

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH III
NEW DELHI**

CP No.IB-251/ND/2018

**IN THE MATTER OF SECTION 9 OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016.**

In the matter of:

**M/s Indsur Global Limited,
1001-C, 10th Floor, Tower-1,
Indiabulls Finance Center,
Senapati Bapat Marg,
Elphiston Road(West),
Mumbai-400013**

... Operational Creditor

Versus

**M/s Indiabulls Real Estate Company Pvt. Ltd.
M-62 & 63 First Floor,
Connaught Place,
New Delhi-110001.**

.. Corporate Debtor



Coram:

**R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)**

**Dr.V.K.SUBBURAJ
Hon'ble Member (TECHNICAL)**

Counsel for the Petitioners : Mr. Piyush Joshi, Advocate

Counsel for the Respondents : -

Order delivered On:01.05.2018

ORDER

M/s Indsur Global Limited as an Operational Creditor (OC) under the provisions of Insolvency and Bankruptcy Code, 2016 (IBC,2016) has filed this Application under the provisions of Section 9 of IBC,2016 against the Corporate Debtor (CD) namely, M/s Indiabulls Real Estate Company Private Limited. The transaction giving rise to the claim in short arises out of registered leave and license agreement entered into between the parties on 28.1.2014 in relation to the premises situated at



No.1001-C, 10th Floor, Tower-1 of Indiabulls Finance Center, Senapati Bapat Marg, Mumbai-400013 for a period of 60 months effective from 1.4.2014 to 31.3.2019 and the rent was paid on a per sq. feet basis having a total area of 4526 sq. feet and that on and from 1.4.2017 the rent to be enhanced and that the total license fee per month comes upto Rs.8,63,855/-. However, with the assistance of licensed surveyor commissioned by OC in 12.02.2017, it was found that the total area comes only to 3719 sq. Feet whereas the rent all along had been collected for 4526 sq. feet and in the circumstances the excess rent had been paid which is to be refunded by CD and which had lead to the claim before this Tribunal and that the break-up of which is given as under:

Amount claimed to be in default and the date on which the default occurred.

Sr. No.	Particulars	Amount
1.	Principal Outstanding Rent Amount as on 31.10.2017	Rs.44,43,544/-



2.	Add. Interest @ 18% upto October, 2017	Rs.14,37,771/-
3.	Principal Outstanding Maintenance amount due as on 31.10.2017	Rs.6,24,618/-
4.	Add: Interest @18% upto October, 2017	Rs.2,06,124/-
5.	Total outstanding due as on October, 2017	Rs.67,12,057/-

2. In relation to the above total outstanding amount, a notice under Section 8 of IBC,2016 it is averred was issued as the correspondence sent prior to it, did not bear any fruit, on 27.12.2017 under the hand of the legal counsel of the OC and subsequently another demand notice was also issued on 25.1.2018 under Section 8 of IBC,2016 taking into consideration the then prevalent legal position that Section 8 notice cannot be issued by legal counsel based on the decisions of Hon'ble NCLAT which subsequently came to be overruled by Hon'ble Supreme Court in Macquarie Bank Limited v. Shilpi Cable Technologies Ltd. in Civil Appeal No.15135 of 2017.



3. To the said notice under Section 8, it is averred that notice of dispute has also been sent by the CD vide its reply dated 31.1.2018 where the claim made by the OC has been disputed and in view of non-payment of the claim being in default, this Application has been preferred as stated earlier by the OC. The matter was first listed before this Tribunal on 15.3.2018 and since there was no appearance on the part of OC the matter was hence adjourned to 5.4.2018 on which date the submissions in relation to necessity of issue of notice to the CD was made by the Ld. Counsel for OC, , this Tribunal directed the Petitioner to establish the maintainability of the Petition in view of the order passed by this Tribunal in Jindal Steel & Power Ltd. v. DCM International Ltd. in IB No.200(ND)/2017 on 16.10.2017 wherein it was held that any claims arising out of lease of immovable property by the lessee, the said transaction cannot be considered as rendering of services or supply of goods as required under the provisions of IBC, 2016 for invoking the provisions as an OC and in relation to operational debt and also



in view of order of this Tribunal in relation to the above position being upheld by the Hon'ble NCLAT in Company Appeal(AT)(Insolvency) No.288 of 2017 dated 28.11.2017 reproduced as under:

Admittedly, the Appellant is a tenant of Respondent- 'Corporate Debtor'. Even if it is accepted that a Memorandum of Understanding has been entered between the parties in regard to the premises in question, the Appellant being a tenant, having not made any claim in respect of the provisions of the goods or services and the debt in respect of the repayment of dues does not arise under any law for the time being in force payable to the Central Government or State Government, we hold that the Appellant tenant do not come within the meaning of 'Operational Creditor' as defined under sub-section (20) read with sub-section (21) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to 'I&B Code') for triggering Insolvency and Bankruptcy process under Section 9 of the 'I&B Code'.

2. For the said reasons, the Adjudicating Authority having dismissed the application under Section 9 of the 'I&B Code' by impugned order dated 6th October, 2017, no interference is called for.

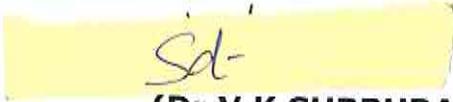
3. In absence of any merit, the appeal is dismissed. No cost.

4. An opportunity was given to Ld. Counsel for OC to make submissions in respect of the above order and judgement

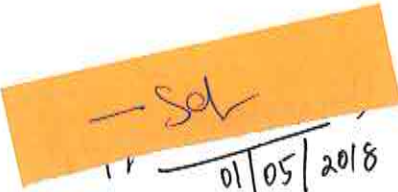
passed by NCLT and Hon'ble NCLAT respectively and to establish the non-applicability of the ratio laid down as above in the instant case and the matter was posted for hearing on 26.4.2018. On 26.4.2018 Ld. Counsel for OC stated that they have not been able to locate the judgement as referred to above but however represented that he will endeavor to convince this Tribunal about the maintainability of this Petition under the provisions of IBC,2016. We heard in detail the submissions of Ld. Counsel for OC and after due consideration of the facts which we have already given in paragraph supra and the same is not repeated here for the sake of brevity. This Tribunal in the Jindal's case referred to above has already taken a stand that in relation to lease transaction for the immovable property the lessee in relation to any claim cannot fall within the definition of Section 5(20) read with Section 5(21) as rendering any services and the same cannot fall within the provisions of IBC,2016 and in the circumstances, we do not find any ground exists even for issue of notice to CD and in the circumstances the Petition is dismissed



but without cost. Let a copy of this order be communicated to the Operational Creditor.

 Sd- 01/05/2018
(Dr.V.K.SUBBURAJ)
MEMBER (TECHNICAL)

U.D.Mehta
01/05/2018

 Sd- 01/05/2018
(R.VARADHARAJAN)
MEMBER (JUDICIAL)