

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2

ITEM No.306
CP(IB)/4(AHM)2021

Order under Section 9 IBC

IN THE MATTER OF:

Lease Plan India Pvt Ltd

.....Applicant

V/s

Shiva Industrial Security Agency (Gujarat)Ltd

.....Respondent

Order delivered on 16/10/2023

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order. The order is pronounced in open Court, vide separate sheet.

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
DIVISION BENCH
COURT-2**

CP (IB) NO.4/AHM/2021

(Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

IN THE MATTER OF:

Lease Plan India Private Limited

Through its Authorised Signatory
Mr. Medhanshu Mishra,
General Counsel & Compliance Officer
Lease Plan India Private Limited,
Having its Registered office at:
Ground Floor, C4C/332, Janakpuri,
New Delhi - 110058

....Operational Creditor

VERSUS

Shiva Industrial Security Agency (Gujarat) Limited,

Having its Registered office at:
Sameer Complex, RS No.71,
Navsarjan Society,
GIDC Pandesara,
Surat - 394221

....Corporate Debtor

Order pronounced on:16.10.2023

CORAM: Mrs Chitra Ram Hankare, Hon'ble Member(J)

Dr. V. G. Venkata Chalapathy, Hon'ble Member(T)

APPEARANCE:

For the Operational Creditor: Mr. Paritosh Budhiraja, Advocate

For the Corporate Debtor: Ms. Sweta Mohanty, Advocate

ORDER

1. This Petition is filed by **Lease Plan India Private Limited** (Operational Creditor) through its Authorised Signatory Mr. Medhanshu Mishra, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 claiming to be an Operational Creditor for initiation of Corporate Insolvency Resolution Process (CIRP) against **Shiva Industrial Security Agency (Gujarat) Limited** (Corporate Debtor) for making default in payment of outstanding amount of Rs.6,26,67,605/- (Rupees Six Crore Twenty Six Lakh Sixty Seven Thousand Six Hundred and Five only.)
2. The Operational Creditor is engaged in the business of providing vehicles on operating lease and also provides fleet management & administration service to its clients with respect to the vehicles provided on lease as per the terms of the Agreement executed between the Parties having its registered office at Ground Floor, C4C/332, Janakpuri, New Delhi - 110058.
3. The Corporate Debtor is a limited company, incorporated on 11.07.1997 under the provisions of Companies Act, 1956 duly registered with Registrar of Companies, Ahmedabad, Gujarat with CIN:U67120GJ1997PLC032649, having registered office at Sameer Complex, RS No.71, Navsarjan Society, GIDC Pandesara, Surat - 394221. Therefore, this Bench has jurisdiction to deal with this Petition.
4. Briefly, the facts of the case as mentioned in the Petition and submitted by the Ld. Counsel for the Operational Creditor are summarised as under:

- a) The Corporate Debtor and the Operational Creditor entered into a transactional arrangement for leasing of vehicles vide Master Lease Agreement bearing No. ND 11980 dated 11.01.2016. Pursuant to the Master Lease Agreement, 120 vehicles were leased to the Corporate Debtor from the year 2016 onwards from time to time. In accordance with the terms and conditions of the said Agreement, the Operational Creditor raised invoices from time to time in respect of all the aforesaid leased vehicle. From January 2018 onwards, the Corporate Debtor has been extremely erratic in making the timely payment of monthly lease rentals and other charges.
- b) The Corporate Debtor started defaulting in payment of the same and the parties subsequently discussed and negotiated a settlement and accordingly reduced the settlement in writing vide Settlement Agreement dated 24.05.2019. Vide the said settlement agreement, the Operational Creditor, only for settlement purpose, agreed at accepting Rs.1,49,89,597/- towards unpaid lease rentals payable by the Corporate Debtor. Vide the said settlement itself, the Operational Creditor agreed to sell the 120 leased vehicles to the Corporate Debtor (which were already in the possession of the Corporate Debtor) for a sale consideration value of Rs. 2,99,10,413/-. Accordingly, under the said settlement, the Corporate Debtor was liable to pay a total sum of Rs.4,49,00,000/- (Rupees Four Crore Forty Nine Lacks only) to the Operational Creditor.
- c) In order to discharge his liability the Respondent (Corporate Debtor) handed over two post-dated cheques no. 406015 dated 24.08.2019 for an amount of Rs. 2,24,50,000/- and cheque no. 406017 dated 24.11.2019 for Rs.2,24,50,000/- drawn on Axis

Bank Ghod Dod Road, Surat which were dishonoured for the reason payment stop by the drawer.

- d) As both cheques got dishonoured, the settlement agreement was treated to be null and void in accordance with the stipulation contained in Clause 1.3 of the Settlement Agreement which provides that in case the cheques get dishonoured the Operational Creditor shall be at liberty to treat the settlement as null and void without prejudice it shall have right to levy late payment charges and invoke other rights under the Master Lease Agreement or the other applicable laws without prejudice to any rights that were available to the Operational Creditor under the MLA. Criminal Complaint was filed under Section 138 under NI Act, 1881 at District & Post Gurgram, Haryana.
 - e) Even after several requests and reminders, the Corporate Debtor failed to pay the said outstanding amount. Hence, the Operational Creditor, issued demand notice dated 06.08.2020 under section 8 of the IBC, 2016 in Form 3 for the demand of Rs. 6,26,67,605/- and the same was delivered to Corporate Debtor on 13.08.2020. Despite service of the said demand notice, the corporate debtor had failed to make the payment of the outstanding amount. Thereafter, the Corporate Debtor neither paid aforesaid outstanding amount nor raised any dispute with respect to said outstanding amount.
5. The Corporate Debtor has filed its reply on 14.03.2021 stating that:
- a) The Petitioner has claimed default as on June 30, 2020. Consequently, on a demurrer the petition is not maintainable and deserves to be dismissed inasmuch as the Insolvency & Bankruptcy Code (Amendment) Ordinance, 2020 is applicable

as the default is alleged post March 25, 2020. The Respondent is not a creditor of the respondent, operational or otherwise. There is no debt owed by the Respondent to the Petitioner.

- b) The Petitioner at one place is treating the settlement agreement dated 24.05.2019 as null and void and at the same time seeking specific performance of agreements dated 11.01.2016 and 24.05.2019 which is not permissible in law. It is settled law that proceedings under the IBC are not meant for specific performance of commercial agreements. The appropriate remedy in such a case is before the civil court.
- c) A mere perusal of the contents of the petition in juxtaposition with the said agreements will show that the payments to be made to the petitioners were in consideration of foreclosure of the agreement dated 11.01.2016 and consequent transfer of ownership of vehicles to the Respondent. In the absence of transfer of vehicles, the Petitioner is not entitled to any sum, much less which is claimed in the present petition. The Petitioner cannot claim any amount on account of foreclosure or sale of vehicles. In fact, such a claim is *ex facie* not maintainable by means of an application under Sec.9 of the IBC.
- d) It is further submitted that contrary to the provisions of the IBC Code, the statutory demand notice sent by the Petitioner was not in proper formant and without any annexures. Thus, the present petition is defective and is liable to be set aside on this ground alone. It is further submitted that the Petitioner has filed various emails with the petition. However, an affidavit under Section 65B of the Evidence Act has not been filed by the

petitioner or his counsel. Hence the said documents cannot be admitted or relied upon to adjudicate the present case.

6. The Operational Creditor filed a rejoinder to the reply of the Corporate Debtor on 21.09.2021 and made the following submissions:

a) The Operational Creditor states that it is absolutely wrong and is contrary to the records that the Petitioner has claimed the date of default as June 30, 2020. The date of default has been clearly mentioned as 19.12.2019 and not 30.06.2020 and therefore the Insolvency & Bankruptcy Code (Amendment) Ordinance 2020 is not applicable in the present case.

b) The Operational Creditor States by no stretch of reasoning, it can be said that he is seeking specific performance of the agreements dated 11.01.2016 or 24.05.2019. It is submitted that there is a breach on the part of the Corporate Debtor in adhering to its obligations under the settlement agreement dated 24.05.2019 under which the Corporate Debtor had in discharge of its obligations, agreed to pay a sum of Rs. 4,49,00,000/- to the Operational Creditor. It is further submitted that as per the Clause 1.3 of the Settlement Agreement in the event SISA fails to make the payment as set out in clause 1.2 or any of the cheques provided under this Agreement is dishonoured for any reason whatsoever, LPIPL shall be at liberty to treat the Settlement Agreement as null and void without prejudice to LPIPL's right to levy the late payment charges under Article 4.4 of the MLA and invoke other rights available to it under the MLA or the applicable laws. In the above circumstances there has been revival and resumption of

all the liabilities and obligations of the Corporate Debtor under the MLA.

- c) The Operational Creditor submits that the payments to be made to the petitioner were in consideration of foreclosure of the agreement dated 11.01.2016 and/or consequent transfer of ownership of vehicles to the Respondent. The Operational Creditor reiterates that under the settlement agreement the amounts were payable by the Corporate Debtor under the following heads:
- i. Rs. 1,49,89,587/- towards outstanding lease rental and other charges as due on 30th September 2018 in terms of the invoices raised by the Operational Creditor under the Master Lease Agreement.
 - ii. Rs. 2,99,10,413/- towards consideration for sale of 120 leased vehicles by Operational Creditor to the Corporate Debtor.

Both the aforesaid heads being the consideration against the services provided by the OC and the sale of the vehicles respectively, squarely fall within the purview of the provisions of the MLA dated 11.01.2016 and thus fall within the ambit of operational debt under the IBC.

- d) The Operational Creditor submits that in the present case there is no requirement for filing an affidavit under Section 65B of the Evidence Act in as much as present proceedings are summary in nature wherein trial is not to take place and particularly when the CD has not denied the said emails, there does not remain to be any requirement of an affidavit under Section 65 of the Evidence Act.

7. We have heard the Ld. Counsel for both the parties and perused the material available on record with written submissions.
8. This Adjudicating Authority is of the opinion that before going into detailed discussion on the facts of the case on merits, it is relevant to examine the issue of maintainability of the present Petition in the light of the provision of Section 10A of the Code, 2016. The provision of Section 10A is reproduced herein verbatim:-

*“10A. Notwithstanding anything contained in section 7,9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March,2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf: **Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.***

Explanation – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said section before 25th March, 2020” (Emphasis supplied).

Subsequently, the period was increased to one year after 25th March, 2020.

9. Applicant relied upon ***B.K. Educational Services Private Limited vs. Parag Gupta and Associates 2019 (11) SCC 633*** in which it was held that, ***“Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of Limitation Act gets attracted -- “The right to sue”, therefore, accrues when a default occurs – If default has occurred over three years prior to date of filing of application, application would be barred***

under Article 137 of Limitation Act, save and except in those cases where, in facts of case, Section 5 of Limitation Act may be applied to condone delay in filing such application.”

10. Respondent relied upon judgement dated September 15, 2022 passed by the Hon'ble NCLAT, New Delhi in ***Company Appeal (AT) (Ins.) No. 742 of 2022*** in which it was held that

“14. So far the contention of the Corporate Debtor that the matter may be referred to the Arbitration under Section 8 of the Arbitration and Conciliation Act is concerned, as we have already stated in the afore-stated para that the role of National Company Law Tribunal is very limited, while exercising its power under Section 7, 9 and 10 of the IBC, 2016. While exercising its power under Section 9, the Adjudicating Authority is required to see only there is a default in payment of debt or any dispute has been raised by the Corporate Debtor or not, so far refer the matter to the Arbitration is concerned, it is beyond the scope of Section 9 of the IBC, 2016. Therefore, we are unable to consider the prayer of the Corporate Debtor to refer the matter before the arbitration. However, the Corporate Debtor is at liberty to move before the Proper and Competent Court. As per the submissions of Corporate Debtor, Commercial Civil Suit No. 2/2020 pending for consideration, therefore, Corporate Debtor is at liberty to raise this issue before that Court.

11. It can be seen from Part IV(2) of Form V of the petition and various material placed on record, the date of default has been clearly mentioned as 19.12.2019 (date of default of cheque) and not 30.06.2020 and therefore, we cannot agree to the Corporate Debtor submission that the petition is not maintainable and deserves to be dismissed inasmuch as the IBC (Amendment) Ordinance, 2020 is applicable.

12. There is no "force majeure" clause relevant in the case on any regulatory changes as the reason for the respondent not in a position to repay the debt. The Corporate Debtor is to be proceeded against for both recovery of the lease rentals and possession of the assets presently under occupation/service of the CD based on the original agreement. The argument is not sustainable.
13. The present petition is well within the period of limitation. It is a settled position of law that the proceedings under Section 9 of the IBC are governed by Article 137 of the Limitation Act which provides that the period of limitation would commence from the date when the Right to apply accrues.
14. As per the Clause 1.3 of the Settlement Agreement in the event SISA fails to make the payment as set out in clause 1.2 or any of the cheques provided under this Agreement is dishonoured for any reason whatsoever, LPIPL shall be at liberty to treat the Settlement Agreement as null and void without prejudice to LPIPL's right to levy the late payment charges under Article 4.4 of the MLA and invoke other rights available to it under the MLA or the applicable laws. In the above circumstances there has been revival and resumption of all the liabilities and obligations of the Corporate Debtor under the MLA.
15. The claim raised by the claimant in the instant Petition herein is based upon the rights of the Operational Creditor arising out of the MLA dated 11.01.2016 for the services provided to the CORPORATE DEBTOR under the said MLA. Accordingly, the claims of the Operational Creditor in the present petition squarely fall within the ambit of the definition of 'debt' in terms of Section 5(21) of the IBC. It is reiterated that the Settlement Agreement in terms of the provisions contained therein has become null and

void on account of default of payment due under the same and the rights of the Operational Creditor under the MLA survive.

16. In view of the above, we are of the considered view that the present Petition (CP(IB)No.4/AHM/2021) is maintainable to the extent of Rs2,28,49,880- plus interest for default at @2.5% as per agreement 6.8.2016. However, since the stated agreement dated is considered null and void, and the transfer of name of the vehicles in the name of the corporate debtor has not taken place, the application is partially allowed up to the default in payment of lease rental due. Accordingly, we accept this present petition.

Order

1. Application is allowed.
2. The Corporate Debtor- M/s. Shiva Industrial Agency (Gujarat) Ltd is admitted in CIRP under section 9 of the IBC, 2016.
3. The moratorium under section 14 of the IBC, 2016 is declared for prohibiting all of the following in terms of Section 14(1) of the IBC, 2016:
 - a. the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

- b. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - c. any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - d. the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
4. The moratorium under section 14 of the Code shall come to effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of section 31 or passes an order for liquidation of the corporate debtor under Section 33 of the IBC 2016, as the case may be.

5. However, in terms of Section 14(2) to 14(3) of the Code, the supply of essential goods or services to the corporate debtor as may be specified, if continuing, shall not be terminated or suspended, or interrupted during the moratorium period.
6. As the Operational Creditor has not suggested an Interim Resolution Professional, we appoint Piyush Jagdish Bhansali having registration number IBBI/IPA-001-IP-P-02138/2020-2021/13352 to act as Interim Resolution Professional (IRP) subject to the condition that no disciplinary proceedings are pending against him. He shall conduct the Corporate Insolvency Process as per the Insolvency and Bankruptcy Code, 2016 r.w. Regulations made thereunder. Specific consent of the IRP in Form 2 along with disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is filed, which is on record.
7. The IRP so appointed shall make a public announcement of the initiation of Corporate Insolvency Resolution Process and call for submissions of claims under section 15, as required by Section 13(1)(b) of the Code.

8. The IRP shall perform all his functions as contemplated, inter-alia, by sections 17, 18, 20 and 21 of the Code. It is further made clear that all personnel connected with the corporate debtor, its promoters, or any other person associated with the management of the corporate debtor are under legal obligation as per section 19 of the Code to extend every assistance and cooperation to the IRP. Where any personnel of the corporate debtor, its promoters, or any other person required to assist or co-operate with IRP, do not assist or cooperate, the IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.
9. The IRP is expected to take full charge of the corporate debtor's assets, and documents without any delay whatsoever. He is also free to take police assistance in this regard, and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.
10. The IRP shall be under a duty to protect and preserve the value of the property of the 'corporate debtor company' and manage the operations of the corporate debtor company as a

going concern as a part of obligation imposed by section 20 of the Code.

11. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
12. We direct the financial creditor to pay IRP a sum of Rs.2,00,000/- as fees and expenses till the COC decides about his fees/expenses.
13. The Registry is directed to communicate this order to the financial creditor, corporate debtor, and to the Interim Resolution Professional and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on the website immediately after pronouncement of the order. A copy of the order may be communicated to the IBBI for their record and for getting the status of the CD updated in the MCA portal.
14. The IRP shall also serve a copy of this order to the various departments such as Income Tax, GST (centre), State Trade Tax, Provident Fund etc. who are likely to have their claim against Corporate Debtor as well as to the trade unions/employees associations so that they are informed

timely of the initiation of CIRP against the Corporate Debtor timely.

15. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of this order.

16. Accordingly, the present application i.e., CP (IB)/04(AHM)2021 stands admitted. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

-Sd-

-Sd-

DR V.G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

MRS CHITRA RAM HANKARE
MEMBER (JUDICIAL)

Puneet Shukla-LRA