

IN THE NATIONAL COMPANY LAW TRIBUNAL  
CUTTACK BENCH  
CUTTACK

C.P (IB) No. 61/CB/2021

*In the matter of*

An application 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;

-And-

*In the matter of:*

**Pardesi Constructions Pvt Ltd. CIN: U70101MH2003PTC138958**, registered office at 48, Residency Road Sadar, Nagpur 440001;

... Applicant/Operational Creditor

-Versus-

**Coppertun Brewing Pvt. Ltd. CIN: U15531CT2015PTC001797**, registered office at H No. 962/3 Prem Bhawan Panchsheel Nagar, Raipur, Chhattisgarh- 492 001.

... Respondent /Corporate Debtor

*Coram:*

Shri P. Mohan Raj : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

*Appearances (through video conferencing)*

For the Petitioner : Mr. Sandeep Bajaj, Adv.

For the Respondent : Mr. Mohit Agarwal, Adv.

**ORDER**

*Per: Satya Ranjan Prasad, Member (Technical)*

*P. Mohan Raj, Member (Judicial)*

1. The present Petition has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016, ('Code' for brevity) by Pardesi

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Constructions Pvt. Ltd., the Operational Creditor herein, to initiate Corporate Insolvency Resolution Process (**CIRP**) against the Corporate Debtor, Coppertun Brewing Pvt. Ltd. for alleged default in payment of Operational Debt to the tune of Rs.7,66,52,157.50 under the Service Agreement dated 03.10.2015 (Annexure V of the Application at page No.24) and Leave and License Agreement dated 05.10.2015 (Annexure VI of the application at page no.31). It is stated that no payment has been made by the Corporate Debtor as per the terms of the agreements.

2. It is alleged that the Corporate Debtor (**CD**) acquired the premises detailed in the aforesaid agreements on leave and license basis from the Operational Creditor (**OC**) and agreed to pay license charges for the same and service charges for the services rendered. Allegedly, the Corporate Debtor breached the agreement and despite notices chose not to vacate the premises. In terms of the agreement dated 03.10.2015 the monthly fee payable by the CD is as under:

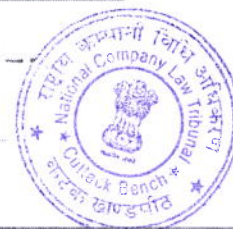
Sl. No.	Particulars of Period	Monthly Fee
1.	From 1 <sup>st</sup> June to 30 <sup>th</sup> Nov. 2015	Rent Free Period
2.	01/11/2015 to 30/11/2017	Rs.4,00,000/-
3.	01/12/2017 to 30/11/2018	Rs.4,75,000/-
4.	01/12/2018 to 30/11/2020	Rs.5,46,250/-

Further, in terms of Leave and License Agreement dated 05.10.2015 monthly licensed fee payable by the CD as under:

Licensed Period	Licensed Fee per month
From 1 <sup>st</sup> June to 30 <sup>th</sup> Nov. 2015	Rent Free Period
01/12/2015 to 30/11/2017	Rs.1,00,000/-
01/12/2017 to 30/11/2018	Rs.1,00,000/-
01/12/2018 to 30/11/2020	Rs.1,15,000/-

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3. Petitioner submits that despite issuance of Notices by them to the CD respectively on 12.12.2016, 16.05.2017, 29.05.2017, 17.04.2021 they did not receive any payment and default continued, therefore, they issued Section 8 demand notice in Form 3 on 17.04.2021.
4. On the allegations the submissions of the Respondent CD are four-fold, mainly to the following effect:
  - (a) The present petition, claiming rental and service dues from the month of December 2015, is barred by limitation;
  - (b) There is a pending arbitration proceedings between the parties, having commenced between them as per Section 21 of the Arbitration and Conciliation Act, 1996;
  - (c) Rental dues do not within the purview of '*Operational Debt*'.
  - (d) The leave and license agreement and service agreement were entered into by making false representations, suppressing the fact that the premises did not have Fire Clearance Certificate, nor Occupancy Certificate, required for running of the business of the Respondent. There is no admitted claim and there is a genuine pre-existing dispute as per the facts on record.
5. On the above contentions of the Respondent the pointwise submissions made by the OC are as follows.
6. ON PRE-EXISTING DISPUTE
  - i. The Corporate Debtor has in reply raised certain allegations for non-compliance of the terms of Leave and License Agreement dated 05.10.2015, however, no dispute has been raised for services provided by the Operational Creditor under the terms of Service Agreement dated 03.10.2015.

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And even the disputes raised by Corporate Debtor are primarily on the count of OC not having requisite Occupancy Certificate and NOC from the Fire Department. However, this Tribunal notes that OC has produced copy of such certificates before this Tribunal. Occupancy certificate is dated 22.10.2016 and certificate from Office of the Corporation of the City, Nagpur (Fire & Emergency Service)) dated 03.08.2016.

- ii. The Corporate Debtor is, till date, in possession of the property and continues to enjoy and benefit from such possession without making any payment towards the holding charges as well as service charges. Moreso, the term of the agreement was for 5 years, and the Corporate Debtor continues to hold the possession even after expiry of the term of the agreement based on moonshine allegations/ dispute.
- iii. The Corporate Debtor cannot be permitted, on one hand, to hold the possession for a period of more than 7 years without paying any rent/service charge and on the other hand contend that no amount is due and payable.

7. EFFECT OF TERMINATION LETTERS

- i. That since the Corporate Debtor failed to make any payment under the agreements, the Operational Creditor tried to terminate the agreements, however, the Corporate Debtor vide its letter dated 13.06.2017 [paragraph No.4 at page No.90] refused to even acknowledge the existence of the agreements and as such refused to accept the termination of the agreements. The Corporate Debtor further refused to vacate the subject property.

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- ii. The Corporate Debtor continuing to be in possession of the subject property as a month-to-month tenant and thus, is still liable to pay monthly license fee and monthly service fee to the Operational Creditor. In this regard OC has relied on the judgement MEC India Pvt. Ltd. v. Lt. Col. Inder Maira & ors., 1999 SCC OnLine Del 422.

4. CORPORATE DEBTOR CONTINUES TO BE IN POSSESSION

- i. The Corporate Debtor during the hearing dated 01.04.2022 stated that it is not in possession of the subject property, however, as per letter dated 16.02.2017 [paragraph Nos.6 and 7 at Page No.65] and reply notice dated 13.06.2017 [paragraph No.4 at page No. 90] the Corporate Debtor has admitted being in possession of the property and has, on the contrary, refused to vacate the property.
- ii. Moreso, even the reply to the notice/ email dated 06.08.2020 sent by the Operational Creditor seeking invocation of the arbitration clause the Corporate Debtor has not only admitted the possession but has stated that the same is not arbitrable.

5. THE APPLICATION IS WITHIN LIMITATION

Petitioner claims that the due amount of Rs.7,66,52,157.50 constitutes the arrears of rent plus arrears of service charges and arrears of maintenance. The due amount consists of three components which are (i) Rent (ii) Service charges (iii) Maintenance, all the said three amounts are payable on or before 10<sup>th</sup> of every calendar month. The date of default

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mentioned in the petition is 17.04. 2021. The dues have been calculated from December 2015 to March 2021. Further, petition has been filed on 14.09.2021.

The respondent argued that since due amount is claimed from December 2015 the petition ought to have been filed on or before 10.12.2018, to meet limitation but the petition is filed on 14.09.2021 hence, this petition is barred by limitation in view of Article 137 of Limitation Act 1963.

In this regard petitioner stated that the default in payment of monthly rent is continuing from the inception of tenancy till the date of filing of this petition, hence as per section 22 of Limitation Act, the petition is filed in time. Section 22 of Limitation Act 1963 is applicable only to the continuing breach of contract or continue in committing acts of torts. The failure to pay the monthly rent does not amount to continuing of breach of contract, it only amounts to default in payment of monthly rents continuously. Article 52 of the Limitation Act 1963 is appropriate and specific article applicable to the arrears of rent. As per Article 52, the three years limitation period starts from the date when the rents become due. In this case as per the service agreement dated 03.10.2015 and Leave and License Agreement dated 05.10.2015, the rent and service charges are payable on or before 10<sup>th</sup> of every month. Rent become due on 11<sup>th</sup> day of every month. The due amount can be claimed within three years from the date of default, accordingly petitioner is entitled to claim arrears of rent and service charges of three years prior to the date of filing the petition i.e., from 14.09.2018 to 14.09.2021.

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In the working sheet submitted by the petitioner annexure (IV page 21-23) of the petition arrears have been calculated from December 2015 to March 2021 for 64 months, but in view of the reason stated above petition is maintainable only in respect of arrears from the month of September 2018 to March 2021 for 31 months. In these circumstances it is concluded that entire claim amount is not barred by limitation, but claims prior to 14.09.2018 are barred by limitation however the dues for the periods from September 2018 to March 2021 is not barred by limitation.

6. EFFECT OF ARBITRATION CLAUSE AND EMAILS DATED  
06.08.2020 AND 31.08.2020

- i. The Corporate Debtor has sought to argue that Arbitration proceedings are pending since the Operational Creditor had vide its email dated 06.08.2020 [page Nos.91-92] tried to invoke the arbitration clause.
- ii. It is submitted by the OC that the Corporate Debtor vide its email dated 31.08.2020 [Page No.92] rejected the invocation of arbitration clause. Thus, the arbitration proceedings never commenced.
- iii. The Corporate Debtor during arguments relied upon a judgment passed by Ld. NCLAT, however, the facts of both the cases are clearly distinguishable, as in the said judgment, it was the Corporate Debtor who had invoked the Arbitration Clause, whereas in the present case the Corporate Debtor has rejected the invocation of the Arbitration clause.

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- iv. When the Operational Creditor issued notice on 17.04.2021 to comply with the Agreements, the Corporate Debtor did not respond to the notice and did not say that any Arbitration is pending. When the Operational Creditor issued the Demand Notice on 11.08.2021, in its Reply dated 24.08.2021 it did not mention that any Arbitration is pending. As per provisions of Section 8 (2) of the Code, the Corporate Debtor ought to have mentioned the fact regarding any pending suit or arbitration in its Reply and that too within the statutory time limit.

7. DUES PAYABLE UNDER LEASE AND LICENSE  
AGREEMENT NOT OPERATIONAL DEBT

The Corporate Debtor put forth the plea that the rent due payable under the lease or leave and license agreement is not an operational debt hence, this petition is not maintainable. In support of their claim, they relied on Rabindranath Reddy vs G. Kishan and others (2020 SCC NCLAT 84) where it is held that dues in the nature of rent of immovable property do not fall under the head of operational debt, but in Anup Sushil Dubey vs National Agriculture Co-operative Marketing Federation of India Limited and others in NCLAT it is held that the rent due is an operational debt. The present case in our hands is distinguishable from the above supra cases. In this case the petitioner claims three components of dues i.e., Arrears of Rent, Service charges and maintenance charges. As already held that petition is maintainable to claim arrears from September 2018 to March, 2021.

As per the annexure IV the rent amount due from September 2018 to November 2018 for three months at the rate of Rs.5,00,000 X 3= Rs.15,00,000/- there after rent due from

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December 2018 to March 2021 for twenty-eight months at the rate of Rs.5,75,000 X 28 = 1,61,00,000/- Total arrears of rent are Rs.1,76,00,000/-

The service charge due for the said period is as follows. From September 2018 to November 2021 for three months at the rate of Rs.4,75,000X3 = 14,25,000/- service charges due from December 2018 to March 2021 for twenty-eight months at the rate of Rs.5,46,250X28= Rs. 1,52,95,000/- Total arrears of service charges are Rs.1,67,20,000/-

The maintenance charge due for the said period from September 2018 to November for three months at the rate of Rs.42,500 X 3= 1,27,500/- due from December 2018 to March 2021for twenty-eight months 48,875x28=13,68,500/- Total arrears of maintenance charges are Rs.14,96,000/-

As per the above calculation the service charges and maintenance amount dues alone come to (1,67,20,000 + 14,96,000) Rs.1,82,16,000/-, excluding interest, since interest does not form part of the operational debt.

The petitioner argued that even if the arrears of rent amount under the leave and licence fee is excluded because of divergent views expressed by the Appellate forum the remaining due amount towards service charge and maintenance charge alone are more than the threshold amount prescribed under section 4 of IBC 2016 hence the petition is to be allowed.

It is settled law that even though the default amount mentioned in the petition is not proved but default of amount proved is covers the threshold amount the petition can be admitted. It is not necessary to prove the exact due amount

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mentioned in the petition, if the amount proved is satisfy the threshold amount the petition is liable to be admitted

8. Thus, this Tribunal notes that the objections raised by the Respondents have been convincingly responded to by the OC. Corporate Debtor could not establish that the leave and license agreement executed on 05.10.2015 and the service agreements dated 03.10.2015 were terminated earlier and they have handed over peaceful possession of the premises to the OC. Corporate Debtor vide its email dated 31.08.2020 has rejected the invocation of arbitration clause. Thus, the arbitration proceedings never commenced.
9. The CD has not produced details of any payment made to OC in respect of monthly rent etc. Thus, in the opinion of this Tribunal operational debt and default is established. In result, going by the facts and circumstances of the case and the material on record, we are inclined to ADMIT this petition.
10. The Operational Creditor has not suggested the name of any Interim Resolution Professional. Therefore, this Tribunal appoints **Mr. Rahul Mishra (Registration No. IBBI/IPA-001/IP-P-02556/2021-2022/13880)** residing at Rahul Mishra and Associates, Chartered Accountants, Mishra Bhawan, Tatyapara Chowk, Behind Shivaji Statue, Raipur Chhattisgarh, 492001 and **E-mail id. [rahulmishraca@gmail.com](mailto:rahulmishraca@gmail.com)** for Interim Resolution Professional, Liquidator, Resolution Professionals and Bankruptcy Trustee for Cuttack Zone, issued by the Insolvency and Bankruptcy Board of India. There is nothing on record to say that any disciplinary proceedings against the proposed Interim Resolution Professional is pending.

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11. Accordingly, the following Orders are passed: -

**ORDER**

- (i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Insolvency Resolution Process against **Coppertun Brewing Pvt. Ltd.**
- (ii) Moratorium Order is passed for a public announcement as stated in Section 13 of the IBC, 2016. The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-Section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- (iii) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
  - i. 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;
  - ii. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
  - iii. Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its

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property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

- iv. The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (iv) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.
- (v) The provisions of sub-Section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (vi) The order of moratorium shall affect the date of admission till the completion of the Corporate Insolvency Resolution Process.
- (vii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-section (1) of Section 31 or passes an order for Liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation order, as the case may be.
- (viii) Necessary public announcement as per Section 15 of the IBC, 2016 may be made by the Resolution Professional upon receipt of the copy of this order.
- (ix) **Mr. Rahul Mishra** having (**Registration No. IBBI/IPA-001/IP-P-02556/2021-2022/13880**) and **E-mail Id.:** [rahulmishraca@gmail.com](mailto:rahulmishraca@gmail.com) residing at Rahul Mishra and

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Associates, Chartered Accountants, Mishra Bhawan, Tatyapara Chowk, Behind Shivaji Statue, Raipur Chhattisgarh, 492001 is appointed as Interim Resolution Professional registered with the ICSI Insolvency Professionals Agency, as Interim Resolution Professional for ascertaining the particulars of Creditors and convening a meeting of Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this Order. He shall file Form-2, and that no disciplinary proceedings are pending against him with the Board.

- (x) We direct the Operational Creditor to deposit a sum of ₹2.00 lakh with Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Debtor) Regulations, 2016. The needful shall be done within three days from the date of receipt of this Order by the Operational Creditor. The amount, however, is subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Operational Creditor.
- (xi) Directions are also issued to the suspended management to provide all documents in their possession and furnish every information in the knowledge within a period of one week from the date of admission of the petition to the IRP, otherwise coercive steps to follow.
- (xii) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

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- (xiii) Registry is hereby directed to communicate the order under Section 9 (5) (i) of the I.B. Code, 2016 to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional by Speed Post as well as through E-mail.
- (xiv) List the main CP for reporting progress on 13.06.2022.
- (xv) Let the certified copy of the order be issued upon compliance with requisite formalities.

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Satya Ranjan Prasad  
Member (Technical)

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P. Mohan Raj  
Member (Judicial)

Signed on this the 12<sup>th</sup> day of May, 2022.

सत्य प्रति प्रमाणित होना  
CERTIFIED TO BE TRUE COPY

Ravijeet\_P.S.

*Prasad*  
*13/05/2022*

उप कुलसचिव  
Deputy Registrar  
राष्ट्रीय कम्पानी विधि अधिकरण  
National Company Law Tribunal  
कटक बेंच  
Cuttack Bench

