IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-IV

IB-595/(ND)/2021

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

In the matter of:

Thakral Computers Private Limited

...Operational Creditor/Applicant

Versus

Pythhos Technology Private Limited

...Corporate Debtor/Respondent

Coram:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)
MS. SUMITA PURKAYASTHA, HON'BLE MEMBER (TECHNICAL)

Order Delivered on: 04-02-2022

ORDER

Per: SMT. SUMITA PURKAYASTHA, MEMBER (TECHNICAL)

1. This is an application filed 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 for initiation of Corporate Insolvency

Resolution Process in respect of respondent company, claimed to be the corporate debtor.

2. The applicant, Thakral Computers Private Limited has filed the present application claiming as the operational creditor with the prayer for initiation of Corporate Insolvency Resolution Process under the provisions of the Code.

3. The details of transactions leading to the filing of this petition as averred by the petitioner are as follows:

   a. The Operational creditor is engaged in the business of branded computers and apple products across India.

   b. It is the case of the applicant that at the request of the Corporate Debtor, the parties entered into an arrangement on July, 2011 whereby the Operational Creditor provided the office space at the Office Premises to the Corporate Debtor for its use. As per the arrangement, the Operational Creditor used to bear the common area maintenance charges, electricity charges, property tax, etc. and various debit notes used to be raised against the Corporate Debtor.

      Furthermore as per the understanding, the terms and conditions between parties, the terms and conditions of the lease deed with DLF Ltd. were to be applicable to the Operational Creditor as well.

   c. The Operational Creditor used to regularly raise Invoices and Debit Notes for the Rent as well as the expenses incurred on the account of the Corporate Debtor. However, the Corporate Debtor was not regular in paying the dues of the Operational Creditor and repeatedly defaulted in the same.

d. The operational creditor sent a Demand Notice dated 28.01.2021 demanding payment of an unpaid operational debt of Rs. I,02,21,098/- (as per provisions under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 via Speed Post. Copy of the Demand Notice demanding payment in prescribed Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 duly served upon the address as per the website of Ministry of Corporate Affairs, Government of India, which was replied too.

4. The Corporate Debtor in its reply to the application submits that:

   a. There is a pre-existing dispute between the Applicant and the Respondent with regard to the amount claimed in the application.

   b. That the corporate debtor submitted that the definitions of 'Claim', 'Debt', 'Default', 'Operational Creditor' and 'Operational Debt' under the Code do not make any reference to rental dues of property. As such, the lease of immovable property cannot be considered as supply of goods or rendering of any services and thus, cannot fall within the definition of 'Operational Debt'. Further neither the Petitioner nor the Respondent are in the business of leasing/sub-leasing of immovable properties and therefore, the alleged dues are not linked to their operations.

c. It is submitted that the Petitioner has also claimed a 'default' to the tune of Rs.11,66,404 /- against various Debit Notes. It is furthermore submitted that these are the reimbursements sought by the Petitioner and not a 'Operational Debt'. The Debit Note for August, 2017 is not even on record.

d. It is stated that though the Petitioner claims that the lease subsists since July, 2011, it has not placed on record any title document to show that the demised premises was under the possession of the Petitioner before 2017.

   Copy of the Lease Deed dated 12.06.2017 has been placed on record.

e. It is submitted that the petition is barred by limitation whereby the Petitioner claims that the date of default is between 01.07.2017 to 02.03.2018 and thus, the limitation stands expired on 01.03.2021; while the petition was filed on 01.10.2021.

f. It is further submitted that the after the Demand Notice (Form-3) dated 28.01.2021, the Respondent had approached the Petitioner and the parties came to a settlement whereby the Respondent was allowed to clear the dues by 01.12.2021. The same is duly recorded in the Reply dated 24.02.2021.

5. In this regard, the applicant has denied the allegations made in the reply of the corporate debtor and further submitted in rejoinder that:

i. That in the reply filed by the corporate debtor stated that the Corporate Debtor had taken the demised premises, i.e. office space at 181 h Floor, Tower-B in Building No.5, Phase-III, DLF Cyber City, Gurgaon ("Office Premises") from the Operational Creditor for running its office. However, the Corporate Debtor defaulted in the payment of rent against the said premises leading to the filing of the present petition

ii. It is submitted that upon the occurrence of the said default, the Operational Creditor had delivered a demand notice dated 28.01.2021 under Section 8 of IBC demanding payment of the defaulted amount. The Corporate Debtor failed to bring to the notice of the Operational Creditor any dispute or payment within 10 days as stipulated in Section 8(2) of IBC. In fact, no response whatsoever was received within the stipulated period.

iii. It is further submitted that in reply dated 24.02.2021 was received wherein the Corporate Debtor admitted the default and sought time till 01.12.2021 to pay the amount.

iv. That it is submitted that no dispute whatsoever was raised by the Corporate Debtor and in fact, the default and claim stood admitted. The Corporate Debtor had only sought time till 01.12.2021 for making the payment. The same was never accepted by the Operational Creditor. Even otherwise, till date, not even a single penny has been paid by the Corporate Debtor.

v. That the Office Premises was used by the Corporate Debtor for running its primary office and hence, had a direct relation with the operations of the Corporate Debtor.

vi. That as regards the issue of sub-leasing, it is submitted that no such issue was ever raised by the Corporate Debtor for the many years it used the Office Premises. In fact, there was no subleasing/licensing and the Office Premises was only given for use by the Corporate Debtor. No issue whatsoever was raised by the landlord or the Corporate Debtor in this regard.

vii. That it is settled law that the 'dispute' under IBC must be preexisting i.e. it must exist prior to issuance of the demand notice. In the present case, it was not even raised in the Reply to the Demand Notice under Section 8 and is for the first time, being alleged before this Tribunal. it is submitted that the Hon'ble Supreme Court of India has excluded the period of limitation w.e.f. 15.03.2020 owing to the outbreak of COVID-19. The relevant portion of the Order dated 23.09.2021 passed in Miscellaneous Application No. 665 of 2021 in SMW(C) No. 3 of 2020 is as under:

> *"I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15. 03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15. 03.2021, if any,*

shall become available with effect from 03.10.2021."

Thus the default on 01.07.2017 shall be well within the limitation period as the limitation for the same would expire on 30.06.2020.

5. We have heard the arguments of Ld. Counsels for the applicant and the respondent and perused the case records.

6. The respondent case that the petition is barred by limitation wherein the date of default is between 01.07.2017 to 02.03.2018 and thus, the limitation stands expired on 01.03.202. Further the applicant relied on the judgement of the Hon'ble Supreme Court of India wherein it had excluded the period of limitation w.e.f. 15.03.2020 owing to the outbreak of COVID-19. Thus, the limitation period expiring on 30.06.2020 was extended by the order of Hon'ble Supreme Court, Hence the petition is not time barred.

7. Further the respondent corporate debtor has admitted its liability to pay the operational debt via reply dated 24.02.2021. The corporate debtor in its reply dated 24.02.2021 admitted the default and further sought time till 01.12.2021 to pay the amount.

8. Furthermore with regard to the argument of the respondent that the claim of the applicant not a operational debt- It is clear that the lease of the office space is commercial, wherein the NCLAT in this matter Anup Sushil Dubey vs. National Agricultural Co-operative Marketing Federation of Indian Limited & Ors observed that:

"*lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease,*' and thus held that lease rentals arising out of use and occupation of a cold storage unit which is for commercial purpose will qualify as operational debt".

Hence, the claim of the applicant is an operational debt.

9. In view of the aforesaid discussion, since the corporate debtor already admitted its liability to clear its debt which is evident from reply dated 24.02.2021, the present application deserves to be allowed.

10. The applicant has not proposed the name of an IRP, therefore, this bench appoints Mr. Sunder Khatri as the Insolvency Resolution Professional of the corporate debtor. The registration number of the IRP being IBBI/IPA-002/IP-N00437/2017-18/11191 and email id- sunder_khatri@yahoo.com. IRP above named is appointed subject to the condition that no disciplinary proceedings are pending against him. The specific consent is required to be filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 and made disclosures as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016.

11. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Sunder Khatri to meet out the expense 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 one

week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

12. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.

13. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

-Sd-

(SUMITA PURKAYASTHA)
MEMBER (T)

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(DHARMINDER SINGH)
MEMBER (J)