

SL No.117

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Special Bench (Video Conference)

**CORAM: HON'BLE BHASKARA PANTULA MOHAN, -MEMBER (J)
CORAM: HON'BLE DR. BINOD KUMAR SINHA- MEMBER (T)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 06.05.2022 AT 02:00 PM THROUGH VIDEO CONFERENCE**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP (IB) No.66/9/HDB/2020
NAME OF THE COMPANY	Vasathi Housing Ltd
NAME OF THE PETITIONER(S)	Indiabulls Distribution Services Ltd
NAME OF THE RESPONDENT(S)	Vasathi Housing Ltd
UNDER SECTION	9 of IBC

ORDER

CP IB 66/9/HDB/2020 is admitted. Orders passed vide separate sheets.


MEMBER (T)

Syamala


MEMBER (J)

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - II**

CP(IB) No. 66/9/HDB/2020

[U/s. 9 of I&B Code, 2016 r/w Rule 6 of I & B (AAA) Rules, 2016]

In the matter of:

M/s. Indiabulls Distribution Services Limited

M-62 & M-63, First Floor

Connaught Place

New Delhi - 110 001

... Operational Creditor

Vs.

M/s. Vasathi Housing Limited

Having its Registered Office at

8-2-269, First and Second Floor

Road No.2, Banjara Hills

Hyderabad - 500 034, Telangana

... Corporate Debtor

Date of Order: 06.05.2022

Coram:

Hon'ble Sri Bhaskara Pantula Mohan, Member (Judicial)

Hon'ble Dr. Binod Kumar Sinha, Member (Technical)

Parties / Counsels Present:

For the Petitioner : Mr.P. Sriharsha Reddy, Mr. Sridhar
Kodipelli, Ms. Jyothi Rani, Ms.
Ashiwarya Thakur, Advocates

For the Respondent : Mr. V. Sethu Madhava Rao, Smt. V.
Dyumani, Advocates



[PER : BENCH]

ORDER

- I. This is a Petition filed by the Operational Creditor under Section 9 of Insolvency and Bankruptcy Code, 2016, r/w Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the application, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and relevant Rules against the Corporate Debtor, alleging that the Corporate Debtor had failed in discharging the debt amount of Rs.5,06,59,566/- (Rupees Five Crores Six Lakhs Fifty Nine Thousand Five Hundred Sixty Six only) which includes principal amount of Rs.4,75,23,619/- alongwith interest from the date of default i.e. on 11.04.2019.

- II. M/s. Indiabulls Distribution Services Limited, for short 'Applicant/Petitioner/Operational Creditor' is engaged, *inter alia*, in the business of distribution for third-party projects of Real Estate Sector including marketing of real estate projects.



- III. M/s. Vasathi Housing Limited, for short 'Respondent/Corporate Debtor' is engaged in the business of developing and selling real estate projects. The Corporate Debtor entered into agreements on 25.01.2014, 14.09.2014, 21.01.2016, 29.09.2016 and 07.03.2017 with the Applicant to identify prospective customers for the project namely, 'Vasathi Avante' being developed by the Corporate Debtor at R.K.Puram, Hubli, East Taluka, Bangalore, Karnataka. The Corporate Debtor is liable to pay marketing fee to the applicant on the flats booked by the Applicant.
- IV. The Corporate Debtor also entered into agreements on 30.03.2015, 16.02.2016, 12.07.2016 and 10.01.2017 with India Land and Properties Limited, for short 'ILPL' whereby ILPL was to identify prospective customers on behalf of the Corporate Debtor, who would book/purchase earmarked units being part of the project namely 'Vasathi Anandi' being developed by Corporate Debtor at Peeran Cheruvu Village, Rajendra Nagar Mandal, Ranga Reddy District, Telangana.
- V. Certain security deposits were made by the Applicant and ILPL, which were also to be returned by the Corporate Debtor on booking of each unit or at the end of the term of



agreements between the parties. Accordingly, various invoices were raised by the Applicant and ILPL but the Corporate Debtor defaulted in making the payment of marketing fee and also failed to refund the security deposit amounts.

VI. When the Corporate Debtor failed to make payments, ILPL, vide Assignment Deed dated 23.03.2017 had assigned all the rights and obligations under the aforementioned agreements to the Applicant. Thereafter, the Applicant as per the terms of the agreements and on account of default by the Corporate Debtor, had invoked the provisions of the Arbitration Clause and two separate arbitration proceedings were initiated by the Applicant, which culminated into two separate Awards both dated 11.04.2019. Even then the corporate debtor failed in making payment of the awarded amounts.

i. When the Corporate Debtor failed to pay the arbitration award amount, the Operational Creditor got issued a Demand Notice dated 22.10.2019 in Form-3, demanding the Corporate Debtor to pay an amount of Rs.5,06,59,566/-. However, even on service of demand notice, the Respondent failed to send any reply within the



statutory time period of 10 days to indicate either payment of debt or existence of dispute.

- ii. Copies of the relevant Agreements are filed at page nos. 181 to 275 of the application.
 - iii. Copies of the Awards each dated 11.04.2019 passed by the Hon'ble Arbitrator in relation to 'Vasathi Avante' at Bangalore and 'Vasathi Anandi' at Hyderabad are filed as Exhibit-4 & Exhibit-5 at page nos.20 to 51 & 51 to 82 of the application respectively.
 - iv. Certified copy of Bank Statement is filed as Exhibit-8 at page nos.91 to 180 of the application.
 - v. It is averred that the Petitioner, left with no further option, filed the instant petition and the same may be admitted by this Adjudicating Authority.
- VII. Per contra, the Corporate Debtor filed a reply dated 16.07.2021 stating that the application filed and framed is not maintainable and is liable to be rejected on the following grounds:



- i. The Applicant has not filed any evidence authorising Mr. Narender Kumar as Authorised Signatory to file the instant application.
- ii. The Applicant filed Arbitration Case for refund of security amount of Rs.2,90,58,657/- and Rs.3,99,299/-, which cannot be called as Operational Debt as defined under Section 5(21) of the IBC.
- iii. Marketing fee cannot be called as an operational debt. The amount claimed by the Applicant is a disputed amount and the Respondent is having a counter claim.
- iv. The Applicant failed to fulfil the terms and conditions of the first agreement dated 25.01.2014 itself, which was entered into between both the parties and could not sell the flats within the time frame contemplated by the 5 agreements particularly the first one, which slowed down the construction work and caused serious loss to the Respondent.
- v. The Applicant also failed to deposit the additional security amount of Rs.1,81,94,114/-, payable under Agreement dated 25.01.2014.



- vi. The applicant raised invoices dated 05.12.2017 which is a best proof of delay in sales. The respondent paid a sum of Rs.2,86,59,670/- towards marketing fee and refunded the security amount / additional security amount to the tune of Rs.6,42,11,195/-. As the applicant committed default in booking the flats/units within the time agreed in the agreement, the respondent constrained to incur Rs.20.00 lakhs per month towards administrative and overhead expenses for the 3 years on average basis.
- vii. The Respondent issued a notice dated 23.11.2017 to the Applicant for making a counter claim of Rs.6,42,90,651/-, which includes Overhead charges of Rs.1,44,00,000/-, interest incurred on the investment borrowed from the open market is Rs.3,98,90,651/- and loss of mental agony is notionally valued at Rs.1.00 crore.
- viii. Even after extending the period by executing a Supplementary Agreement dated 12.07.2016, the ILPL, Applicant and the Respondent entered into Tripartite Agreement whereby ILPL assigned all its rights, benefits and obligations under the agreements to the Applicant. The respondent paid a sum of Rs.2,06,02,632/-



towards marketing fee and refunded the security amount to the tune of Rs.3,17,85,140/- to ILPL/Applicant. Due to delay on the part of the ILPL/Applicant the Respondent has sustained huge overheads / administrative costs and also incurred interest on the funds borrowed from the public and the Respondent made a counter claim of Rs.12,17,50,272/- on the Applicant.

- ix. It is submitted that the Hon'ble Arbitrator took an erroneous view and passed award dated 11.04.2019. The Respondent filed Arbitration Petition No.IA 1188/2020 (for exemption) in O.M.P.(Comp) 97/2020 and Arbitration Petition No.IA 1192/2020 (for exemption) in O.M.P.(Comp) 98/2020 challenging the awards dated 11.04.2019 passed by the Hon'ble Arbitrator, which were dismissed by the Hon'ble High Court, New Delhi, vide orders dated 28.01.2020 as the applications were filed beyond the period of limitation. Challenging the said orders, the Respondent preferred SLP before the Hon'ble Supreme Court on 05.03.2020 and 06.03.2020 respectively and the same are yet to be listed.



- VIII. In Rejoinder, the Applicant has brought to our notice orders issued by the Hon'ble High Court of Delhi, in O.M.P.(Comp) 97/2020 and in O.M.P.(Comp) 98/2020, dated 28.01.2020 rejecting the Respondent's prayers against the Arbitral Awards. The Learned Counsel for the Applicant also brought to our attention the order of Hon'ble Supreme Court in Special Leave to Appeal (C) No.12288/2020 which was filed by the Corporate Debtor against the Order of Hon'ble Delhi High Court supra wherein Hon'ble Supreme Court have pleased to dismiss the Corporate Debtor's SLP against the Order of Hon'ble Delhi High Court dismissing the Petition u/s 34 of the Arbitration & Conciliation Act, 1996.
- IX. Heard and perused record and pleadings.
- X. In the instant case, the Corporate Debtor being a Real Estate Company entered into various Agreements as annexed with the instant application with the Applicant herein as well as with another Company, namely, India Land and Properties Limited (ILPL), for identification of prospective customers and booking of flats constructed by the Corporate Debtor at its projects named "Vasathi Avante" at Bangalore and "Vasathi Anandi" at Hyderabad. For their services so rendered 'marketing fee' was to be paid by the Corporate Debtor to the Applicant as agreed in the Agreements. On



their part, the Applicant as well as ILPL was required to make certain security deposits with the Corporate Debtor, which were to be refunded by the Corporate Debtor on the booking of each unit and/or at the end of the tenure of agreements between the parties, as agreed. The Applicant/ILPL rendered their services and raised invoices, but the Corporate Debtor defaulted in making payment of the marketing fees' as well as failed in making refunds of the security deposits. It is also part of record that after the Corporate Debtor also failed to make payments to ILPL, the ILPL had assigned all its rights and obligations under the aforesaid Agreements with the Corporate Debtor, to the Applicant herein.

- XI. As there was default committed by the Corporate Debtor in terms of the agreements aforesaid, the Applicant invoked the Arbitration clause in the Agreements, and initiated two separate Arbitration proceedings, in respect of two projects namely, "Vasathi Avante" at Bangalore and "Vasathi Anandi" at Hyderabad. The Arbitration proceedings was duly joined by the Corporate Debtor, by making certain counter claims. However, the Applicant was successful in these proceedings and was awarded two separate Arbitral Awards vide two orders of the Hon'ble Arbitral Tribunal dated 11.04.2019. Copies of these orders are placed on record as part of the Application itself. According to these Arbitral Awards, the



Corporate Debtor is liable to pay Principal Amount of Rs.4,75,23,619/- and total amount of Rs.5,06,59,566/-. The Corporate Debtor had taken these Arbitral Awards to Appeal u/s 34 of the Arbitration & Conciliation Act, 1996 before the Hon'ble Delhi High Court, but received no relief from the Hon'ble High Court. Subsequently, their SLP before the Hon'ble Supreme Court was also dismissed.

XII. It is also seen from record that the Applicant had filed a Memo dated 28.01.2020, in response to the observations made by the Registry, stating that the subject matter of the instant application falls within the ambit of Section 9 and placed reliance on the order dated 22.10.2020 passed by the **Hon'ble NCLT, New Delhi, Bench-V in (IB) 1493(ND)2019 in the matter of M/s. Suresh Chand & Sons LLP.**

XIII. The Corporate Debtor has advanced the following contentions to challenge the instant Application:

- i. That the Application has not been filed by a duly authorised person on behalf of the Applicant.
- ii. That the claimed amount does not fall within the definition of 'Operational Debt' as the same is for 'marketing fee' and refund of security deposit amount,



which cannot be called 'Operational Debt' u/s 5(21) of the Code; and

- iii. That the claimed amount is 'disputed' and the Corporate Debtor is having a counter claim on the Applicant, therefore, the instant Application is not maintainable.

XIV. We have given due consideration to the arguments advanced by the Corporate Debtor.

- i. As regards their first argument, it is seen from the record that a copy of Board Resolution duly authorising Shri Narendra Kumar to represent the Applicant Company before various Courts, Judicial Authorities, Forums, in respect of legal matters is annexed as Exhibit-2 to the instant Application. This resolution is certified by the Director on 18.11.2019. Therefore, we observe that the Application has been filed by a duly Authorised Person on behalf of the Applicant and this technical ground taken by the Corporate Debtor, fails.
- ii. As regards the argument that the claimed amount does not fall within the definition of 'Operational Debt', it is



pertinent to refer the definition of 'Operational Debt' as stipulated in the Insolvency & Bankruptcy Code, 2016:

“**Section 5(21) - “Operational Debt”** means a claim in respect of the provisions of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”

It is clear that any debt arising in respect of provisions of 'goods' or 'services' including 'employment' or 'statutory dues' would fall within the definition u/s 5(21). Further, an 'Operational Creditor' has been defined u/s 5(20) as under:

“**Section 5(20) - “Operational Creditor”** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;”

Thus, the term 'Operational Creditor' would also include in its ambit an assignee of an 'Operational Debt'.



XV. In the instant case, the Applicant as well as ILPL, whose debt was subsequently assigned to the Applicant herein, were to provide specific services of 'identification of prospective customers' of the flats and booking of sale of flats' on behalf of the Corporate Debtor. In other words, the Applicant as well as ILPL were functioning as the 'Marketing Agency' of the Corporate Debtor, and for their services as Marketing Agency, a service fees, which is described as 'Marketing Fee' in the Agreements between parties, was payable. Further, the 'Security Deposit' was also made by these Marketing Agencies (Applicant & ILPL) as per the terms of these Agreements only. It is an undeniable fact that the Applicant had rendered marketing services to the Corporate Debtor and raised invoices according to the terms of the agreement. The Agreements themselves are evidence of business relationship between the Applicant and the Corporate Debtor. Further, the Agreements themselves incorporate Arbitration clause, which is another evidence that there was business relation between the parties and therefore Applicant will fall within the category of Operational Creditor. This has also been held by the **Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. vs. Union of India WP (C) No.99 of 2018**, wherein Hon'ble Apex Court differentiated between a Financial Creditor and an Operational Creditor as under:



¶ **Para 23.** A perusal of the definition of –financial creditor and –financial debt makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an operational debt would include a claim in respect of the provisions of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.

Para 27. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Act both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business.

Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately.

Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. (Emphasis supplied) On the other hand, financial debts made to banks and financial institutions are well-documented and defaults made are easily verifiable. ʘ

- XVI. In view of the above factual and legal positions, we have no doubt that the claimed amount shall fall within the definition of 'Operational Debt' in Section 5(21) and the Applicant is an Operational Creditor in terms of Section 5(20) of the Code. Thus, the second argument of the Corporate Debtor also fails.
- XVII. As regards the argument of the Corporate Debtor that the claimed amount is disputed, as counter claims were filed by the Corporate Debtor before Hon'ble Arbitral Tribunal, suffice it to say that as soon as the Hon'ble Arbitral Tribunal had given the final Award in favour of the Applicant, all disputes between the parties are to be deemed to have been fully resolved, particularly in view of the fact that the Corporate Debtor's Appeal under Section 34 of the Arbitration & Conciliation Act, 1996 was dismissed by the Hon'ble Delhi High Court and SLP filed by the Corporate Debtor was also dismissed by the Hon'ble Supreme Court. Since the instant Application was filed after the Final Award date, the argument of disputed claim does not hold much water.



- XVIII. After hearing both sides and perusing record, we are of the view that in the instant case there is an operational debt and there has been a default in repayment of the same and that this Adjudicating Authority is satisfied that the Operational Creditor has proved its case by placing evidence that default has occurred for which the Corporate Debtor was liable to pay. Hence, the contentions of the Corporate Debtor are overruled.
- XIX. Further the Operational Creditor has fulfilled all the stipulations as required under the provisions of the IB Code, 2016 for the purpose of initiating Corporate Insolvency Resolution Process. In these circumstances, having satisfied with the submissions made by the Petitioner/Operational Creditor, this Adjudicating Authority is inclined to admit the instant Application.
- XX. Accordingly, the instant application is hereby admitted and this Adjudicating Authority orders the commencement of the Corporate Insolvency Resolution Process (CIRP) which shall ordinarily be completed within the timelines stipulated in the IB Code, 2016 (as amended), reckoning from the day of this order is passed.



XXI. The Operational Creditor has not named anyone as Interim Resolution Professional (IRP) and has requested this Adjudicating Authority to appoint one for the Insolvency Resolution Professionals as IRP. The Insolvency and Bankruptcy Board of India (IBBI) has recommended a panel of Insolvency Professionals for appointment as Insolvency Resolution Professional for the period from January 1, 2022 to June 30, 2022 in compliance with Section 16(3)(a) of the Code in order to avoid delay. Accordingly, this Tribunal appoints Mr. Rajesh Donkeshwar, having Registration No. IBBI-IPA-001/IP-P01245/2018-2019/11960, e-mail: reachcadr@gmail.com as Interim Resolution Professional. As per the IBBI website, his AFA is valid upto 08.12.2022. He is directed to file Authorization for Assignment within three days from the date of this order.

XXII. The IRP is directed to take charge of the Respondent/Corporate Debtor's Management immediately. He is also directed to cause public announcement as prescribed under section 15 of the IB Code, 2016 within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed.



XXIII. We direct the Operational Creditor/Petitioner to pay a sum of Rs.2,00,000/- towards the advance fee of IRP and expenses towards CIRP, which shall be ratified later on by CoC.

XXIV. The moratorium is hereby declared which shall have effect from the date of this order till the completion of CIRP. For the purposes referred to in Section 14 of the IB Code, 2016. It is hereby ordered to prohibit all of the following namely:-

- i. *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 or law, tribunal arbitration panel or other authority;*
- ii. *Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal rights or beneficial interest therein;*
- iii. *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 (54 of 2002);*
- iv. *The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*
- v. *Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right*




given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

- XXV. The supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. Further, if the IRP considers supply of any goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period. Furthermore, the provisions of Sub-section (1) of Section 14 shall not apply to such transactions, agreements. or other arrangement as may be notified by the Central Government in consultation with any operational sector regulator or any other authority.



- XXVI. The IRP shall comply with the provisions of Sections 13(2), 15, 17 & 18 of the Code. The Directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all assistance and co-operation to the IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I&B Code, 2016.
- XXVII. The Petitioner/Operational Creditor as well as the Registry is directed to send the copy of this Order to IRP so that he could take charge of the Corporate Debtor's assets etc. and make compliance with this Order as per the provisions of I&B Code, 2016.
- XXVIII. The Registry is directed to communicate this Order to the Operational Creditor and the Corporate Debtor.
- XXIX. The Registry shall also communicate this Order to the ROC, Hyderabad for updating the status of the Corporate Debtor in the MCA website.
- XXX. Accordingly, this Petition is admitted.


DR. BINOD KUMAR SINHA
MEMBER (TECHNICAL)


BHASKARA PANTULA MOHAN
MEMBER (JUDICIAL)

Syamala