

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

(IB)-797(ND)2021

IN THE MATTER OF:

**CBRE South Asia Private Limited
Ground Floor, PTI Building,
4 Parliament Street
New Delhi-110001**

...Applicant

VERSUS

**M/s. United Concepts and Solutions Private Limited
A-1A, 31 B, Janakpuri
New Delhi-110058**

...Corporate Debtor

Section: 9 of the IBC, 2016

Order Delivered on: 19.01.2022

CORAM:

SH. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Mrs. Pratik Malik, Counsel

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

M/s. CBRE South Asia Pvt. Ltd. (for brevity the **‘Applicant’**), has filed the present Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity the **‘IBC, 2016’**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate the Corporate Insolvency Resolution Process against M/s. United Concepts and Solutions Pvt. Ltd. (for brevity the **‘Corporate Debtor’**).

2. That the Corporate Debtor namely, M/s. United Concepts And Solutions Pvt. Ltd. is a Company incorporated on 31.05.1999 with CIN U70100DL1999PTC100002 under the provisions of the Companies Act, 2016 having its registered Office at A-1A, 31 B, Janakpuri, New Delhi-110058, which falls within the territorial jurisdiction of this Bench.

3. That the Authorized Share Capital of the Corporate Debtor is Rs.1,25,00,000/- and Paid-up Share Capital is Rs.1,01,01,900/- as per the Master Data of the Corporate Debtor.

4. That the Part IV of the Application giving particulars of the operational debt claimed by the applicant is reproduced overleaf:

PART IV

PARTICULARS OF OPERATIONAL DEBT

1.	Total amount of debt, details of transaction of which such debt fell due, and the date from which such debt fell due.	<p>Total amount amounting to INR 1,39,84,400/- (Indian Rupees One Crore Thirty Nine Lakhs Eighty Four Thousand Four Hundred Only) till 10.08.2021, thereafter interest @ 24 % per annum till realization.</p> <p>Principal Amount : INR. 88,50,886/-</p> <p style="text-align: center;">+</p> <p>Interest on Principal Amount : INR 51,33,514/- (From the date of default till 10.08.2021)</p> <p><u>Brief Facts of the Case:</u></p> <p>1. The Applicant is engaged in the business of providing real estate advisory services, facility management and project management consultancy services all over the Country and Asia as well. The Applicant enjoys impeccable and enviable reputation and goodwill in its field.</p> <p>2. The Corporate Debtor is in the field of construction, office buildings and housing realty.</p>
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		<p>3. That the Applicant was engaged by Corporate Debtor to provide its acclaimed transaction brokerage services to find a suitable Company/Organisation that will be willing to take on lease, area in one property owned by Corporate Debtor i.e. property bearing No-C-18, Sector-67, Noida("said Property").</p> <p>4. It was agreed between the parties that for its services Applicant will charge a brokerage fee equivalent to three months gross rent plus applicable taxes.</p> <p>5. Thereafter, Applicant immediately and diligently commenced its work in terms of the covenants of the terms agreed between the parties. That the work done by Applicant was to utmost satisfaction of Corporate Debtor and there were no complaints whatsoever.</p> <p>6. That with efforts of Applicant, Corporate Debtor was able to</p>
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		<p>lease 68500 sq. feet super area in the said Property to M/s IDC Technologies.</p> <p>7. Thereafter, one Fee Confirmation/Service Fee Letter dated 05.02.2019 was executed between Corporate Debtor and Applicant, therein detailing the terms of payment of the brokerage fee equivalent to three months gross rent. Copy of Fee Confirmation/Service Fee Letter dated 05.02.2019 is attached herewith as Annexure-D.</p> <p>8. Thereafter, due to efforts of Applicant a lease dated 06.02.2019 was executed between Corporate Debtor and M/s IDC Technologies. Copy of Lease Deed dated 06.02.2019 as is attached herewith as Annexure-E.</p> <p>9. Thus, Applicant acting in terms of the said Fee Letter raised its Invoice dated 27.03.2019, bearing No: R182UP04144 upon Corporate Debtor for an amount of INR 88,50,886/- (Indian Rupees Eighty Eight</p>
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		<p>Lakhs Fifty Thousand Eight Hundred Eighty Six Only)(‘the Invoice’) upon Corporate Debtor. The Corporate Debtor was obligated to make payment towards the Invoice in terms of the FEE Letter. It was also stated in the Invoice that payments has to be made within seven days from the date of issue of this invoice and payments received after due date are subject to interest @ 2 % per month. Copy of Invoice dated 27.03.2019, bearing No: R182UP04144 upon Corporate Debtor for an amount of INR 88,50,886/- (Indian Rupees Eighty Eight Lakhs Fifty Thousand Eight Hundred Eighty Six Only) is attached herewith as Annexure-F.</p> <p>10. Applicant performed its work diligently. But, Corporate Debtor was not adhering to the terms of the Agreement by not making the agreed payments.</p> <p>11. That Applicant requested Corporate Debtor on various occasions to clear</p>
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		<p>the dues, but to no avail. That after much persuasion Corporate Debtor agreed to make payments in parts and gave certain cheques, but they also did not encashed. That Applicant got two Legal Notices dated 31.03.2021 issued U/s 138 of Negotiable Instrument through its Counsel. But still there were no payments coming from Corporate Debtor. Copy of both the Legal Notices dated 31.03.2021 is attached herewith as Annexure-G(Colty).</p> <p>12. The Applicant kept on reminding/requesting Corporate Debtor to clear the outstanding due. However, till date, no payment has been released by Corporate Debtor qua the transaction mentioned hereinabove.</p> <p>13. That being left with no other option, the Applicant issued Demand Notice under Section 8 of the Insolvency & Bankruptcy Code, 2016 dated 28.08.2021, demanding</p>
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		<p>payment of the unpaid operational debt due from the Corporate Debtor, which was received by Corporate Debtor on 31.08.2021. Copy of Demand Notice dated 28.08.2021 is attached herewith as Annexure-H. Copy of tracking report from the website of Indian Post Department is attached herewith as Annexure-I.</p> <p>14. However there was no positive response by the Corporate Debtor to the Applicant for payment of the said due amount.</p> <p>15. It is stated that the Corporate Debtor thereafter sent a reply to the demand notice sent by the Applicant much beyond the statutory period of ten(10) days, vide its reply dated 13.09.2021. The said reply was dated 13.09.2021 and was received after the lapse of statutory period of 10 days. In the said reply the Corporate Debtor raised frivolous objections which is an attempt to show "prior dispute". Copy of the Reply dated 13.09.2021 is</p>
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		attached herewith as Annexure-J.
2.	Amount claimed to be in default and the date on which the default occurred (attach the workings for computation of amount and dates of default in tabular form)	Total amount amounting to INR 1,39,84,400/- (Indian Rupees One Crore Thirty Nine Lakhs Eighty Four Thousand Four Hundred Only) till 10.08.2021, thereafter interest @ 24 % per annum till realization. First default occurred in 04.04.2019 Workings for computation of the claim amount and days of default in tabular form has been explained in Annexure-K.

5. That during the course of preliminary hearing on 03.01.2022, while going through the Part IV of the Application, it was observed by this Bench that the Applicant has claimed a total amount of Rs.1,39,84,400/- as Operational Debt, out of which Rs.88,50,886/- only is the Principal amount and the remaining Rs.51,33,514/- is the interest component. Since the principal outstanding claimed by the Operational Creditor is less than Rs. 1 Crore, a query to the Applicant was raised by this Bench as to whether the Principal and Interest amounts can be clubbed together to reach the minimum threshold of Rs. 1 Crore as stipulated under Section 4 of IBC, 2016.

6. That in response, it was submitted by the Ld. Counsel appearing for the Operational Creditor that the invoices raised in support of debt contained the provision of interest and accordingly, the Applicant has claimed the interest as part of the Operational Debt.

7. To adjudicate this issue, it is imperative to examine the various related provisions of IBC, 2016.

8. That since an Application under Section 9 can only be filed on “occurrence of default”, therefore, we would like to examine the definition of “default” as defined under Section 3(12) of IBC, 2016 -

*“(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;”*

9. Since the term default refers to the terms like non-payment of debt and debt becoming due and payable, we would like to examine the definition of “debt” as defined under Section 3(11) of IBC, 2016. The contents of the same are reproduced below -

*(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;*

10. Since the term debt means a liability or obligation in respect of a claim, we visit the definition of “claim” as defined under Section 3(6)-

“(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;”

11. Since the definition of claim is common for both the Operational Debt as well as the Financial Debt, we further refer to the definition of “Operational Debt” and “Financial Debt” as defined under section 5(21) and 5(8) of IBC, 2016 respectively. The same are reproduced below –

*“(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;”*

*(8) **“financial debt”** means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes -*

.....

.....”

(Emphasis supplied)

12. That from the above discussion, it can be inferred that the “interest” can be claimed as the Financial Debt, but neither there is any provision nor there is any scope to include the interest to constitute as the Operational Debt.

13. That a similar finding was given by the NCLT Chandigarh Bench in the matter of **M/s. Wanbury Ltd. Vs. M/s. Panacea Biotech Ltd. in CP No. 8/2016 dated 18.04.2017**. The relevant extracts are given below :

“15. I am, however, of the view that the issue here is to be determined, in view of the provisions of the ‘Code’ which has come into force w.e.f. 01.12.2016. Learned Counsel for parties have not disputed that the term ‘debt’ or operational creditor were not defined in the 1956, Act. This term is now defined in section 3(11) of the ‘Code’ as meaning ‘a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt’. We are presently concerned with the definition of term “operational debt” as defined in section 5(21) of the Code. Section 5(20) defines “operational creditor” as meaning 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) of the Code says that “operational debt” means a claim in respect of the provision of goods and services including employment or a debt in respect of the repayment of the dues arising under any law for the time being in force and payable to the Central Government or State Government or any local authority.

16. There is a marked difference between the definition of the term ‘financial debt’ and the ‘operational debt’. Under Section 5(8) the term ‘financial debt’ means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and that is an inclusive definition. In the definition of the term ‘operational debt’ under section 5(21) the word ‘interest’ has not been mentioned...”

14. That in the light of the above discussion, we are of the view that the Interest amount cannot be clubbed with the Principal amount of debt to arrive at the minimum threshold of Rs.1 Crore for complying with the provision of Section 4 of IBC, 2016.

15. That the Ld. Counsel appearing for the Applicant had taken another plea in the hearing that since the date of default is of 2019 hence, the limit of 1 Crore shall not be applicable to it.

16. In this context, it is worthwhile to refer to the Judgement of Hon'ble NCLAT in the matter of **Jumbo Paper Products Vs Hansraj Agrofresh Pvt. Ltd. Company Appeal (AT) (Ins) No. 813 of 2021 dated 25.10.2021**. The relevant extracts are reproduced below :

"10. The other judgments cited by learned Counsel for Appellant broadly lay down that any statute/law can be applied retrospectively only if explicit provision regarding its retrospective application is made in the statute. It is seen that notification dated 24.3.2020 (supra) makes it unambiguously clear that the threshold limit to be considered for section 9 application will be Rs. 1 crore. This threshold limit will be applicable for application filed u/s 7 or 9 on or after 24.3.2020 even if debt is of a date earlier than 24.3.2020. Since the application under section 9 which is the subject matter of this appeal was filed on 13.9.2020, therefore the threshold limit of Rs. 1 crore of debt will be applicable in the present case."

17. Since the present application has been filed in the year 2021, therefore, we find no force in the arguments of Ld. Counsel of Operational Creditor that the limit of Rs. 01 Crore is not applicable to its case.

18. In view of the above, we conclude that since the Principal amount of operational debt claimed by the Applicant is less than Rs.01 Crore and the Application is filed in the year 2021, **the Application is not maintainable under Section 4 of IBC, 2016 and is accordingly, dismissed.**

**Sd/-
(L. N. GUPTA)
MEMBER (T)**

**Sd/-
(ABNI RANJAN KUMAR SINHA)
MEMBER (J)**