IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - V

CP (IB)/1209/MB/2020

Under section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of

Chandramouli Silk Mills, a partnership firm having its registered office at 412, EMCA House, Shahid Bhagat Singh Road, Mumbai 4000001.

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..... Applicant/ Operational Creditor

Versus

Larsen & Toubro Limited, having its registered office at :- L&T House, Ballard Estate, Mumbai 400001.

.....Corporate Debtor

Order Delivered on :- 20.10.2023

Coram:

Mr. Anuradha Sanjay Bhatia
Member (Technical)

Mr. Kuldip Kumar Kareer
Member (Judicial)

Appearances:

For the Operational Creditor: Sr. Adv. Zal T. Andhyarujina a/w Adv. Akanksha Agarwal, Adv. Neerav Merchant i/b Thakordas and Madgavkar.

For the Corporate Debtor: Adv. Ankit Lohia a/w Adv. Lipsa Unadkat i/b Manilal Kher Ambalal & Co.

ORDER

Per: - Shri. Kuldip Kumar Kareer (Hon'ble Judicial Member)

1. This Company petition is filed by M/s. Chandramouli Silk Mills, a Partnership firm (hereinafter referred to as "Operational Creditor") seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Larsen & Toubro Limited. (hereinafter referred to as "Corporate Debtor") by invoking the provisions of Section 9 of the Insolvency and Bankruptcy code, 2016 (hereinafter called "Code") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Copy of board resolution authorising filing of the petition/proceedings is annexed to the Company Petition.

2. The Company Petition was filed on 16.09.2020 claiming an amount of Rs.1,44,01,609/- (Rupees One Crore, Fourty Four Lakhs, One Thousand, Six Hundred and Nine Only).

3. The details of the transactions leading to the filing of this Application as averred by the Operational Creditor in the application are as follows:

a) The Operational Creditor is the owner of the property bearing survey number C-3A of Village Pavne, District-Thane, MIDC, TTC Industrial Area, Pavne, Turbhe, Navi Mumbai-400614. Corporate Debtor had approached the Operational Creditor to give the aforementioned property on rent for building a labour colony for residential accommodation purpose in connection with the project for IKEA India Pvt Ltd. at Turbhe, Navi Mumbai.

b) Leave and Licence Agreement for the above said property for a period of 36 months commencing from 01/01/2018 to 31/12/2020. A security deposit of INR 1,40,00,000/- (Rupees One Crore and Fourty Lakhs Only) was to be paid by the Corporate Debtor which was remitted to the Operational Creditor by the Corporate Debtor. The compensation was to be paid on or before 10th of every subsequent month with applicable GST and TDS to be deducted by the Corporate Debtor. The Compensation was fixed per annum as per the agreement which is as follows: January 2018 to December 2018 is INR 35,00,000/-; January 2019 to December 2019 is INR 38,50,000/- and January 2020 to December 2020 is INR 42,35,000/-. It is pertinent to note that the compensation for the period January, 2020 to December, 2020 was reduced to INR 38,50,000/- by mutual understanding.

c) The Corporate Debtor sent an Intimation Letter dated 16th December, 2019 to the Operational Creditor via email stating that they will be vacating the premises on or before 29th February, 2020. Acceptance Letter dated 16th December, 2019 was issued by Operational Creditor to the Corporate Debtor even though 3 months' prior notice to vacating the premises was not given. Due to non-payment of outstanding dues, a Notice No. AD/220/2020 dated 03rd March, 2020 was served to the Corporate Debtor by the Operational Creditor.

d) The Corporate Debtor was paying the compensation from time to time uptill October, 2019. The rent (without interest) from the period of November, 2019 to February, 2020 remaining unpaid is INR 01,74,02,000/- (Rupees One Crore, Seventy-Four Lakhs and Two Thousand) only. Debit notes raised by the Operational Creditor against the Corporate Debtor for the interest on the rent remaining due and unpaid for the aforesaid period amounts to INR 28,26,337/-. Clause 20(e) of the Leave and License Agreement specifically states that the Corporate Debtor has to vacate the premises subject to normal wear and tear. It is alleged by the Operational Creditor that the Corporate Debtor has vacated the said premises without proper handing over and have damaged the property beyond reasonable repair for which the Operational Creditor has claimed an amount of INR 50,00,000/- (Rupees Fifty Lakhs Only) towards the damages as Cost of Repairs.

e) Due to non-payment of outstanding dues along with the interest, a Demand Notice dated 22nd July, 2020 was issued by the Operational Creditor to the Corporate Debtor in Form 3 under Rule 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and the same was received by the Corporate Debtor on

18/08/2020. The amounts remained unpaid despite the service of Demand Notice. Hence, this Petition.

4. Submissions of the Respondent in brief:
    a. The Application does not suffice the minimum threshold of INR 1 Crores as enumerated u/s 4 of the Insolvency and Bankruptcy Code, 2016. The Applicant has clubbed the alleged principal and purported damages in order to meet the minimum threshold requirement. INR 50,00,000/- claimed by the Applicant towards the costs of repairs are for the sole purpose of meeting the minimum threshold of rupees one crore.
    b. Even from the bare perusal of the definition of Operational Debt, the term "damages" does not fall within the realm and therefore, the same cannot be termed as Operational Debt. Further, the damages have not been adjudicated by any competent authority or by a competent court of law, and therefore, the same cannot be claimed as a Debt.
    c. It is a trite law that claim for damages cannot be a ground for initiation of CIRP. The Applicant is only attempting to use this Tribunal and its sacrosanct machinery as a recovery platform with an intention to threaten and intimidate the Respondent. The Application is misconceived and filed purely with the intention to use an arm-twisting technique to recover monies from the Respondent.
    d. There is no specific clause in the Agreement which attracts interest on delayed payment. Therefore, the averment on levying the interest and issuing debit notes is wholly illegal and therefore, the same cannot constitute debt under the Code.

ANALYSIS AND FINDINGS

5. We have heard the Counsel for the Applicant-Operational Creditor and the Respondent-Corporate Debtor. We have also gone through the pleadings and the records.
6. In this case, the Operational Creditor has claimed that the Corporate Debtor has committed a default of Rs.1,44,01,609/- (Rupees One Crore, Fourty Four Lakhs, One Thousand, Six Hundred and Nine Only). According to the Operational Creditor, the Corporate Debtor has vacated the licence premises without proper handing over the possession of the licensed premises and has damaged the property which is beyond normal wear and tear. Therefore, the claim of INR 50 Lakhs is on account of damages allegedly caused by the Corporate Debtor. The Hon'ble National Company Law Appellate Tribunal, New Delhi in the matter of Chandrashekhar Exports Pvt Ltd v/s Babanraoji Shinde Sugar & Allied Industries Ltd vide Order dated 07th August, 2023 in Company Appeal (AT) (Insolvency) No. 1032 of 2023 has held that the damages and compensation cannot be said to be amount on basis of which application under Section 9 can be admitted. The Operational Debt claimed by the petitioner must be crystallized, undisputed and not something which requires adjudication by competent court or authority. Para 4 of the above-mentioned NCLAT Order is reproduced as under:

"As per Clause 10 of the agreement, the entitlement is for compensation and penalty if there is failure in performance on part of the Corporate Debtor. We are of the view that for crystallization of said compensation penalty adjudication is required by Competent Court and Adjudicating Authority has rightly not admitted Section 9 application. We are of the view that it is

always open for the Appellant to take a remedy as available as per the contract in accordance with law. With these observations, the Appeal is dismissed."

7. In the instant case, there is no adjudication of penalty, compensation or damages by any competent court or authority. Therefore, the compensation claimed on account of cost of repairs of Rs. 50,00,000/- cannot be treated as "debt" as defined u/s 3(11), much less an "Operational Debt" as defined u/s 5(21) of the IBC, 2016.

8. It is also pertinent to note that initially the Legal Notice dated 3rd March 2020 was issued for an amount of Rs.77,52,268/-. After the jurisdictional threshold was amended by way of Notification issued by the Ministry of Corporate Affairs on 24th March 2020, the claim of the Applicant came to be revised without any basis to Rs. 1,44,01,609/- in the Demand Notice dated 22nd July 2020. Thus, it seems that the claim has been inflated by the Operational Creditor by including the damages of INR 50 Lakhs on account of the alleged damage to the licensed property only with a view to meet the minimum threshold of rupees one crore so as to trigger the insolvency proceedings against the Corporate Debtor.

9. The Corporate Debtor has submitted that the Operational Creditor has erroneously issued debit notes claiming interest for late payment as there is no clause in the Leave and Licence Agreement providing for the levy of interest on alleged late payment. On bare perusal of the registered Leave and License Agreement dated 11th January, 2018 executed between the Operational Creditor and the Corporate Debtor,

we find that indeed there is no clause for levy of interest on late payment of licence compensation. Further, we find that the invoices raised by the Operational Creditor are also silent with respect to the imposition of interest in case of any delay in making payment towards the outstanding amount. The Hon'ble N.C.L.T, New Delhi Bench (Court II) in the case of M/s. Bhotika Trade & Services Private Limited v/s M/s. Avinash EM Projects Private Limited in CP(IB)-598(ND)/2022 decided on 14.11.2022 has held that interest can be added to reach the threshold of one crore rupees only if provided in the agreement. Para 16 of the Order dated 14.11.2022 is reproduced as follows:

"16. Since neither any specific agreement between the parties is placed on record or produced, pursuant to which interest could be claimed by the applicant nor there is any delayed payment clause with interest is in the invoices, therefore, we are of the considered view that interest cannot be claimed by the Applicant herein, merely to reach the minimum threshold amount of Rs. One crore."

The Hon'ble NCLAT in its Judgment in Appeal(AT)(Insolvency) No.148 of 2018 dated 27.07.2018 in Pawan Enterprises vs. Gammon India Ltd has held that if in terms of any agreement interest is payable to the operational creditor or financial creditor, then the debt will include interest, otherwise the principal amount is to be treated as the debt which is the liability in respect of the claim which can be made from the corporate debtor.

Thus, in the absence of any agreement between the parties with respect to the interest on late payment of licence compensation, the same cannot be claimed by the Applicant herein to reach the minimum threshold of rupees one crore.

10. For the reasons stated above, the debit notes against interest of INR 28,26,337/- and the cost of repairs of INR 50,00,000/- cannot be treated as operational debts for the purpose of computing the minimum threshold of rupees one crore. If the above two charges are deleted from the claim amount, then the amount of default stands reduced to INR 65,75,272/- (Rupees Sixty-Five Lakhs, Seventy-Five Thousand, Two Hundred and Seventy-Two Only), which is well below the minimum threshold of rupees one crore for initiating the insolvency proceedings as stipulated u/s 4 of the Code read with the Notification No. S.O. 1205(E) dated 24th March, 2020 issued thereunder. Further, the Operational Creditor has already adjusted the security deposit of INR 1,40,00,000/- against the arrears of licence compensation and other alleged claims.

11. In the light of the above discussion, the instant Company Petition filed u/s 9 of the Code, 2016 is hereby **dismissed.** There shall be no order as to costs. File be consigned to records.

Sd/-	**Sd/-**
ANURADHA SANJAY BHATIA	**KULDIP KUMAR KAREER**
(MEMBER TECHNICAL)	**(MEMBER JUDICIAL)**