreement on 15.11.2017 for Unit No. 1 admeasuring 1368 square feet carpet area situated on the 2nd floor of the "C" wing of the said Hotel, as the Corporate Debtor was in need of a licensed unit for a temporary period of 5 years for running a restaurant under the name of 'The Kettlery'.

2.2. The Operational Creditor agreed to grant license to the Corporate Debtor for the use and occupation of the Licensed Unit on lease and license basis for a period of 5 years commencing from 01.11.2017 and ending on 30.10.2022. Clause 14.3 of the said agreement provides that “*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”. Annexure “D” to the said agreement list the details of brand/trade names as 'The Kettlery'.

- 2.3. As per the Agreement, the Corporate Debtor was to pay the License Fees, CAM charges, all other utilities as well as interest on delayed payment in a timely manner, however, the Corporate Debtor failed to pay the same.
- 2.4. The Operational Creditor has claimed the default in payment of license fees of Rs.1,05,57,540/-, CAM charges of Rs.1,88,238/-, HVAC Running Cost 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 fees includes Rs.84,99,540/-, being licensee fees for the unexpired Lock in period.
- 2.5. In view of the aforesaid, the Operational Creditor issued a Demand Notice dated 27.12.2019 to the Corporate Debtor calling upon the Corporate Debtor to make a payment of Rs.1,47,92,962/-. The Corporate Debtor through its reply has denied each and every allegation raised by the Operational Creditor stating that there exists no debt at all.
3. The Corporate Debtor in its reply states that, there is a Frustration of Contract; this application is in the nature of claim for damages, which is not maintainable, as such claim is based upon seeking Specific Performance of the Lock-in clause and can be adjudicated by a Civil Court of competent jurisdiction for the actual damage suffered by the Operational Creditor, if any, so also the steps taken by the Operational Creditor to mitigate those losses. It is submitted that the leave and license agreement dated 15.11.2017 binds the Corporate Debtor to use the

licensed premises for running the Master franchise which came to terminated on 12.11.2018. The Corporate Debtor fairly disclosed all this fact to the Operational Creditor vide its letter dated 01.03.2019 and offer to peacefully terminate the said agreement on account of frustration, and the operational Creditor received on 14.03.2019 keys of the licensed premises and 3 letters without prejudice. Accordingly, the Corporate Debtor has no dues payable to the Operational Creditor on account of return of licensed property & Dispute/non-adjustments of Security Deposit.

3.1. It is further contended that, there is non- payment of GST by the Operational Creditor, which disentitled the Corporate Debtor to claim credit of GST.

3.2. The Corporate Debtor had categorically refused the existence of certain invoices in its reply to the said demand notice dated 09.01.2020, asserting that there existed prior dispute and present application is filed to circumvent adjudication of Disputes in relation to claim amount. It is also contended that the directors of the Operational Creditor were disqualified u/s 164(2)(a) of the Companies Act,2013, hence, these directors could not have signed the present petition in terms of resolution passed by these directors in the meeting held on 24.01.2020.

3.3. The Corporate Debtor also relied upon an order dated 21 March 2022 passed by NCLT Bench at Cuttack in CP (IB) No. 181/CB/2020 holding that *When the liquidated damages, or the amount fixed in the contract for breach of contract or for non-performance the said amount is ceiling, not the actual amount to be paid. Here, also the petitioner claims the amount on the basis of monthly fee fixed in the agreement. The Liquidated Damages will crystalize only after the adjudication by the competent Civil Court. This cannot be determined in the Insolvency Proceedings: undecided claim cannot be used to bring an application for insolvency.*

4. The Operational creditor has filed rejoinder dated 14.05.2023 submitting that the disqualification under companies act came to be revoked after compliances having been made in relation to another company i.e. M/s. Horizon Realty Private Limited. The contention regarding abandonment of routine maintenance and basic requirements such as water supply etc. have been raised or disputed by the Corporate Debtor before any forum or even in the letters addressed to the petitioner and the same are nothing but an afterthought. The disputes between the Corporate Debtor and its franchisor has no relevance to the present proceedings. There is an admission of liability resulting from deduction of tax at source and reflection of such tax in 26AS of the applicant. Further, the cheques no 73 to 91 issued towards monthly license fees which were dishonoured on presentation confirms the admission of liability on the part of Corporate Debtor. The applicant has relied upon the case of Hon'ble Supreme Court in the case of *Subramanian vs Aruna Hotels Ltd. (Civil Appeal No 187 of 2019)* (para 10) has observed that when there is an acknowledgment of liability, there is no dispute as to the amounts owed by the Debtor to its creditor.

Findings:

5. We have heard the arguments of Learned Counsel for Operational Creditor and Corporate Debtor and perused the records.
- 5.1. This bench finds that the applicant has claimed license fees for the period from 01.11.2018 to 31.03.2019 and license fees for an unexpired Lock in period of 19 months, as a lock in period under leave and license agreement dated 15.11.2017 was to expire on 30.10. 2022. Further, the corporate Debtor vide its letter dated 01.03.2019 informed to the Operational Creditor about termination of Master Franchise Agreement with M/s CPK food and Beverages Pvt. Ltd. which entitled it to carry the business of restaurant

under the brand of 'The Kettlery'. It is also noticed that the keys of said premises were returned to the Operational Creditor on 14.03.2019.

5.2. Clause 14.3 of the said agreement provides that *“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”*. Annexure “D” to the said agreement list the details of brand/trade names as 'The Kettlery'.

5.3. In view of Clause 14.3 of the said agreement, which allowed the Corporate Debtor to use the License premises only for the stated purpose, the question arises whether the claim for license fees of the unexpired lock in period starting from 14.03.2019 i.e. date of handing over of the keys of license premises, is maintainable.

5.4. The Operational Creditor has also relied upon the decision in the case of *Jaipur Trade Expocentre Private Limited Vs. Metro Jet Airways Training Private Limited MANU/NL/0422/2022* to contend that License Fee is an Operational Debt; *Sri Amuruvi Perumal Devathanam v. Kr Sabapathi Pillai AIR 1962 Mad 132: MANU/TN/0278/1962* to contend that merely commercial impossibility will not excuse a party from performing a contract; *Boothalinga Agencies v. VTC Poriaswami Nadar AIR 1969 SC 110 MANU/SC/0361/1968* to contend that the provisions of sec 56 of the Indian Contract Act cannot apply to a case of Self-induced frustration; *Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight*

Ltd MANU/SC/0628/1996 to contend that the liability undertaking in contract between parties should be limited to extent undertaken; *N Subramaniam v. Aruna Hotels Ltd. & Ors. MANU/SC/1052/2021* to contend that an acknowledgement of liability shows that there is no dispute as to the amount owed to the appellant; *Amluckie Investment Co.Ltdv. Skil Infrastructure Ltd. MANU/NC/0679/2021* to contend that payment of TDS on interest is not only an acknowledgement of debt but which constitutes a confirmation of debt by the Corporate Debtor that is liable to pay the principal sum borrowed and further extends the limitation of liability.

5.5. This bench is of the view that license fees is an Operational Debt and other charges in relation to such license fees for the period of usage of said license premises is also an Operational Debt. The Clause 4.7 of the said license agreement also stipulates payment of interest @18 p.a. on the amount of unpaid License Fees, accordingly the interest claimed as debt and default is also permissible to the extent such interest is claimed on the license fees and other charges having accrued under the agreement. As regards claim of license fees for an unexpired lock in period starting from 14.03.2019, the question to be decided is whether such claim is in nature of liquidated damages, requiring adjudication on the consideration of equity, or such claim is mandatorily permissible in terms of agreement dated 15.11.2017 in view of Corporate Debtor not having right of termination in any case. The Corporate Debtor has placed reliance on the decision of NCLT Cuttack Bench wherein the coordinate Bench of this tribunal held that license fees for the lock in period does not arise from rendition of any service but are in nature of compensation for breach of an agreement.

5.6. This bench finds that Clause 14.3 allows the licensee to use the license premises for other purposes with prior consent of the Licensor. It is not the case of Corporate Debtor it sought any such consent from the licensor to use the said premises for any other purpose during the unexpired lock in period.

5.7. The Hon'ble Bombay High Court in *Indiabulls Properties Pvt. Ltd. V. Treasure World Developers Pvt. Ltd, [CP No. 496 of 2013] wherein it was held that:*

“59. I am unable to see how Claim 3, for license fees for the remainder of the lock-in period, couched in the manner it is in the contract, can be said to be one for damages of any kind. Treasure World's liability arises not from Clause BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH CP No. 1664/IBC/NCLT/MB/MAH/2017 12 | Page 3.2, which makes no mention of any payment at all, but only says that there is a lock-in period of 36 months during which Treasure World may not terminate. It arises under clause 13.2: should Treasure World, despite the interdiction of clause 3.2, terminate after that lock-in period commences but before it ends, it incurs an immediate liability to pay for the remainder of the 36-month term. This is a debt. It is payable eo instanti; debitum in praesenti and solvendum in praesenti. A party solemnly binds itself to a three-year license term for premises. The licensor agrees, in exchange, not to increase the license fee for that duration. The agreement is, clearly, that the licensee will pay the licensor the agreed monthly license fee for three years. To allow the licensee not only the option of a premature exit, but also to allow it to slither out of its financial liability, and, correspondingly, to drive the licensor to a protracted civil proceeding in which it needs prove nothing is

clearly unjust. A defence that attempts this is not one that is bona fide or substantial. Defences of this stripe evidence commercial and corporate perfidy; they can never be allowed to constitute a bona fide or substantial defence.”

- 5.8. In view of aforesaid decision of the Hon’ble Bombay High Court we hold that license fees for the unexpired Lock in period is not in nature of liquidated damages but is a license fees falling under the Operational Debt.
6. As per the material on record this Bench is of the view that, on perusal of the documents submitted by the Operational Creditor, it is clear that Operational Debt amounting to more than Rs.1,00,00,000/- (Rupees One Crore Only) is due and payable by the Corporate Debtor to the Applicant. There is default by the Corporate Debtor in payment of debt amount. Therefore, we find that it is a fit case for initiation of CIRP against the Corporate Debtor, and that the petition is filed within the limitation period. This Tribunal has jurisdiction to adjudicate the Company Petition filed by the Operational Creditor and that there is a Debt due & payable by the Corporate Debtor. Since, the debt and default exist and no pre-existing dispute has been brought to our notice, it is a fit case for admission u/9 of IBC,2016.
7. In view of the above, we find that the present case deserves to be admitted under Section 9 of the Insolvency and Bankruptcy Code, 2016.

ORDER

8. The petition bearing CP (IB) No.1281MB-IV/2020 filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by HOTEL HORIZON PRIVATE LIMITED, (“the Operational Creditor”), seeking initiation of Corporate

Insolvency Resolution Process (CIRP) in the case of PCK Corporation LLP., (“the Corporate Debtor”) is **Admitted**.

- I. That this Bench as a result of this prohibits:
 - a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor 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 corporate debtor 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 corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Operational Assets and Enforcement of Security Interest Act, 2002;
 - d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to

- a. such transactions as may be notified by the Central Government in consultation with any Operational sector regulator;
 - b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. The bench hereby appoints Mr. Sunil Kumar Bansal, an Insolvency Professional registered with Indian Institute of Insolvency Professionals of ICAI having registration number IBBI/IPA-001/IP-P01232/2018-2019/11928 Email: skbansal.irp@gmail.com. He is appointed as IRP for conducting CIRP of the Corporate Debtor and to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Sections 15,17,18,19,20,21 of the IBC.
- VII. During the CIRP Period, the management of the Corporate Debtor 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 Corporate Debtor 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.

- VIII. The Operational Creditor shall deposit a sum of Rs.5,00,000/- (Rupees Five lakh only) 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. The amount so deposited shall be interim finance and paid back to the applicant 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).
- IX. The Registry is directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- X. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)
16.06.2023.

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)