

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP (IB) NO. 3446 OF 2018

**APPLICATION BY OPERATIONAL CREDITOR TO INITIATE
CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER
THE INSOLVENCY AND BANKRUPTCY CODE, 2016.**

*(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

M/s TNS India Private Limited.

Registered Office : 7th Floor, Orion
Block,

The V-Ascendas IT Park, Plot No. 17,
Software Units Layout, Madhapur,
Hyderabad, Telangana- 500081, India.

.....Operational Creditor

Versus

Mack Star Marketing Private Limited.

Registered Office : Dheeraj Apartment-II,
P.P. Dias Compound, Natwar Nagar
Road No. 1, Jogeshwari € , Mumbai,
Maharashtra-400060, India.

.... Corporate Debtor

Order delivered on: 08.09.2021

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

Hon'ble Chandra Bhan Singh, Member (Technical)

Appearance:

For the Petitioner: Adv. Anand Bagwade,

For the Respondent: Adv. Shivani,

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

ORDER

1. The above Company Petition is filed by M/s TNS India Private Limited., (hereinafter called as “Operational Creditor”) seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Mack Star Marketing Private Limited (hereinafter called as “Corporate Debtor”) alleging that the Corporate Debtor has committed default in making payment of Rs. 73,41,042/- to the Operational Creditor under the invoices raised by them upon the Corporate Debtor, by invoking the provisions of Section 9 of Insolvency and Bankruptcy Code (hereinafter called the “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. **The brief facts of the petition are as follow :-**
 - i. The corporate debtor M/s Mack Star Marketing Private Limited is the owner of the premises located at the 3rd floor of the building known as ‘Kaledonia’ situated on Sahar Road, Off Western Express Highway, Andheri (East) Mumbai.
 - ii. The corporate debtor executed a registered leave and license agreement dated 13.01.2011 registered with the office of Sub Registrar of Andheri in favour of the operational creditor i.e. M/s TNS India Private Limited for a period of 5 years from 07.01.2011 to 06.01.2016 in addition to the license fee and the amenity fee payable to the corporate debtor under the license agreement, the operational creditor also paid a refundable interest free security deposit of Rs. 1,27,68,042/- to the corporate debtor. As per terms of the understanding between the parties the corporate debtor was liable to refund the security deposit to the operational creditor on the

expiration of the license term and upon the operational creditor vacating and handing over the Licensed.

- iii. Although the license term expired on 06.01.2016, the operational creditor continued to occupy the licensed premises on the same terms as contained in the earlier License agreement and the Amenities Agreement. The understanding between the parties was that they would execute a fresh leave and license agreement and amenities agreement in due course until which the terms of the license agreement and the Amenities Agreement would continue to govern their relationship as well as their mutual roles responsibilities, obligations and liabilities.
- iv. In the meantime the corporate debtor transferred the property to M/s Orlando Trading Private Limited under an agreement sale dated 08.03.2016 and hence, fresh agreement were executed between the parties.
- v. Under an email dated 17.05.2016 the corporate debtor intimated the operational creditor about the transfer of property to M/s. Orlando Trading Private Limited and requested the operational creditor to sign the letter dated 11.05.2016 executed by the corporate debtor and M/s. Orlando Trading Private Limited for attornment of the license (Attornment letter) The Attornment Letter inter-alia stipulated that the corporate debtor has retained the Security Deposit and that the entire Security Deposit shall be refunded to the operational creditor as per the terms and conditions of the License Agreement.
- vi. On 31.05.2016 the operational creditor handed over the Licensed premises which was acknowledged by the corporate debtor and demonstrated by issue of cheques. Despite due

handover of the by the operational creditor, the corporate debtor failed to refund the Security Deposit three post dated cheques issued by the corporate debtor in favour of the operational creditor dated 17.09.2016, 24.09.2016, 30.09.2016, each cheque for an amount of Rs. 13,56,750/- drawn on Kotak Mahindra Bank were return for insufficient funds on 21.09.2016, 27.09.2016 and 01.10.2016 respectively.

- vii. Subsequently, the corporate debtor paid an amount of Rs. 13,56,750/- vide a demand draft dated 28.09.2016. At the request of the corporate debtor, the operational creditor once again represented the Dishonored Cheques with the Bank on 08.12.2016 which was once again declined for insufficiency of funds.
- viii. The operational creditor got issue a notice dated 06.01.2017 to the corporate debtor and all the directors of the corporate debtor informing them about the Dishonored Cheques. The Operational Creditor received a reply dated 24.01.2017 from two of the directors namely Mr. Kamal Khanna and Mr. Chaitanya Gorrepati.
- ix. The operational creditor filed a Criminal Complaint against the corporate debtor U/sec. 138 of the negotiable Instruments Act, 1881 and the matter got settled between the parties after the paying of Rs. 40,70,250/- by the corporate debtor to the Operational Creditor. An amount of Rs. 73,41,042/- remains unpaid.
- x. Hence, the Operational Creditor filed above company petition.

3. The corporate debtor filed an affidavit in reply of one Mr. L.D. Singh authorized signatory on 11.04.2019 contending that the security amount deposited by the applicant under leave and License agreement dated 30.01.2011 r/w. Amenities Agreement dated 08.03.2011 will not amount to an “Operational Debt” and therefore an application under section 9 of the Insolvency and Bankruptcy Code is not maintainable. The corporate debtor also filed additional affidavit in reply dated 04.07.2019 contending that the leave and license agreement dated 13.01.2011 contains an arbitration clause in Clause 39 and therefore the remedy if any available to the “Operational Creditor” is to go for an arbitration. Apart from the above main pleas, the Corporate Debtor also contended in their reply that the minority shareholders of the Corporate Debtor are holding the control of the company and they have committed so many frauds and financial irregularities in accepting security deposits from the people like Operational Creditor and misutilized the funds of the Corporate Debtor etc. which are not necessary for deciding the above company petition and therefore this tribunal is not dealing with any of the pleas which are not relevant for this petition.
4. In the light of the above pleadings the core issue that falls for consideration in the above company petition is :-
Whether the petitioner qualifies as an “Operational Creditor” and whether the Security deposit amount claimed by the “Operational Creditor” qualifies as an “Operational Debt” within the meaning of the code.
5. In order to decide the above issue it is important to extract the definitions of “Operational Creditor” and “Operational Debt” as define under the clause 20 and 21 of Section 5 reads as under:-

(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) “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

6. It is an admitted fact in this case that the “Operational Creditor is a License who has not supplied any goods nor services to the corporate debtor similarly the “Operational Creditor” is not a Central Government any State Government or any local authority. Similarly, the amount claimed by the “Operational Creditor” is the balance security deposit payable by the corporate debtor to the “Operational Creditor”.
7. Therefore, from the above referred facts and from the plain reading of the definitions this bench feels that the claim of the “Operational Creditor” does not qualify as an “Operational Debt” and the “Operational Creditor” also does not qualify under the definition of “Operational Creditor” within the meaning of the code and the above company petition is liable to be dismissed on the ground of maintainability.
8. Accordingly, the above company petition is dismissed. However the above order does not preclude the Operational Creditor from recovering the same before an appropriate forum of course subject to limitation.

Sd/-
CHANDRA BHAN SINGH
Member (Technical)

Sd/-
H V SUBBA RAO
Member (Judicial)