BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, NEW DELHI

C.P. NO.IB-1478(PB)/2019

IN THE MATTER OF:

Omega Finvest LLP

....Petitioner

Vs.

Direct News Private Limited

....Respondent

SECTION: Under Section 9 of the Insolvency and Bankruptcy Code, 2016

Order delivered on: 30.09.2019

Coram:
CHIEF JUSTICE (RTD.) M.M. KUMAR
Hon'ble President

Ms. SUMITA PURKAYASTHA
Hon'ble Member (Technical)

PRESENTS:

For Petitioner : Mr. Abhishek Sharma, Ms. Anisha Mahajan, Advocates

For Respondent : Mr. Gaurav Srivastava, proxy counsel

ORDER
M.M.KUMAR, PRESIDENT

The Petitioner claiming to be an operational creditor has filed the instant Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent Direct News Private Limited (for brevity the 'corporate debtor'). It is appropriate to mention that the 'operational creditor' is a company incorporated under the provisions of the Companies Act, 1956.

2. The Corporate Debtor – Direct News Private Limited was incorporated on 22.12.2006 initially under the name INX News Private Limited as per the provisions of the Companies Act, 1956. The name of the corporate debtor was changed to the present one on 20.07.2015. The identification number of the Corporate Debtor given is CIN U70101DL2006PTC279928.

3. It is submitted by the petitioner that the respondent, earlier known as INX News Private Limited, had entered into a lease deed dated 28.02.2008 with Syndicate Printers Limited to lease the premises situated at B-4, Sector 111, Noida, Uttar Pradesh- 201301. It is appropriate to mention that Syndicate Printers Limited was demerged into Omega Finvest Private Limited vide an order passed by the Hon'ble High Court of Delhi and the same was converted into Omega Finvest LLP in

the year 2012. It is further submitted that in order to continue the lease of the premises the petitioner and the respondent had entered into a lease deed dated 13.07.2016 for a period of three years from 01.07.2016 to 30.06.2019. A Copy of the lease deed is placed on record (Annexure P-8). The terms of the said lease deed were subsequently modified vide modification deeds dated 12.09.2016 and 14.06.2018 (Annexure P-9 and P-10) and as per the said deed the respondent had submitted a security deposit amounting to Rs. 1,25,00,000/- to the petitioner.

4. The petitioner further asserts that upon execution of the modification deed dated 14.06.2018 the respondent issued 13 post-dated cheques for payment of rent for each month from 01.06.2018 to 30.06.2019 for a sum of Rs. 21,60,000/- inclusive of the base rent of Rs. 20,00,000/- along with Goods and Services Tax@ 18% amounting to Rs. 3,60,000/-. The petitioner states that when it presented the cheque towards payment of rent for the month of April and May, 2019, both the cheques got dishonoured.

5. The precise case of the Petitioners is that the total amount in default due to the operational creditor by the corporate

debtor is Rs. 43,94,564/- (inclusive of interest @ 18% per annum). A computation of the amount due including interest is placed on record (Annexure P-7).

6. In Part-IV of the Petition, the Operational Creditor has given the details of the total amount of the debt along with the dates of disbursement. In Column 2 of Part-IV of the Application the Operational Creditor has mentioned the amount claimed in default and the date of the default.

7. In Part V of the Petition the Operational Creditor has mentioned and placed on record the balance sheets, bank statements, emails and other related documents under which it claims the operational debt to become due.

8. It s further submitted by the petitioner – operational creditor that it had served a demand notice under Section-8 of the Code to the respondent- corporate debtor dated 28.05.2019 which is in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016. True Copies of the demand notice along with the proof of dispatch and delivery have been placed on record [Annexure-P-14,P-15 and P-16(Colly)]. It is further submitted by the petitioner that no reply was

received on behalf of the respondent- corporate debtor to the said notice.

9. A reply to the petition has been filed by the respondent-corporate debtor and it is vehemently denied that there is any debt due to the petitioner-operational creditor. The respondent has raised a defence that the debt claimed does not come within the definition of 'operational debt' and therefore the petitioner cannot claim itself to be an 'operational creditor'. Further, the respondent has affirmed that before the instant petition was filed there has been communication between the parties regarding the claimed amount in the petition and therefore there is an existence of a dispute. It is also submitted by the respondent that they had replied to the demand notice issued under Section-8 of the Code and the said notice of dispute had been communicated within the prescribed time to the petitioner-operational creditor. The reply to the demand notice along with the tracking report is placed on record (Annexure R-2). The respondent also averred that there have been correspondence between the parties regarding the adjustment of the rent for the remaining months from the

security deposit and in support of the same reliance has been placed on Clause 9.3.2 of the Deed of Modification dated 14.06.2018 (Annexure P-10).

10. We have minutely gone through the pleadings and have heard the arguments of both sides at length. The issue to be decided and to be adjudicated in the present application is whether the debt claimed is an 'operational debt' within the meaning of Section- 5(21) of the Code and if there is a pre existing dispute between the parties even before issuance of the Section 8 demand notice by the Petitioner.

11. The parameters to fall under the definition of an 'Operational Creditor' have been defined under Section 5(20) of the IBC, 2016 which is ***"any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred"***. Whereas, under section 5(21), the term 'Operational Debt' has been defined which is ***"a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment 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"***.

12. The petitioner in the instant case had leased out its premises to the respondent for the functioning of respondent's day to day operations and it is directly related to the input and output of the supply of services by the respondent. The petitioner in the case had provided the infrastructure services to the respondent for its functioning. A harmonious reading of the above paragraph makes it clear that leasing and letting out the premises amounts to the supply of services. The report of the Bankruptcy Law Reforms Committee dated 04.11.2015 also mentions that the "the lessor that an entity rents out space from is an operational creditor to whom the entity owes monthly rent" and in view of the aforesaid the petitioner is an 'Operational Creditor' within the meaning of Section-5(21) of the Code.

13. A perusal of the email dated 01.05.2019 would show that the respondent- corporate debtor expressed its intention to vacate the rented premises within 2-3 months. It further shows that a request was made by the respondent to adjust the cheque amount of March, 2019 from the security deposit held by the petitioner-

operational creditor amounting to Rs. 1.25 Crores and to hold back the encashment of the cheques to adjust the post-dated rental cheques for the months of April, May and June, 2019. It was for the aforesaid reason that the cheque for April, 2019 was requested to not be encashed. The assurance given in the said letter is to vacate the premises by July/August, 2019 and the remaining cheques from April, 2019 onwards were to be adjusted and the rest of the adjustment was to be made in terms of the agreement at the time of vacating the premises.

14. However, the aforesaid email has been controverted by the trailing email dated 04.05.2019 and the cheque was presented for payment for the month of March, 2019 and the same was dishonoured vide cheque bouncing memo dated 25.03.2019 due to insufficient funds. Likewise the cheque presented for the rent due for the month of April, 2019 was also dishonoured and the memo dated 17.04.2019 was issued. It was insisted that the lease deed was to expire on 30.06.2019 and they were to vacate the premises after restoring the same to its original condition

on or before 30.06.2019 and a request was made for the payment of the rent.

15. It is true that the security deposit of Rs. 1.25 Crore has remained deposited with the Operational Creditor-petitioner, yet the purpose of the deposit is entirely different as is evident from the reading of Clause 9.3.2 of the Rent Agreement which reads as under:

> 9.3.2 On handing back the vacant, peaceful possession of the Demised Premises, Landlord shall within 30 (thirty) days of handover of possession, refund the Security Deposit to the Tenant, after deducting the following:
>
> i. Any Rent Remaining unpaid and interest thereon.
>
> ii. Any Penal Rent and interest thereon remaining unpaid.
>
> iii. Estimated costs of restoring premises as specified at 4.4(i) above.
>
> iv. Rent as specified at 4.4(ii) above
>
> v. Interest as specified at 4.4(iv) above
>
> vi. Any other charges/levies/taxes or other dues whatsoever payable by the Tenant to any authorities/service providers in respect of the Demised Premises.

A perusal of the aforesaid clause would show that within 30 days of handing over the possession the Security Deposit is to be refunded to the tenant after deducting any unpaid rent plus interest thereon, any penal rent plus interest thereon, estimated cost of restoring premises along with rent and interest as specified in sub-clauses of Clause 4.

16. There is no evidence on record showing that the petitioner-operational creditor had ever agreed to adjust the rent from the Security Deposit which has an entirely different purpose. The corporate debtor is assuming on its own that the lease deed would extend to August, 2019 whereas it is determinable in June 2019. Therefore, there is no plausible defence set up and there is no pre existing dispute between the parties.

17. Even otherwise the cheques for the payment of rent were dishonoured in April which would lead to an inference that there is an acknowledgement of debt as has been held in the Judgement rendered by the Hon'ble Appellate Tribunal ***Sudhi Sachdev vs. APPL Industries Ltd. [Company Appeal (AT) (Insolvency) No. 623 of 2018] dated 13.11.2018*** where it has been held that:

> "The pendency of the case under Section 138/441 of the Negotiable Instruments Act, 1881, even if accepted as recovery proceeding, it cannot be held to be a dispute pending before a court of law. Thereby we hold that the pendency of the case under Section 138/441 of

Negotiable Instruments Act, 1881 actually amounts to admission of debt and not an existence of dispute."

18. Therefore, the default stands established and there is no reason to deny the admission of the petition. It is needless to say that if any payment has been made that would be looked into by the Resolution Professional. In view of the above this Tribunal is inclined to admit this petition and accordingly initiate the process of CIRP of the Respondent-Corporate debtor. The Petitioner has proposed the name of the insolvency resolution professional Mr. Abhishek Anand but he has not filed his written communication as per the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and neither has he filed the certificate of registration. Therefore we propose the name of Mr. Sanjeev Gupta as Resolution Professional from the Panel of Insolvency Professionals recommended for the appointment of IRP by the IBBI. His registration no. given is IBBI/IPA-001/IP-01575/2018-2019/12408, e-mail id is fcasanjeev@gmail.com and Mobile No. is 9810034027.

19. We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government and a surety in a contract of guarantee to a corporate debtor. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

20. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional shall immediately (3 days) make public announcement with regard to admission of this application under Section 9 of the Code.

21. We direct the Operational Creditor to deposit a sum of Rs. 1 Lac with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and

Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Operational Creditor. The amount however is subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Operational Creditor.

22. Directions are also issued to the ex-management to provide all documents in their possession and furnish every information in the knowledge within a period of one week from the admission of the petition to the IRP, otherwise coercive steps to follow.

23. There is a general complaint received against the financial creditors, banks, NBFCs and Asset Reconstruction Companies that the amount claimed by them is far more than what is owed by the corporate debtor to them. Many a times the rate of interest is alleged to be exorbitant and allegations are levelled that a penal interest compounded monthly has been charged. We have no mechanism of rectification of claims made. However, the RPs ordinarily have professionals & experts at their disposal and in case

the ex-management raises any such issue then the RP must get it settled in order to avoid any injustice to the corporate debtor.

24. The office is directed to communicate a copy of the order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional at the earliest but not later than three days from today. A copy of this order be also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

Sd/-
30.09.201
(M.M.KUMAR)
PRESIDENT

Sd/-
(SUMITA PURKAYASTHA)
MEMBER (TECHNICAL)

30.09.2019
(VIDYA)