BEFORE THE NATIONAL COMPANY LAW TRIBUNAL MUMBAIBENCH

CP (IB) NO. 4035 OF 2019

APPLICATION BY OPERATIONAL CREDITOR TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016.

(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

Yogesh Ahuja &Anr.

104, Kenwood Building,
Dr. Ambedkar Road, Pali,
Bandra West, Mumbai – 400050.

……. Operational Creditor

versus

Govinda Industries Private Limited

401, Dev Pooja, North Avenue Road,
Santacruz West, Mumbai – 400054.

……Corporate Debtor

Order Pronounced on: 30.04.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Shri ShyamBabuGautam, Member (Technical)

Appearance:

For the Operational Creditor: Mr. Jamsheed Master, a/w Mr. Yahya Batatawala, Advocates

For the Corporate Debtor: Mr. Rohit Gupta, Advocate a/w Mr. Rushab Thackar, Advocates

Per: Shri. H.V. Subba Rao, Member (Judicial)

ORDER

1. This Company Petition is filed by Mr. Yogesh Ahuja and Mr. Pitamber Ahuja (hereinafter called as "Operational Creditors") seeking to initiate Corporate Insolvency Resolution Process (CIRP), against Govinda Industries Private Limited (hereinafter called as "Corporate Debtor") on the ground that the corporate debtor defaulted in payment of dues to the operational creditor by invoking the provisions of sections 8 & 9 of Insolvency and Bankruptcy Code (hereinafter called as "Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The operational creditors are individuals who have given their office premises together situated at 504, Savoy Chambers, 5th Floor, Plot No. 17-C, Link Road Extension, Santacruz East, Mumbai – 400 054 along with two car parking spaces to the corporate debtor. The operational creditor in its petition alleged that a sum of Rs.10,40,000/- is due and payable against the arrears of license fees for the period February 2019 to September 2019 and further sum of Rs.8,90,000/- is due and payable against the liquidated damages as per Leave and Licence agreement dated 31.07.2018.

3. The corporate debtor issued several cheques in the month of April 2019 to clear his outstanding license fees. However, the said cheques were returned with a remark "Funds Insufficient". It was further mentioned by the learned counsel that on failure to pay the license fees by the corporate debtor, the operational creditors terminated the leave and license agreement through termination letter dated 19.06.2019 issued by Advocate Manoj K. Bhatia on behalf of operational creditors.

4. A Demand Notice dated 15.10.2019 under Section 8 of the Code was served upon the corporate debtor and acknowledged by them. The corporate debtor didn't reply to this Demand Notice within the stipulated period of 10 days. Later, the operational creditors issued a notice of hearing dated 19.12.2019 which was served upon on the corporate debtor and its directors requesting to remain present on the next date of hearing i.e. 16.01.2020.

5. In the submissions made by the corporate debtor on 28.02.2020, the corporate debtor has not stated anything about the claim amount. However, corporate debtor disputed that the rent/ license fees with respect to any premises is not a claim in respect of provisions of goods and services and is not an operational debt as per the provisions of section 5(21) of the Code. Therefore, the creditor is not an operational creditor as defined under the Code. It was alleged that this petition has been filed for recovery of arrears of license fees and damages under the leave and license agreement.

6. The corporate debtor further stated that the claim with respect to recovery of rent amount is not maintainable as per the various judgements of NCLAT and Hon'ble Supreme Court. It was also submitted that in case of immovable property, default can be determined, on the basis of evidence. While exercising the summary jurisdiction, the adjudicating authority exercising its power under the Code cannot give finding regarding default in payment of lease rent, because it requires further investigation.

FINDINGS

7. We have heard both the parties at length. We have also perused all the documents submitted by them. This matter has been posted for hearing before us on various dates. The corporate debtor has opposed the admission of this petition claiming that the creditors are not operational creditors as required under the Code and claimed that the rent/license fee is not a claim and thereby license fees is not an operational debt.

8. To ascertain the same, it is essential to reproduce the relevant definitions as enumerated in the code –

> ***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 paid by the debtor or the corporate debtor, as the case may be;*
> ***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 payment 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;*

9. Here, it has also become important to place reliance upon the judgment of the Hon'ble National Company Law Tribunal (NCLAT) in the matter of ***Anup Sushil Dubey vs National Agriculture Co-operative Marketing Federation of India Ltd [Company Appeal (AT) (Insolvency) No. 229 of 2020),*** wherein it was held in paragraph 22 that:

"22. Therefore, keeping in view, the observations made by the Hon'ble Supreme Court in Para 5.2.1 of Mobilox (supra), and having regard to the facts of the instant case this tribunal is of the earnest opinion that the subject lease rentals arising out of use and occupation of a cold storage unit which is for Commercial purpose is an 'Operational Debt' as envisaged under section 5(21) of the code. Further, in so far as the facts and attendant circumstances of the instant vase on hand is concerned, the dues claimed by the first respondent in the subject matter and issue, squarely falls within the ambit of the definition of 'operational debt' as defined under section 5(21) of the code."

Also, we would like to refer on paragraph 24 of the judgment of this bench in the matter of ***Indiabulls Real Estate Company Private Limited V. Crest Steel& Power Private Limited (CPNo.1664/IBC/NCLT/MB/MAH/2017),***which runs as follows:

"24. Secondly, the operational creditors has given its premises on lease under an agreement. Therefore, receiving any consideration by way of lease rent from time to time or license fee for letting out premises falls under purview of providing

services and the consideration that is receivable becomes 'Operational Debt'. 'Arrears of rent' are in the nature of operational debt within the meaning of definition of operational debt defined under section 5(21) of the I&B Code. An action as regards recovery of arrears of rent is maintainable under section 9 of the I&B Code, 2016. ………"

10. Basing on the above, we firmly believe that the contentions made by the corporate debtor to the effect that the rent/license fee is not operational debt is incorrect.

11. In view of the above observations, it can be concluded that it is an admitted liability and that the documents submitted by the operational creditor are enough to establish the debt upon the corporate debtor and hence the contentions made by the corporate debtor cannot be relied upon. Also, they defaulted in repaying the debt amount which is more than the threshold of Rs.1,00,000/- to each individual operational creditor.Hence, all the requisite conditions for admission of a petition under Section 9 have been found to be fulfilled and therefore, this petition deserves to be admitted.

12. The operational creditors had also annexed Form 2 along with this present application wherein the name and consent of one Mr. S. Gopalkrishnan has been proposed as the Interim Resolution Professional by the operational creditors. Hence, all the requisite conditions for admission of a petition under Section 9 have been found to be fulfilled and therefore, this petition deserves to be admitted. Accordingly, we pass following:

ORDER

(a) The above Company Petition No. (IB) -4035(MB)/2019 is hereby admitted and initiation of Corporate Insolvency

Resolution Process (CIRP) is ordered against M/s Govinda Industries Private Limited.

(b) This Bench hereby appoints **Mr. S. Gopalkrishnan** Insolvency Professional, Registration No: IBBI/IPA-001/IP-P00999/2017-2018/11646 having office at 22, Dignity Apartments, Bon Bon Lane, 7 Bungalows, Versova, Andheri (W), Mumbai 400053 as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code.

(c) The Financial Creditor shall deposit an amount of Rs.2 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

(d) That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

(e) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(f) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(g) That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

(h) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

(i) During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

(j) Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is allowed.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

Sd/-

H. V. SUBBA RAO
Member (Judicial)