

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT No. V, MUMBAI BENCH**

C.P. No. 3859/I&B/2019

Under section 8 & 9 of the IBC, 2016

In the matter of

Plutusone Hospitality Private Limited

Unit No. 403 'B2' wing, 4th Floor, Kanakia
Boomerang, Chandivali Farm Road, Yadav
Nagar, Chandivali, Andheri (East), Mumbai -
400072

.... Petitioner / Operational Creditor

V/s.

Busabong & Company Private Limited

B-2, Usha Sadan Colaba

Post Office, Colaba Mumbai - 400005.

.... Corporate Debtor

Order Reserved on: 16.12.2022

Order Pronounced on: 06.02.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via Video Conferencing):

For the Petitioner: Adv. Srushti More i/b Ashok Pratap and Co.

For the Corporate Debtor: Adv. Fatema Kachwalla, Hormuz Mehta and
Ahsan Allana i/b. J. Sagar Associates

Per: - Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. This Company petition is filed by Plutosone Hospitality Private Limited (hereinafter called “**the Petitioner**”) seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Busabong & Co. Private Limited (hereinafter called “**Corporate Debtor**”) alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 9 Insolvency and bankruptcy code (hereinafter called “**Code**”) read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor had failed to make payment of a sum of Rs. 2,16,05,725/-.

The submissions by the Operational Creditor: -

3. On December 8, 2017, the Corporate Debtor and Petitioner entered into a Restaurant Operations and Services Agreement (hereinafter referred to as the “ROSA” wherein it was agreed that the Petitioner would finance, furnish and equip restaurants in Mumbai which were to be operated by Corporate Debtor under their proprietary mark “Busago” and / or “Busaba” (“Restaurant”).
4. Under the ROSA, the Corporate Debtor was appointed as an operator in the said Restaurants to provide operations, management assistance and technical assistance as would be required in the said Restaurants. As per the ROSA, the Petitioner was required to pay for the Capital Expenditure and Security Deposit for each of the Restaurants and the Corporate Debtor was to arrange for the working capital and cash flows to operate and manage up to five restaurants within the city of Mumbai for a five years term.

5. Further, as per the ROSA, the Corporate Debtor and the Petitioner identified, negotiated and executed rental agreements with respect to three Restaurants in the following premises:
- 10, A Wing Ground Floor, City Park Building, Hiranandani Powai;
 - S1036, Ventana Shopping Complex, Hiranandani Estate, Ghodbunder Road, Thane; and
 - G24, R Gallewria, Runwali Greens, Mulund Goregaon Link Road, Bhandup.
6. It is also pertinent to note that under Article II- Section 4 (Capital Expenditure) of the ROSA, the Petitioner was to provide the capital expenditure of upto Rs. 35,00,000/- per outlet towards the setup cost of providing necessary infrastructure in the said restaurants and the petitioner claims that as on date the Petitioner has, in fact, incurred more than Rs. 35,00,000/- for two of the three outlets though the Petitioner was not obligated to do so in accordance with Article II Section 4 (Capital Expenditure) of ROSA, but in good faith the Petitioner granted the Corporate Debtor an additional amount of Rs. 3 lakhs for the Powai outlet and Rs. 4 lakhs approximately for the Thane outlet as capital expenditure.
7. Under Article II- Section 4 (Working Capital), it was agreed between the parties that the Working Capital shall be arranged by the Corporate Debtor from the Operating Account as defined in the ROSA. However, in the event the Corporate Debtor requires additional working capital, the Petitioner was to provide the same in any manner as may be mutually agreed between the parties.
8. Thus, from the above, it is clear that the Corporate Debtor was obliged to return the Working Capital, granted by the Petitioner to the Corporate Debtor, in priority to any other payments under the ROSA or otherwise.

9. It is submitted that the Petitioner paid an amount of Rs. 7,02,628/- as working capital to the Corporate Debtor. However, the said amount remains unpaid. The amount was paid by way of a financial assistance and hence qualifies as a 'Financial Debt' as per Section 5(8) of the Code. Therefore, the Petitioner reserves its right to initiate separate proceedings to recover the Working Capital given to the Corporate Debtor, under Section 7 of the Code.
10. Due to non-payment of the dues by the Corporate Debtor, the Petitioner addressed a letter dated 20.06.2018, inter alia, stating that an amount of Rs. 11,87,911/- is due and pending from the Corporate Debtor to the Petitioner. However, no payments were made by the Corporate Debtor. Thereafter, due to the continued non-payment of dues, the Petitioner issued a Legal Notice dated 28.06.2018 and called upon Corporate Debtor to pay a sum of Rs. 11,87,911/- towards the outstanding amounts under the ROSA.
11. Furthermore, as per the Article VII of the ROSA, it was the obligation of Corporate Debtor to clear rental charges/ license fee of the rented premises for each of the Restaurants, on a monthly basis or before the 4th calendar day of each month. However, the Corporate Debtor has failed to release payment towards the same. Thus, the Corporate Debtor has violated the terms of the ROSA as it has illegally utilized the sales proceeds from the three Restaurants towards the corporate expenses of Busabong & Co. Private Limited and other expenses which are unknown to the Petitioner.
12. On 12.02.2019, the Petitioner received a claim notice from one, Roma Builders Private Limited (hereinafter referred to as "ROMA"), the landlord of one of the Restaurant premises, wherein the Petitioner was called upon to pay an amount of Rs. 9,28,086/- towards rental and maintenance of the Thane Restaurant, which was outstanding. It is reiterated that under the ROSA, the obligation to pay the monthly rentals was solely upon the

Corporate Debtor.

13. Consequently, the Petitioner issued another Notice dated 14.03.2019 and called upon Corporate Debtor to pay outstanding amount of Rs. 1,38,07,142/- and further make good all the material breaches of the ROSA committed by it within 7 days therefrom.
14. As no payments were made by the Corporate Debtor, the Petitioner issued a Demand Notice under Section 8 of the Code dated 29.03.2019. Vide this Demand notice, the Petitioner claimed an amount of Rs. 1,38,07,142/-. The Petitioner received a reply dated 02.04.2019, wrongly denying all contents of the Notice dated 14.03.2019 and calling upon the Petitioner to withdraw the said notice. Thereafter, on 12.04.2019, a notice of existence of dispute was issued by the Corporate Debtor. The Petitioner has submitted that the said notice of dispute is baseless, erroneous and was issued with the mala fide intent to avoid the CIRP.
15. Subsequently, on 18.07.2019, the Petitioner received a Termination Notice from ROMA, calling upon the Petitioner to make a payment of Rs. 18,25,153/- failing which ROMA would be entitled to take possession of the licensed premises. Thereafter, on 30.09.2019 a Notice of Dispute was issued by the Corporate Debtor upon the Petitioner. However, it was submitted that the Notice of Dispute was issued erroneously and maliciously by the Corporate Debtor to avoid the CIRP. It is submitted that as on date, the outstanding payable by the Corporate Debtor to the Petitioner, as per the terms of the ROSA, is Rs. 2,16,05,725/-
16. The Petitioner also submits that Mr. Nikhil Chib, the Director of the Corporate Debtor vide email dated 13.06.2019, addressing an email to Mr. Saumyendra of the Petitioner, admitting its liability. Hence the present petition.

Reply filed by the Corporate Debtor: -

17. The Corporate Debtor had filed their Affidavit in Reply (“**Reply**”) and denied each and every statement, contention and allegation made by the Petitioner.
18. It is submitted that as per the nature of the terms of the ROSA, the Petitioner is not an Operational Creditor but merely an investor. In this regard, the Respondent had placed reliance upon the following from the Investment Agreement:
- *In paragraph no. I of the ROSA, the Petitioner has been referred to as "Investor"; and*
 - *Under Article VII of the ROSA, the revenue share model between the parties was subject to the revenue to be generated by the restaurants.*
19. It is further submitted that the return on investment was dependent on the revenue to be generated by the restaurants. However, due to the various breaches committed by the Petitioner, including its failure to remit Working Capital to the Respondent, the restaurants were unable to break even and, therefore, the Petitioner cannot seek the return on its investment under the false and fraudulent pretext of an Operational Debt.
20. In terms of the ROSA, the restaurants were set up at Powai, Thane and Mulund in December 2017, January 2018 and March 2018 respectively. The premises wherein these restaurants were operating were rented in the name of the Petitioner under three different Leave and License Agreements. The Corporate Debtor was not a party to any of the said agreements.
21. It is submitted that the Petitioner issued a demand notice dated 29.03.2019 to the Respondent and claimed an unpaid Operational Debt of Rs. 1,38,07,142/-. On 12.04.2019, the Corporate Debtor in response to the demand notice, issued a notice of dispute and denied the existence of an ‘Operational Debt’ was incorrectly

claimed by the Petitioner.

22. It is submitted that the Petitioner had again issued a Demand Notice dated 19.09.2019, based on which the present petition is filed. In response to the said demand notice, the Respondent vide letter dated 30.09.2019 (Notice of Dispute), brought the pre-existing disputes to the notice of Petitioner. The Corporate Debtor stated that there is no Creditor-Debtor relationship between the Petitioner and the Corporate Debtor and under the ROSA, it was the Corporate Debtor who was rendering services for day to day operations, management assistance and technical assistance services for the restaurants, whereas the Petitioner's role was to provide timely finance towards operational and working capital, until the three restaurants broke even and there is no 'Operational Debt' as defined under Section 5(21) of the Code. Therefore, the Petitioner does not qualify as an 'Operational Creditor' under the Code to maintain the present petition under section 9 of the Code. Even otherwise, there is a pre-existence of dispute between the Petitioner and Corporate Debtor as defined under Section 5(6) of the Code, and therefore, the petition is not maintainable.
23. It is further submitted that the Operational Creditor had failed to establish the breaches made by the Corporate Debtor in terms of the ROSA. In this backdrop, no amount can be claimed to be due and/or payable by the Corporate Debtor to the Operational Creditor on account of breach of the ROSA. On the contrary, the Operational Creditor itself is in breach of its obligations agreed upon by the Parties under the ROSA and is liable to compensate the Corporate Debtor for the loss of reputation, business and goodwill.
24. It is further submitted that the Operational Creditor has also not filed the certificate which is requested to be filed under Section 9(3)(c) of the Code.

Rejoinder filed by the Operational Creditor:

25. In the rejoinder, the Petitioner has denied if it was the Operational Creditor's duty to provide Working Capital to the Corporate Debtor until the Restaurants achieved a break-even as per the terms of the ROSA as claimed by the Corporate Debtor. The Petitioner submit that, it was agreed between the parties that the Working Capital shall be arranged by the Corporate Debtor from the Operating Account (as defined in the ROSA). However, in the event the Corporate Debtor required additional working capital, the Operational Creditor was to provide the same "**in any manner as may be mutually agreed between the Parties**". Thus, it was never an obligation of the Operational Creditor to unilaterally and continuously provide the working capital to the Corporate Debtor.

26. The Petitioner has further denied the contention of the Respondent that it is not an Operational Creditor and merely an investor. It is submitted that under the ROSA, the Corporate Debtor was obliged to make payments to the Operational Creditor in following manner:

- *An aggregate commission of 10% of the operating receivable after deducting applicable GST on the operating receivables plus GST on aggregate commission on or before the 7th day of each month for the previous month; and*
- *Monthly rentals charges/license fees on or before the 4th day of each month for the same month.*

Such operating receivables clearly form an Operational Debt in accordance with Section 5(21) of the Code. The obligation under the ROSA were clear so as to bind the Corporate Debtor to make payments to the Operational Creditor. It is also submitted that the ROSA is an operating agreement and not an investment agreement.

27. The Petitioner had denied the objection raised by the Corporate Debtor of not filing a Certificate under Section 9(3)(c) of the Code. The Petitioner submits that the Certificate under Section 9(3)(c) of the Code is directory and not mandatory.

28. The Petitioner has further denied the pre-existing dispute raised by the Corporate Debtor and submit that the Notice of Dispute is erroneous and frivolous and has been issued by the Corporate Debtor to avoid the initiation of CIRP. The Petitioner further submit that Article VII of the ROSA expressly provides the obligation of the Corporate debtor to make payments of the monthly rent to Operational Creditor, which the Corporate Debtor has failed to do so. The Corporate Debtor is financially unstable and the CIRP of the Corporate Debtor is crucial for its survival.

Findings:

29. We have heard the Counsel for the parties.

30. During the course of arguments, the Counsel for the Operational Creditor has argued that as per the 'ROSA' Agreement payments were to be made by the Corporate Debtor from the Operating Receivables i.e. the revenue collected /generated by running the restaurants. This fact has not been denied by the Corporate Debtor.

31. The Counsel for the Petitioner has further contended that it has not been disputed by the Corporate Debtor that the payments out of the Operating Receivables were to be made to the operational creditor as agreed under the 'ROSA'. Apart from that, there was no mandatory obligation upon the operational creditor to provide working capital to the Corporate Debtor. The total amount of Rs. 2,16,05,725/- was due against the Corporate Debtor who has admitted its liability by the Email dated 13th June 2019. It is also been admitted by the Corporate Debtor that the restaurants has been generating revenue but no payments were made to the Operational Creditor from the revenue which the Corporate Debtor was otherwise bound to share with the Petitioner on regular basis. Therefore, a fit case of admission of Petition under Section 9 is

made out as no pre-existing dispute has been raised by the Corporate Debtor. Even though a semblance of a dispute has been raised, that is patently feeble and would not fall within the definition of a 'Pre-existing dispute'. In support of the argument, the Petitioner has relied upon the case of Mobilox Innovations (P) Ltd v. Kirusa Software (P) Ltd, 2018 (1) SCC 353, wherein it is held that a patently feeble legal argument or an assertion of fact unsupported by evidence would not amount to a 'dispute'.

32. On the other hand, the counsel for the Corporate Debtor has vehemently argued that the case set up by the Petitioner/Operational Creditor does not prima facie fall within the ambit of Section 9 of the Code, as the petitioner is not covered under the definition of operational creditor. According to the counsel for the Corporate Debtor, as per the terms and conditions incorporated under the 'ROSA', the petitioner has been an investor and not an operational creditor and, therefore, is not entitled to invoke Section 9 of the Code. In this regard, it has further been pointed out that under the 'ROSA', the petitioner has been referred to as "investor" and as per the Article VII of the ROSA, the revenue sharing between the parties was subject to the revenue to be generated by the restaurants. The return on investment made by the petitioner was dependent on the revenue to be generated by the restaurants. Moreover, the petitioner was to provide working capital to the Corporate Debtor but it miserably failed to remit the working capital to the respondent due to which the restaurants could never break even. Since the Petitioner has failed to fulfill its obligations and duties under the 'ROSA', it cannot raise any claim. Apart from that, due to failure of the Petitioner to honor its obligation of providing working capital to the Corporate Debtor, the business could never gain momentum. Moreover, the landlords of Thane, Mulund and Powai restaurants were constantly threatening the Corporate Debtor to close the restaurants due to non-payment of rentals and as a result, the Corporate Debtor was constrained to

close the outlets. Under these circumstances, according to the counsel for the Corporate Debtor, the Petitioner cannot take advantage of its own wrongs to invoke Section 9 of the Code and the Petition deserves outright dismissal.

33. We have heard and considered the contentions raised by the Counsel for the parties.
34. By way of this petition, the petitioner/ Operational creditor has claimed that operational debt of Rs. 2,16,05,725/- was outstanding against the Corporate Debtor at the time of filing of the petition. The total of the outstanding amount has been given in annexure II-I attached with the petition. As per table-A attached with the annexure II-I, an amount of Rs. 1,01,84,522/- has been claimed to be due on account of maintenance, rental of Powai restaurant. As per Table-B, an amount of Rs. 23,50,853/- is stated to be due on account of rental maintenance of Thane outlet while as per Table-C, an amount of Rs. 29,41,056/- is stated to be due on account of rental and electricity charges of the Mulund outlet. An amount of Rs. 59,80,069/- is stated to be due being commission of 10% on the net sales of Rs. 5,06,78,540/- at all the three outlets.
35. Here it would be interesting to refer to the agreement i.e. the 'ROSA' wherein all the terms and conditions were settled between the parties for setting up /running the business of restaurants at different places. Under the 'ROSA', the Petitioner is referred to as an "investor" while the Corporate Debtor is referred to as the "operating partner". As per Clause-B of 'ROSA' in the head of "Recitals", it is mentioned that the investor i.e. the Petitioner is desirous of or intends to finance, furnish, acquit and decorate in Mumbai restaurants consisting of seating capacity of at least 25 persons to be operated by the operating partner under the Operating Partner's proprietary mark, "Busago" and/or "Busaba" (the "Restaurants"). On the face of it, the Petitioner seems to have invested in the business of restaurants in which the Corporate

Debtor was made the operating partner.

36. It would further be pertinent to refer to the “Revenue Sharing Clause” that is Article VII of the ‘ROSA’ which provides as under:

- a) *First, to the Investor such that the Investor would get the aggregate commission of (i) 10% of the Operating Receivables after deducting applicable goods and service tax (including any surcharge, cess and/or other levy thereon) on the Operating Receivables plus applicable goods and service tax on aggregate commission on or before the 7th day of each month for the previous month and (ii) monthly rental charges/ license fees under the Rental Agreement plus goods and service tax on such rental charges /License fees on or before the 4th day of each month for the same month.*
- b) *Balance to the Operating Partner, after Operating Expenses and amounts payable under (a) above.*

37. As per Article II Section 4 of the ROSA, the operating partner was to provide and arrange for working capital and cash flows sufficient in the operating account to ensure the uninterrupted operation and effective continuation of the operations of the restaurants. It is further provided that if the operating partner required working capital for the initial period till a restaurant has achieved break even, the investor shall provide the same in the manner as mutually agreed between the party and the operating partner shall be obliged to return the money provided by the investor in priority to any other payment under this agreement or otherwise.

38. From the aforesaid terms and conditions incorporated under ROSA, it emerges that as per the contract called the “ROSA”, the Petitioner was to invest money in setting up the restaurant by

hiring /taking on lease or rent premises and furnishing the same with necessary infrastructure to convert the premises into running restaurants. It was also the duty of the Petitioner to provide for working capital for running the restaurant in case the Corporate Debtor was not able to do so till the restaurant broke even. As against this obligation, the Petitioner was to get 10% of the Operating Receivables and was also entitled to recover the monthly rental charges from the revenue generated from the restaurants every month.

39. Against the backdrop of terms and conditions of aforesaid contract called ROSA, it is to be seen as to whether the money invested by the Petitioner in the business of restaurant can be termed or qualified as operational debt or not. Section 5(21) defines “Operational Debt” as the *claim in respect of the provision 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.*

40. From the above ‘definition’ it is clear that a case of an Operational Debt can be made only in case of certain goods are supplied or certain services are provided. If the terms and conditions of the ROSA in detail are taken into consideration, it cannot be said to be a case of supply of goods or providing any type of services. In our considered view, the Petitioner and the Corporate Debtor by way of the agreement called the ‘ROSA’ entered into a joint venture for setting up a business of restaurants. As per the contract executed between them, the Petitioner was to invest money in setting up the restaurants by renting premises and also providing for the necessary infrastructure and in case of need, a working capital was also to be provided to the Corporate Debtor in certain events. No doubt, as per the agreement, the primary duty of securing necessary working capital was of the Corporate Debtor itself. It can

further be made out from the Revenue Sharing Clause of the agreement that against the aforesaid investment, the Petitioner was entitled to recover the rentals of the restaurants and 10% of the revenue earned by the Corporate Debtor from each of the restaurants. On the face of it, the business set-up by the parties was in the nature of a joint venture and revenue was also to be shared by the parties. Therefore, strictly going by the agreement executed between the parties, it cannot be said to be a case of supply of goods or services and, in our considered view, in the context of the present case, the investment made by the Petitioner cannot be equated with or covered under the definition of “Operational Debt”.

41. As regards the working capital of Rs. 7,02,628/-, allegedly claimed the Petitioner to have provided to the Corporate Debtor, it have been candidly admitted in the petition itself that the said part is a Financial Debt and the same is not an Operational Debt covered under the definition provided under section 5(21) of the Code.
42. Therefore, in our considered view, absolutely no case is made out for admission of the Petition under Section 9 of the Code. In fact, it was a joint venture. The necessary infrastructure for the restaurants was to be provided by the petitioner and the Corporate Debtor was to run and operate the business and the revenue generated from the business was to be shared as per the terms incorporated in the contract i.e. the “ROSA”. Therefore, the investment made by the Petitioner was not an operational debt. That being so, according to us, the remedy available to the Petitioner is not under Section 9 of the Code. The Petitioner may seek rendition of accounts from the Corporate Debtor before an appropriate forum or court of law; as the case may be.
43. As a sequel to above observations, the above company petition

bearing No. 3859 of 2019 under Section 9 of the Code is hereby dismissed.

Sd/-

Anuradha Sanjay Bhatia
Member (Technical)

Sd/-

Kuldip Kumar Kareer
Member (Judicial)