

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER
SHRI ATUL CHATURVEDI,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 68/9/JPR/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:

ARUN KAUSHAL & ANR.

...Operational Creditor/Applicant

Versus

CHOUDHARY BUILD MART PRIVATE LIMITED

...Corporate Debtor/Respondent

MEMO OF PARTIES

1. ARUN KAUSHAL

R/o 4 Birbal Marg,
Jangpura Extension
New Delhi – 110014

.... Operational Creditor No. 1

2. NIRU KAUSHAL

R/o 4 Birbal Marg,
Jangpura Extension
New Delhi - 110014

... Operational Creditor No. 2

VERSUS

M/S CHOUDHARY BUILD MART PRIVATE LIMITED

CIN: U70101RJ2012PTC038065

R/o 404, 4th Floor, KJ City
Tower, Ashoka Marg, C-Scheme
Jaipur, Rajasthan - 302001

...Respondent/ Corporate Debtor

For the Applicant/ Operational Creditor: Srishti Juneja, Adv.

For the Respondent / Corporate Debtor: Aalok Jagga, Adv.
APS Madaan, Adv.
Harkirat, Adv.

Order Pronounced On: 12.07.2023

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present application has been filed by Mr. Arun Kaushal & Mrs. Niru Kaushal ('Operational Creditors'/ 'Applicants'), seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Choudhary Build Mart Private Limited ('Corporate Debtor'/ 'Respondent') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC' / 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules').
2. The Applicants, Mr. Arun Kaushal & Niru Kaushal are the owners of Part B of unit Bearing No. 445 on the Fourth Floor in JMD Megapolis, situated at, Sector 48, Gurugram, Haryana 122018. The alleged default by the Corporate Debtor for the non-payment of operational dues amounts to Rs. 7,64,472.77/- (Rupees Seven Lakhs Sixty-Four Thousand Four Hundred Seventy-Two and Seventy-Seven paisa Only) inclusive of interest amount.
3. The Corporate Debtor, M/s Choudhary Build Mart Private Limited is a private company incorporated under the Companies Act, 1956, on 28.02.2012, having CIN: U70101RJ2012PTC038065. The Respondent has

its registered office as per the Ministry of Corporate Affairs website at – C G R Mall Chahal Chowk Sri Ganganagar Sriganganagar Rajasthan-335001. The Corporate Debtor has an Authorised Share Capital of Rs. 10,00,00,000/- (Rupees Ten Crore Only) and Paid-Up Share Capital of Rs. 9,40,00,000/- (Rupees Nine Crore Forty Lakhs Only).

4. The details of the transactions leading to the filing of this application averred by the Applicants *vide* Diary No. 403/2020 dated 24.02.2020 are as follows:
 - a. The Applicants and Respondent entered into a lease deed Agreement ('Agreement') dated 26.04.2017, wherein the Operational Creditors leased the Part B of Unit No. 445 at Fourth Floor, JMD Megapolis situated at Sohna Road, Sector- 48 Gurgaon Haryana-122018 to Corporate Debtor for a monthly rent of Rs. 38,225/- (Rupees Thirty-Eight Thousand Two Hundred Twenty-Five Only) for a period of 3 years with initial 18 Months lock in period subject to enhancement by 5%. Copy of the Lease Deed annexed as Annexure A-3 of the Petition.
 - b. Thereafter, the Applicants made numerous reminders to the Corporate Debtor for the payment of rent and maintenance charges towards the leased property since the Corporate Debtor has defaulted in payment of rent.
 - c. As per the lease agreement Corporate Debtor was required to indemnify the Operational Creditors against all losses, claims, or demands raised by the Maintenance Company. An amount of Rs

1,98,663.77 (Rupees One Lakh Ninety-Eight Thousand Six Hundred Sixty-Three and Seventy-Seven paisa only) towards maintenance service and charges were payable by the Corporate Debtor.

- d. Subsequently, the Applicants sent a Demand Notice dated 22.07.2019 for payment of money alongside interest for Rs. 7,64,472.77/- (Rupees Seven Lakh Sixty-Four Thousand Four Hundred Seventy-Two and Seventy-Seven paisa) towards the arrears of rent arising out of the Lease Deed. The Corporate Debtor sent an E-mail dated 27.07.2019 in reply to the Demand Notice under Section 8 of the Code.
- e. The aforementioned details, as reflected in Part IV of the Application, are as follows:

Part IV

Particulars of Operational Debt

1.	Total Amount of Debt, Details of Transactions on account of which debt fell due, and the Date from which such debt fell due.	Total amount of debt: Rs. 7,64,472.77/- (Rupees Seven Lakh Sixty-Four Thousand Four Hundred Seventy-Two and Seventy-Seven paisa) inclusive of maintenance charges and legal expenses along with 24% interest p.a. is payable by the Corporate Debtor
2.	Amount claimed to be in default and the date on which the default occurred	That as on the present date, an amount of Rs. 7,64,472.77/- (Rupees Seven Lakh Sixty-Four Thousand Four Hundred Seventy-Two and Seventy-Seven paisa) along with 24% interest p.a. is payable by the Corporate Debtor.

		<p>The default first occurred in March 2018</p> <p>True Copy of the tabular calculation of the amount outstanding is annexed as Annexure-A-2 of the Petition.</p>
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5. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply *vide* Dairy No. 2790/2022 dated 19.09.2022, stating as follows:

- a. The Respondent submits that unit bearing no. 445 on the Fourth Floor in JMD Megapolis at Sohna Road, Sector- 48 Gurugram Haryana- 122018 was vacated on 12.11.2018 whereas the Applicants are contending that the alleged premise was vacated in June 2019.
- b. Further it is stated that the dispute between the parties in the present matter needs to be adjudicated under Rajasthan Rent Control Act, 2001/Civil Procedure Code, 1908. Therefore, the alleged claim of the Applicants is not maintainable.
- c. The Respondent further relied on the Judgement of the Hon'ble Supreme Court passed in *M/s S.S Engineers vs Hindustan Petroleum Corporation Ltd & Ors. Civil Appeal No. 4583 of 2022* and stated that this Tribunal is not a substitute for a recovery forum/trial court. The present petition was filed by the Applicants under Section 9 of the IBC, 2016 for recovery of the disputed rent dues.

- d. The Respondent further contended that the alleged Lease Deed dated 26.04.2017 was executed between the parties and had a lock-in period of 18 months. Subsequent to the completion of the lock-in period on 26.10.2018 all the payments towards rent and maintenance had been made in terms of the Agreement.
- e. It is also submitted that the Applicants themselves mentioned in the Petition on page no. 14 that *the debt payable by the Corporate Debtor has become due under the provisions of Order 37 of the Code of Civil Procedure, 1908*. Therefore, if there is any debt due against the Corporate Debtor, the remedy lies before public law.
- f. The Corporate Debtor has further given a reply to the Demand Notice dated 27.07.2019 stating that the alleged premises were handed over to the Applicants on 12.11.2018 and all payments were cleared.
- g. The Respondent states that the payments of the rent does not fall within the ambit of the Operational Debt under Section 5(21) of the IBC, 2016. Section 5(21) of the Code states that:
- “Operational debt” means a claim in respect of the provision 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.”*
- h. Further the Corporate Debtor states that leasing/renting out space cannot be treated as providing service to the Corporate Debtor within the meaning of Operational Debt.

- i. The Corporate Debtor also raised an existence of a dispute on the date of vacating the alleged property and relied on the Judgment of the Hon'ble Supreme Court passed in *Mobilox Innovations Pvt. Ltd. V. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353* and *Innoventive Industries Ltd. V. ICICI Bank & Anr. Civil Appeal Nos. 8337-8338 of 2017*.
- j. It is also submitted that the Applicants were intentionally ignoring the communications by the Respondent regarding vacating the alleged premise and not accepting the cheques from the Corporate Debtor, therefore, the Applicants are liable to be prosecuted for abuse of process of law under Section 65 of the Code, 2016.
- k. The Corporate Debtor further contended that NCLT is not a debt collection forum, the present petition under Section 9 of the Code filed for recovery of the disputed rent dues (if any).
- l. Additionally, the Respondent relied on the following Judgements of the Hon'ble Supreme Court and NCLAT:
 - I. *Anshul Vashishtha Vs Jayhind Steel Traders and Anr. (Company Appeal (AT) (Insolvency) No. 656 of 2020)*
 - II. *Drip Capital Inc V. Concord Creations (India) Pvt. Ltd. (Company Appeal (AT) (CH) (Ins.) No. 167/2021)*
 - III. *Transmission Corporation of Andra Pradesh Limited Vs Equipment Conductors and Cables Limited (Civil Appeal No. 9597/2018)*

- m. Lastly, the Respondent submitted that there is no debt due against the Applicant, and the claim of the Applicants (if any) is not covered under the definition of Operational Debt under Section 5(21) of the Code.
6. During the course of arguments this Tribunal *vide* order dated 26.09.2022 raised certain queries from the parties for the proper adjudication of the matter. In order to comply with the same, the Applicants filed an affidavit *vide* Dairy no. 3352/2022 dated 15.11.2022 and stating as follows:
- a. The Applicants contended that the subject premises were not vacated up till May 2019 despite repeated reminders through E-mails and calls. Copy of the E-mails dated 10.04.2019, 24.04.2019, 06.05.2019, and 16.01.2022 are annexed as Annexure-A 1, A-2, A-3, and A-4 of the Affidavit respectively.
- b. Additionally, reliance was placed on the Judgment of the Hon'ble NCLAT in *Praful Nanji Satra V/s Vistra ITCL (India) Limited in Company Appeal (AT) (Ins.) No. 713 of 2020* which states that the Corporate Debtor cannot take advantage of his own wrong by setting up the defence of insufficient stamping of the documents.
7. An affidavit has been filed by the Corporate Debtor also in compliance with the order dated 26.09.2022 *vide* diary no. 3680/2022 dated 07.12.2022 stating the following:
- a. The Corporate Debtor states that the Lease Deed requires registration mandatorily as per the provision of the Stamp Act, 1899. In the present

case herein, the document is neither registered nor affixed any stamp duty.

b. Further the Corporate Debtor relied on the Judgement of *Promila Taneja Vs Surendri Design Private Limited in Company Appeal (80) (Insolvency) No. 459 of 2020*, wherein the Hon'ble NCLAT held that dues of the landlord cannot be treated as operational dues and against the same Judgement an appeal is pending before the Hon'ble Supreme Court wherein notices have been issued and there is no stay against the order of the NCLAT.

c. In addition to the above, the Corporate Debtor relied on the following Judgements:

I. *M. Ravindra Nath Reddy Vs Mr. G. Kishan Appeal No. 80(Insolvency) No. 331 of 2019*

II. *Anup Sushil Dubey Vs National Agricultural Co-operative Marketing Federation of India, Company Appeal No. 18 (Insolvency) No. 229 of 2020*

III. *New Okhla Industrial Development Authority Vs Anandson Bhadra Civil Appeal No. 222 of 2021*

d. The Corporate Debtor contended that the alleged premises was vacated on 12.11.2018 and the full rent amount was paid to the Applicants which is apparent from the Bank Statements. Copy of the Bank statement depicting the payment is annexed as Annexure-R4 of the Affidavit.

- e. The Corporate Debtor further states that Rs. 7,19,011/- (Rupees Seven Lakh Nineteen Thousand and Eleven Rupees Only) and Rs. 7,03,547/- (Rupees Seven Lakh Three Thousand Five Hundred Forty-Seven Only) have already been paid towards the rent and maintenance charges respectively, therefore, there is no debt outstanding against the Applicants.
- f. Moreover, the subject matter in the present case cannot be adjudicated under the provisions of the IBC, 2016. An application can be filed under the Rent Control Act, of 1948.
8. The Respondent filed its written submission *vide* Diary No. 751/2023 dated 23.03.2023 stating the following:
- a. The Corporate Debtor submits that the rent has been paid till July 2018. Further, it is an admitted fact that *vide* E-mail dated 09.08.2019 at page no. 55 of the Petition, the Applicants state that the Corporate Debtor has talked about making payment till November 2018 and handed over the keys, however, the Applicants refused to take the keys as the Corporate Debtor has not made full payment. Moreover, the Corporate Debtor was ready and willing to pay the due amount to the Applicants till November 2018.
- b. Further the Corporate Debtor submitted that there was an existence of a dispute between the parties since November 2018 which is much prior to the issuance of the Demand Notice dated 22.07.2019.

c. Additionally, the Corporate Debtor relied on the following Judgements:

- I. *M/s Pitti Coal Company Vs Mahalaxmi Continental Ltd. [Company Appeal (AT) (Insolvency) No. 943 of 2020 upheld by the Hon'ble Supreme Court in M/s Pitti Coal Company vs M/s Mahalaxmi Continental Ltd. & Ors. [CA No. 1898 of 2022]*
- II. *Sabarmati Gas Limited Vs Shah Alloys Limited [SC] [CA No. 1669 of 2020]*
- III. *Ved Contractors Pvt. Ltd. Vs Pan Realtors Pvt. Ltd. [NCLAT New Delhi] [Company Appeal (AT)(Insolvency) No. 908 of 2019]*
- IV. *Living Consumer Products Pvt. Ltd. Vs Play Games 24x7 Private Limited [NCLAT New Delhi] [Company Appeal (AT) (Insolvency) No. 1436 of 2019]*
- V. *Ashish Gupta Vs Delagua Health India Ltd. & Anr. [NCLAT, New Delhi] [Company Appeal (AT) (Ins) No. 17 of 2022]*
- VI. *L. Padmanabha Chari Vs Prateek Apparels Private Limited Company Appeal (AT) (CH) (Ins) No. 120/22]*
- VII. *M/s Embee Software Pvt. Ltd. Vs M/s Silicon Pvt. Ltd. Company Appeal (AT) Insolvency No. 780 of 2019]*
- VIII. *M/s Jyoti Ltd. Vs M/s Prasad & Company (Project Works) Ltd. [Company Appeal (AT) Insolvency No. 288 of 2019]*

- d. The Corporate Debtor also stated that instant proceedings are qualified under Section 65 of the IBC, 2016, and shall be dismissed with exemplary cost since the Applicants have tried to misuse the proceedings under IBC and sought to initiate CIRP for the purpose other than the resolution of the Corporate Debtor.
9. The Applicants have filed the written submission *vide* Diary No. 1237/2023 dated 17.05.2023 and submitted the following:
- a. The present petition is filed under Section 9 of the Code for non-payment of operational dues of Rs. 7,64,472.77/- (Rupees Seven Lakh Sixty-Four Thousand Four Hundred Seventy-Two and Seventy-Seven paisa). The Corporate Debtor has defaulted in the payment of rent dues along with maintenance charges.
 - b. The present Petition is maintainable under Section 9 of the Code. The alleged claim of the Applicants amounts to an Operational Debt in the view of *Jaipur Trade Expocentre Private Limited Vs M/s Jet Airways Training Private Limited CA (AT) (Ins) No. 423 of 2021*.
 - c. Further it is pertinent to note that the Corporate Debtor raised a frivolous and bogus dispute at a belated stage. However, no documents are on record to show the existence of dispute between the parties and reliance was placed on the Judgement of the *Sunil Sachdeva Vs Haldiram Fincap Pvt. Ltd. in NCLT Delhi Company Petition IB 2768(ND) 2019*.

- d. The Applicants submit that the Corporate Debtor contended that there is a deficiency of the stamp duty in the Agreement. In order to refute this argument of the Corporate Debtor, the Applicants relied on the Judgement of the *Praful Nanji Satra Vs Vistra ITCL (supra)*.
 - e. The Applicants also filed a list of the judgments in support of its case *vide* diary no. 1667/2023 dated 11.07.2023.
10. We have heard the Learned Counsels for the parties and perused the averments made in the Application, Reply, Written Submissions, and the documents enclosed with the Application.
 11. This Adjudicating Authority has perused all the relevant papers and found them in order. The Registered Office of the Respondent is situated in the state of Rajasthan; therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this matter is within the purview of Laws of Limitation, as the cause of action arose in 2018, and the Application was filed before this Adjudicating Authority in 2020. Hence, the period of three years after the default occurred had not been exhausted at the time of filing this Application. Therefore, the present Application has been filed within the prescribed period of limitation.
 12. Before we come to the facts of the present case, the statutory scheme with regard to the Application under Section 9 needs to be recapitulated. Section 8 of the Code requires the Operational Creditor on the occurrence of default to deliver a Demand Notice on unpaid Operational Debt. Section 8 (2) of the

Code, 2016 provides that Corporate Debtor within a period of 10 days of the receipt of the Demand Notice bring to the notice of the Operational Creditor existence of dispute, if any.

13. We have a number of judgments showing light on the aspect of pre-existing disputes under Section 9 of the Code. A conjoint reading of Section 8 and Section 9 of the Code shows that an Operational Creditor can trigger the CIRP when there is an undisputed debt and a default in payment thereof. In the present case, the Corporate Debtor had raised a dispute regarding vacating the alleged premises on 12.11.2018 and handed over the same to the Applicant. Further, the Corporate Debtor replied to the Demand Notice dated 27.07.2019 within 10 days of the issuance of the Demand Notice stating that the Corporate Debtor was ready to make the payment of rent till November 2018, accordingly the cheques were also prepared however the Applicants had denied in accepting the said cheques. Copy of the Reply to Demand Notice dated 27.07.2019 is annexed as Annexure- 6 of the Petition.
14. Moreover, it is observed from the records available with us that the Applicants admittedly stated *vide* E-mail dated 09.08.2019 that the Corporate Debtor has offered the payment of rent till November 2018 and handed over the keys however the Applicants have not accepted the keys since the Corporate Debtor did not pay the rent due in full. This action of the Operational Creditors reflects recovery as the motive for filing the instant

Application. Copy of the E-mail dated 09.08.2019 annexed as A-7 of the Petition.

15. The Hon'ble Supreme Court in *Swiss Ribbons Vs Union Of India in Writ Petitions. Civil Nos. 99/2018* held that;

*“12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. **The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.** The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.”*

IBC is not a recovery proceeding. The provisions of the Code cannot be allowed to prevail as a recovery mechanism or to enforce the recovery of claim by the Operational Creditor. The Application under Section 9 cannot be converted into proceedings for recovery, which is contrary to the objective of IBC. The object of the IBC is to resolve the insolvency of the Corporate Debtor and to bring back the Corporate Debtor on its feet.

16. We have closely gone through the facts of the case. As per Section 8(2)(a) of the Code, *‘existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoices in relation to such dispute’* can interdict Section 9 proceedings under the Code. Therefore, there is a pre-existing dispute the merits of which need not be examined by this Adjudicating Authority, and the claim of the Operational Debt cannot be raised before this Adjudicating Authority for CIRP of the Respondent Company.
17. Furthermore, the Hon’ble Supreme Court of India, in the matter of *‘Mobilox Innovative Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353’*, held as follows:

“40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties.

Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster.

However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a

dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

18. In view of the foregoing, *inter-alia* including pre-existing dispute, we have no option but to reject the prayer of the Operational Creditors to initiate proceedings under Section 9 of IBC.
19. Hence, the Application is Dismissed. The Order in the present matter is made in terms of Section 9 (5) (ii) of IBC, 2016, and based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority.
20. Accordingly, CP No. (IB)68/9/JPR/2020 is dismissed.

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**SHRI DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

-Sd-

**SHRI ATUL CHATURVEDI,
TECHNICAL MEMBER**