

IN THE NATIONAL COMPANY LAW TRIBUNAL

JAIPUR BENCH

**CORAM: Dr. P.S.N. PRASAD,
HON'BLE JUDICIAL MEMBER
SHRI RAGHU NAYYAR,
HON'BLE TECHNICAL MEMBER**

Company Petition No. (IB)- 12/9/JPR/2019

(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:

Mr. SUDHIR GARG

**...OPERATIONAL CREDITOR/
APPLICANT**

VERSUS

M/S ASG HOSPITAL PRIVATE LIMITED

**...CORPORATE DEBTOR/
RESPONDENT**

**For the Applicant: Anant Kasliwal, Adv.
Shashank Kasliwal, Adv.**

For the Respondent: Shivangshu Naval, Adv.

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MEMO OF PARTIES

Mr. Sudhir Garg
Resident At: - D-247(A), Behari Marg,
Bani Park, Jaipur- 302016 (Rajasthan)

...Operational Creditor/Applicant

VERSUS

ASG Hospital Private Limited
Registered Office at: PLOT NO 1,
Shyam Nagar, Pal Link Road,
Jodhpur - 342001 (Rajasthan)

...Corporate Debtor/Respondent

Order Pronounced On: 10.01.2020

ORDER

Per- Dr. P.S.N. Prasad (Judicial Member)

1. This Application has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) read with Rule-6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Sudhir Garg (for brevity 'Applicant') claiming to be an Operational Creditor with a prayer for initiation of Corporate Insolvency Resolution Process against M/s ASG Hospital Private Limited (for brevity "Respondent").



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2. The Applicant is an individual, residing at D-247(A), Behari Marg Bani Park, Jaipur- 302016 (Rajasthan).
3. The Respondent is a Private Limited Company incorporated under the provisions of Companies Act, 1956 on 10.12.2007, duly registered with the Registrar of Companies, Jaipur bearing CIN: U85110RJ2007PTC025459 and the Registered Office of the Respondent located at Plot No 1, Shyam Nagar, Pal Link Road, Jodhpur-342001 (Rajasthan).
4. It is the case of the Applicant that in year 2010 the respondent approached the Applicant to take on lease a portion of Applicant's premises situated at D-247 (A), Bihari Marg, Bani Park, Jaipur (Rajasthan) for the purpose of running a hospital under the name and style of ASG Eye Hospital for period of 5 years. The parties had executed appropriate lease deed for year 2015-16. The lease was further extended for a period of 3 years by executing a lease deed dated 21.03.2017, at a rent of Rs. 3,25,000/- per month which would be increased @ 10 % per year. Copy of the lease deed is annexed as Annexure- II with the Application.
5. It is further submitted by the applicant that the respondent had served notice dated 01.02.2018 through RPAD and also through email dated 02.02.2018 upon the Applicant for termination of the lease stating that it would vacate the premises on 30.04.2018 but it did not vacate the same till filing of the

Application. The applicant, through various emails, requested for handing over the premises and stated that otherwise the respondent would be liable to pay lease money at escalated rate. The respondent never replied to any of the emails sent by the Applicant. The last payment of Rs. 3,93,250/- was made by the respondent for the month of October, 2018. It is further stated that clause 27 of the lease deed provides that in case the lessee does not handover the premises, lessee will be liable to pay additional rent at an escalated rate of 50% of the then prevailing monthly rent; thus respondent was liable to pay rent @ Rs. 5,89,875/- from the month of June, 2018. Neither any payment towards rent was ever made nor the respondent vacated the premises.

6. The applicant issued a notice under Section 8 of the Insolvency and Bankruptcy Code for an amount of Rs. 29,30,382/- which includes Rs. 23,59,500/- as rent arrears and Rs. 4,24,708/- as differential Goods and Service Tax due amount on 06.12.2018 on the respondent, which was duly received by Corporate Debtor through post on 08.12.2018.
7. The Corporate Debtor sent its reply dated 17.12.2018 to the notice. On perusing the reply, it is seen that the Corporate Debtor had stated that since the applicant had asked to occupy the property till expiry period otherwise the security deposits would not be released, therefore the Corporate Debtor

had not vacated the premises even after giving termination notice. The Corporate Debtor further stated that clause 27 of lease deed relating to escalation of rent is applicable only in case property is not handed over on or before the expiry date of the agreement. The Corporate Debtor has not held the possession beyond such expiry date, therefore it is not liable to pay escalated rent nor any GST. The Corporate Debtor has denied the amount claimed by the applicant and admits the liability to pay rent of only Rs. 8,49,420/- for month of November and December, 2018. It is further stated that the corporate debtor will make payment of Rs. 8,49,420/- on refund of security deposit of Rs. 9,75,000/- from the applicant or Rs. 1,25,580 from the applicant after adjusting the due amount of Rs. 8,49,420/-. Also, the respondent shall not be liable for any rent beyond December, 2018.

8. The Applicant further submits in the application that respondent has never asked for the deposit money and also as per security deposit receipt the respondent is entitled to refund only if all the dues towards electricity, water or other services utilised by lessee have been paid and original receipts handed over to lessor. The respondent has never before the issuance of notice under Section 8 raised dispute with respect to clause 27 of lease deed. The outstanding amount for month of November and December is Rs. 11,79,750 (Rs. 5,89,875/- per month). It is stated in the Security Deposit Receipt that



“the deposit shall not be adjusted in running lease amount”, therefore the applicant cannot adjust Rs. 8,49,000/- with security deposit.

9. It is further submitted by the applicant that as per Section 2 of Central Goods and Service Tax Act, 2017 leasing or letting out a premise is a service. Therefore, the applicant has been collecting Goods and Service Tax @ 18 % from the respondent and depositing the same with appropriate authority. It is further submitted that after the receipt of demand notice the respondent has vacated the premises; however, it has not given the possession of the same. Thus, the applicant filed the present application under section 9 of Code, 2016 and duly served the same on the corporate debtor.
10. The total amount claimed by the applicant as mentioned in part IV is a sum of Rs. 27,84,208/- plus interest @ 18% p.a. plus non-payment of lease money for January, 2019. Default has been continuously occurring since May, 2018.
11. The respondent has filed its reply to the Application vide Dairy No.869/2019 dt. 14.05.2019. It is submitted by the respondent that the dispute concerning lease consideration and attached security deposit does not fall within the definition of Operational Debt defined under Section 5(21) of Part II of the Insolvency and Bankruptcy Code, 2016 and therefore the Applicant is not an ‘Operational Creditor’ as defined under Section 5 (20) of the IBC, 2016. It is further submitted that the matter is already pending before the Rent



Tribunal, Jaipur titled as ASG Hospital Pvt. Ltd. Vs. Sudhir Garg. It is admitted that the notice for vacation was served on the applicant. However, business move was not achieved and the applicant has also refused to return the security deposit so the respondent continued paying rent of Rs. 3,93,250/- plus GST, till the month of October,2018 and same was accepted without any discomfort by the applicant. The respondent had vacated the premises by end of December 2018 and also made payment of all bills of amenities. The respondent had filed FIR against applicant so that they were allowed to take away their goods from the premises.

12. The Applicant has filed rejoinder dated 21.05.2019 and submits that the applicant has not received any notice from the Rent Tribunal and is not aware of any such proceeding. The applicant wrote various e-mails to respondent requesting to pay lease consideration at escalated rate of 50% and to vacate and handover the premises in furtherance of termination notice. The respondent is still in the possession of the leasehold premises and in support of the said statement the applicant has produced the photographs clicked on 16.05.2019 of the said premises having the hoarding of the respondent.
13. The learned counsel for the parties has placed detailed arguments. The preliminary question to be considered for discussion is:

Whether the dispute concerning lease consideration and attached security deposit does fall within the definition of "Operational Debt"

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and the applicant herein i.e. lessor under a lease agreement can be categorized as an "Operational creditor" as defined under the provisions of Insolvency and Bankruptcy Code, 2016.

14. In order to answer the above question it is necessary to go through the following definitions as provided under of Insolvency and Bankruptcy Code, 2016:

Section 3 (6) "claim" means—

- (a) *a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
- (b) *right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;*

Section 3 (11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 3 (12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;



Section 3 (10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder;

Section 5 (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;

Section 5 (21) "operational debt" means a 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;

15. Further in the matter of **Mr. Pramod Yadav V/s Divine Infrcon Private Limited** in IB No. 2019/ND/2017, Dated 28.09.2017, National Company Law Tribunal, New Delhi Bench has held in detail as follows:

Thus, for an amount to be classified as an "operational debt" under IBC, 2016 a sort of filtration process is provided:

Firstly, the amount should fall within the definition of "claim" as defined under Section 3(6) of the code;



Next such a Claim should fall within the confines of the definition of a "debt" as defined under Section 3(11) meaning it should be by way of a liability or obligation due from any person;

Thirdly such a "debt" should fall strictly within the scope of an "operational debt" as defined under Section 5(21) of the Code, i.e., the claim should arise in respect of

(i) provision of goods or services including employment or

(ii) A debt in respect of the repayment of dues arising under any law for the time being in force and payable either to the Central Government, any State Government or any local authority,

To sum up thus only if the claim by way of debt falls within one of the three categories as listed above can such a claim be categorized as an operational debt. In case if the amount claimed does not fall under any of the categories mentioned as above, the claim cannot be categorized as an operational debt and even though there might be a liability or obligation due from one person, namely Corporate Debtor to another, namely Creditor other than the Government or local authority, such a creditor cannot categorize itself as an "operational creditor" as defined under Section 5(21) of IBC, 2016 unless It is established that such goods or services has direct relationship to input-output operations of the Corporate Debtor and hence disentitles such a person from maintaining



an application for CIRP against the corporate debtor as an Operational Creditor. There seems to be some rationale in restricting only to Operational Creditors for Initiating a CIRP against a Corporate Debtor other than a Financial Creditor, Default committed to operational creditors in relation to payment of their debt definitely connotes that the Corporate Debtor is not even in a position to service their dues and run the day to day operations of the Corporate Debtor which is a clear pointer to its commercial insolvency warranting the process of insolvency being initiated and restructuring process being put in place. Before proceeding further this Tribunal 'is refraining from going into the aspect where the immovable property in itself constitutes stock-in-trade of the corporate person and has a direct nexus to its input-output and being an integral part of the operation, In the instant case no such specific pleading to support such a contention has been placed on record by the petitioner, In fact even the Memorandum and Articles of Association of the Corporate Debtor has not been filed from which atleast the object for which the Corporate Debtor has been incorporated can be gathered,

Thus, this Tribunal is of the view that lease of immovable property cannot be considered as a supply of goods or rendering of any services and thus cannot fall within the definition of operational debt'



16. Also in the matter of **Jindal Steel and Power Limited Vs. DCM International Limited**, IB No. 200/ND/2017 dated 06.10.2017 passed by National Company Law Tribunal, New Delhi Bench and upheld by NCLAT, New Delhi it was held as follows:

“ in relation to transaction of immovable property the same cannot be considered as a transaction falling under the term 'operation' and 'Operational Debt' unless such a transaction having a correlation of direct input to the output produced or supplied by the Corporate Debtor and hence we do not have any hesitation looking at any way in holding that the petitioner will not fall under the definition of Operational Creditor and the claim which is sought to be made cannot be considered as an Operational Debt”

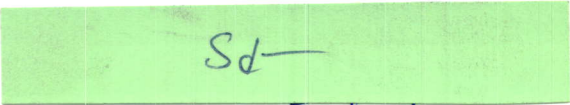
17. The same opinion is observed by National Company Law Tribunal, Guwahati Bench in M/s Aurora Accessories Pvt. Ltd. Vs. M/s Ace Acoustics 7 Audio Video Solutions Pvt. Ltd. vide order dated 09.08.2019.
18. The applicant relied on the order passed by NCLT, Kolkata Bench which was upheld by Hon'ble NCLAT, New Delhi in the matter of **Sarla Tanita Vs. Raamnil Hotels and Resorts Pvt. Ltd., CA (AT) (Insolvency) No. 513 of 2018, decided on 26th February, 2019**. In the said case the issue of Operational Creditor and Corporate Debtor was not in question before Hon'ble NCLAT. In the instant case there is no assertion pivoted on firm

rationale that the lease has nexus with the business of the respondent inasmuch as no manifest service was being provided by the Operational Creditor.

19. It is seen from the above provisions and various orders that to fall under the definition of operational creditor, the amount in default must fall within the definition of 'claim' defined under Section 3(6), such claim must fall within the definition of 'debt' defined under Section 3(11) and lastly the said debt must be a 'operational debt' as defined under Section 5(21) of IBC, 2016.
20. In the present application the claim of the applicant has arisen out of a Lease Deed and it is concluded that the claim arising out of lease of immovable property does neither fall in the category of goods or services including employment nor is a debt 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 as defined under Section 5(21) of the IBC, 2016. Thus, the amount claimed in the present petition is not an unpaid "Operational Debt". This order is made in term of 9(5)(ii) of the IBC, 2016.
21. Hence the Application bearing IB No. 12/9/JPR/2019 is dismissed without costs. The Order in the present matter is made on the basis of the facts and

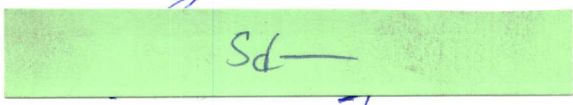


pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial/ other authority.



Sd—

**SH. RAGHU NAYYAR,
TECHNICAL MEMBER**



Sd—

**Dr. P.S.N. PRASAD,
JUDICIAL MEMBER**

Mansi J.

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