

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH,

COURT III

C.P.(IB)-4485/(MB)/2019

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

SARWAN KUMAR

Having registered office at: 603-B, New Blue Heaven CHSL, Juhu Versova Link Rd., Andheri (West), Mumbai-400053.

.....Operational Creditor

Vs

C.S. HOSPITALITY AND MANAGEMENT SERVICES PVT. LTD.

Registered office at: CTS No. 381/1-8, Swaroop Enclave, Off. Military Road, Marol, Andheri (West), Mumbai-400059.

..... Corporate Debtor

Order pronounced on: **16.02.2023**

Coram:

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

Hon'ble Anuradha Sanjay Bhatia, Member (Technical)

For the Applicant: Ms. Mansha Bhatia, Advocate

For the Respondent: Mr. Avinash R. Khanolkar i/b Mr. Subodh B. Gokhale, Advocate

Per: Shri. H.V. Subba Rao, Member (Judicial)

1. The above Company Petition is filed by SARWAN KUMAR hereinafter called as Operational Creditor seeking to initiate Corporate Insolvency Resolution Process (CIRP) against C.S. HOSPITALITY AND MANAGEMENT SERVICES PVT. LTD. hereinafter called as Corporate Debtor by invoking the provisions of Section 9 Insolvency and Bankruptcy code (hereinafter called "Code" read with rule 6 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of Operational Debt of Rs. 43,00,982/- (Rupees Forty-Three Lakhs Nine Hundred and Eighty-Two Only)

2. **BRIEF FACTS OF THE PETITION**

i. The Operational Creditor granted lease of the said Unit in favour of the Corporate Debtor from 2007 onwards. However, the Lease agreement with respect to the said unit could be entered into only in 2009 as the Corporate Debtor claimed not have the necessary funds at that time. The agreement jointly with Kavita Kumar was therefore entered into on 14th September 2009, registered under registration no. BDR/15-8488-2009, for a period of 114 months (hereinafter referred to as '**the said agreement**'). Clause 4 of the said agreement provides that the Corporate Debtor shall pay the Rent to the Operational Creditor with yearly increase of 10% and also the interest free deposit Rs. 1,50,000/-. As per Clause 8 of the said agreement the Corporate Debtor has undertaken to pay the periodic rent and in default thereof, the Corporate Debtor has undertaken to pay interest at

the rate of 12% per annum on the compensation amount due from the due date till the actual date of payment.

- ii. The Corporate Debtor is in wilful breach of payment of the rent and has failed to make timely payments towards the same (details of arrears as per annexures). No amount was paid till April 2010. Thereafter, the Corporate Debtor has failed to make full payments and has made certain on account payments towards the outstanding rent only, as described in the sheet annexed herewith at Annexure 7. Despite repeated requests and reminders, the Corporate Debtor has failed to make payments. The Corporate Debtor till date continues to face financial difficulties and is therefore unable to pay outstanding rent.
- iii. In the meantime, the Operational Creditor approached the Corporate Debtor for a certificate confirming the outstanding lease rent. The Corporate Debtor has therefore issued a certificate confirming/admitting relationship of lessor and lessee since September 2007 and also the outstanding rent.
- iv. Even thereafter the Corporate Debtor has confirmed/admitted its liability to pay the amounts but despite repeated requests/demands, it has failed to make complete and timely payments. The Operational Creditor sent letters to the Corporate Debtor dated 04th September 2013 again demanding outstanding amounts within 30 days from receipt thereof. The Corporate Debtor belatedly responded vide its letter dated 11th

December 2013 therein admitting their liability to pay the amounts and assuring payment of the outstanding amounts within 3 months. Through letter dated 16th December 2013, the Operational Creditor yet again asked for payments and the Corporate Debtor orally continued to assure that payments will be made.

- v. Despite the above admission, assurances and undertakings, the Corporate Debtor has failed to pay the entire outstanding amounts and are merely making ad-hoc payments, which are duly appropriated by the Operational Creditor towards the outstanding rent. An amount of Rs. 43,00,982/- including the interest as well as an amount of Rs. 1,44,000/- being the balance on the interest of security deposit i.e. a total of Rs. 44,44,982/- is still outstanding and payable and the Corporate Debtor has unauthorizedly retained occupation of the said premises and has failed to hand over possession, for which the Corporate Debtor is liable to pay market rent. The Corporate Debtor has also admitted its liability to pay the amounts by deducting TDS for certain payments but has not actually paid the amounts to the Operational Creditor. The Corporate Debtor has fraudulently committed various illegalities by, inter alia, failing to (i) hold Annual General Meetings, (ii) circulate minutes of the meetings, (iii) file returns etc. In fact, the name of the Corporate Debtor was also struck off from the register of companies and was

subsequently revived. There are several financial irregularities and misappropriation of funds by the Corporate Debtor. There are various other parties who are similarly placed with identical facts, who are also in the process of instituting proceedings against the Corporate Debtor.

- vi. The Operational Creditor then sent the statutory Demand Notice in Form 3 as required under Section 8 of the Insolvency and Bankruptcy Code 2016 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to the Corporate Debtor dated 30th October 2019 therein, which was duly served to the Corporate Debtor on 22nd November 2019 and through Speed Post with AD received on 26th November 2019. The Corporate Debtor despite receiving the notice has failed to reply. There is no dispute with respect to the outstanding amounts and is in fact an admitted liability and considering the financial capacity of the Corporate Debtor, it is not in a position to make pay the outstanding amounts. Hence, the Corporate Debtor has no defence and has failed to pay the admitted amounts.
3. The Corporate Debtor has filed detailed reply opposing the above Company Petition. The important and relevant Paras of the reply of the Corporate Debtor are mentioned here under:
 4. I state that the CD was promoted as joint venture of few entrepreneurs to commence business activity of Hospitality

whereby well-furnished rooms will be given on rent as Service Apartment/Rooms to visitors and tourists and the Applicant was also one of the Promoter of this business idea. The Applicant has hidden this fact from the Tribunal that the Applicant is also one of the Promoter and shareholder of the CD, holding jointly with her husband 2022 equity shares of Rs. 10/- each, and that is why the CD has made a statement that the Applicant has not approached this Hon'ble Tribunal with clean hands.

5. I state that thus the Applicant is trying to settle scores with the Company/CD of which the Applicant is a Promoter with intention of extortion of money. I state that the Applicant is fully aware of the status and financial situation of the CD and the Applicant has filed this non-maintainable Petition under Section 9 of the IBC, 2016 only as pressurizing tactics.
6. I further state that there is a difference between a shareholder of a public Company, in which there can be lakhs of shareholders and shareholder of a private company, in which number of shareholders is restricted to 200 only. Further a private company cannot make a public offer for its shares and hence the shares in a private company are allotted only to group of persons who form the group of Promoters. I therefore state that the Applicant being a shareholder is like a Promoter of the Company. The Applicant

was always aware of the financial strains suffered by the Company. Unfortunately, the Promoter has changed its stand and position and commenced litigation against its own company by filing this petition.

7. I further state and submits that the Applicant has raised a claim of Rs. 43,00,982/- towards lease rent and outstanding interest, after adjusting the amount of TDS and the amounts paid, allegedly due as on 30.09.2019. I state that the first and foremost objection of the CD is on the amount of rent calculated. The Applicant has admitted on page 11 of the petition that the Lease Agreement which was executed for 114 months on 14.09.2009 has expired on 14th March 2019. Thus, despite being aware of the fact that the lease agreement has ended on 14.03.2019, the Applicant has instead of demanding possession of its Unit given on lease has continued to sleep over and filed this petition making a demand even for period beyond the lease period which is not permissible.
8. I further state that the Applicant has attached letters written by the CD on 11.12.2013. I state that there is no confirmation issued by the CD about the amount outstanding or about there being any dues at all after December 2013 and hence the claim of the Applicant filed in

December 2019 based on a letter dated 11.12.2013 is hopelessly time barred.

- 10.I Further state that, assuming without admitting, the calculation of amount dues, paid, interest etc. submitted by the Applicant on Page No. 48 to 50 of the petition, I state that the amount of Rs. 43,00,982/- allegedly due as on 30.09.2019, claimed by the Applicant in the petition filed on 07.12.2019 includes cumulative rent dues of Rs. 28,65,821/- as on 30.09.16 as appearing on the Page No. 50 of the Applicant's own statement. The CD has, in tabular form, prepared break-up of the alleged claim of the Applicant, for period up to 30.09.2016 and also for the period 01.10.2016 to 30.09.2019.
4. Heard Ms. Mansha Bhatia, counsel appearing for the Operational Creditor and Mr. Avinash R. Khanolkar, counsel appearing for the Corporate Debtor and perused the record.
- After hearing the submissions on both sides and upon perusing the material available on record, the important question that needs to be decided in the above Company Petition is:
- i. Whether the amount claimed by the Operational Creditor is barred by limitation?
5. Let us discuss the above issue of limitation. The bare perusal of the Company Petition along with the details of claim annexed at Page Nos. 48 to 50 makes it clear that the above Company Petition is filed

for the unpaid portion of the remaining rent due to the Operational Creditor under a registered Lease Agreement dated 14.09.2009 which was entered into between the Corporate Debtor and the Operational Creditor for 114 months commencing from the date of execution of the deed. The date of expiry of lease is 14.03.2019. The Operational Creditor issued a Demand Notice dated 30.10.2019 without mentioning the details of the amounts due from time to time in the Demand Notice. The Operational Creditor claimed an amount of Rs. 43,00,982/- along with interest calculated up to September-2019 and further interest thereafter. However, the Operational Creditor annexed the details of the claim under Page Nos. 48 to 50 of the Company Petition.

6. It is very clear from the bare perusal of the details of claim that most of the amounts claimed in the Company Petition are beyond 3 years from the date of filing the Company Petition and are barred by limitation. The so-called letters of admission of liability executed by Corporate Debtor and relied by Operational Creditor are of 11.12.2013, 16.12.2013 and they are no way useful in extending the period of limitation as they are also beyond 3 years from the date of filing the above Company Petition i.e. 10.12.2019 even if they are accepted as acknowledgement of liability.
7. The next question is whether the above Company Petition can be admitted for the claims which are within three years from the date of filing the Company Petition by excluding the remaining part? This

Bench has no hesitation in holding the above issue in negative in view of the law laid down by the Hon'ble NCLAT in Next Education India Private Limited vs. K12 Techno Services Private Limited. In Company Appeal No. 98/2019 where in the NCLAT in the following paras observed and held as under:

Para-13. Whether the 'Operational Creditor' can change the 'date of default' by confining the invoices to a later period, when the Demand Notice under Section 8 includes all the invoices from the date of default and the 'debt amount' is crystallized based on the invoices.

*Para-21. As can be seen from Section 8, reproduced above, the moment there is an occurrence of a default, copy of an invoice demanding payment of the amount involved in the default is to be delivered by way of a Demand Notice to the 'Operational Creditor'. Form III gives the details of the invoices. In the instant case, the 'Operational Creditor' has given the details of invoices from (pages 399 to 406 of Volume II) and has also crystalized the amount at Rs. 2,39,85,521.35/-, which is unpaid from 2011. Therefore, the argument of the Learned Counsel for the 'Operational Creditor' that the period should be confined only from 2015 to 2017 cannot be sustained. The Tribunal cannot confine to one or other invoice if the Applicant has relied on all the invoices to arrive at the amount of Rs. 2,39,85,521.35/- in the Demand Notice under Section 8. **We are of the view that the Tribunal does not have jurisdiction in these Insolvency Proceedings to cut-short the invoices which would cause recurring dates of cause of action as it is not a suit for recovery.***

Therefore, in the light of the above facts and in view of the law laid down by the Hon'ble NCLAT this Bench has no hesitation in holding that the above Company Petition is barred by limitation.

8. Of course, the Corporate Debtor has also taken the plea that the rents due under lease agreement does not fall within the definition of "operational debt" and the Petitioner being one of the promoters of the Corporate Debtor has no locus to file the above Company Petition. Since there are conflicting views of different Benches of the Hon'ble NCLAT and the matter is sub-judice before the Apex Court with respect to the nature of debt of rental income and since this Tribunal is dis-missing the above Company Petition on the ground of limitation itself, this Tribunal is not giving its findings on the above issues.
9. For the aforesaid reasons, there is no merit in the above Company Petition and the same is deserves to be rejected.
10. Accordingly, the above Company Petition is dismissed without costs.

Sd/-

ANURADHA SANJAY BHATIA
MEMBER(TECHNICAL)

//Shubham//

Sd/-

H.V. SUBBA RAO
MEMBER(JUDICIAL)