

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT- 5, MUMBAI BENCH**

C.P. No.1284/MB/I&B/2020

Under section 8 & 9 of the IBC, 2016

In the matter of

Hotel Horizon Private Limited,

37, Juhu Beach, Mumbai MH 400049 IN

....Petitioner

v/s.

Degustibus Hospitality Pvt. Ltd.,

A-101 & 102, Navbharat Estates,
Zakaria Bunder Road, Sewri (West),

Mumbai-400015

....Respondent

Order Reserved on: 09.08.2021

Order pronounced on: 27.09.2021

Coram:

Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)

Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Petitioner : Advocate Mr. S. S. Jan

For the Respondent: Advocate Mr. Vivek Kantawala.

Per: Chandra Bhan Singh, Member (Technical)

ORDER

1. This Company Petition is filed by Hotel Horizon Private Limited, (hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Degustibus Hospitality Private Limited (hereinafter

called "Corporate Debtor") alleging that Corporate Debtor committed default in making payment to the extent of Rs. 1,31,52,877/- which is inclusive of interest by invoking the provisions of Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with Rule 6 of the Insolvency and Bankruptcy (AAA) Rules, 2016.

2. In the requisite Form-5, under the head "Particulars of Operational Debt" the amount claimed to be in default to the extent of Rs. 1,31,52,877/- which is inclusive of some charges and interest. The summary of amounts under default are as follows:

I.	License Fee	Rs. 30,15,009/-
II.	CAM Charges	Rs. 15,47,069/-
III.	HVAC Running Cost	Rs. 33,06,419/-
IV.	Water Charges	Rs. 2,90,360/-
V.	Interest on delayed payment	Rs. 49,94,020/-
	Total Amount of Debt	Rs. 1,31,52,877/-

Contentions of Petitioner:

3. The Petitioner is constructing a star category Hotel which is situated at Juhu Tara Road, Juhu Mumbai *inter alia* comprising of hotel facility, food and beverages outlets, retail outlets, offices, etc.
4. The Corporate Debtor was in need of a licensed unit for temporary period of 5 years for running a restaurant under the name of "Indigo Deli" and hence, the Corporate Debtor and Petitioner entered into a registered leave and license agreement dated 28th December 2017.
5. The Petitioner agreed to grant license to the Corporate Debtor for the use and occupation of the Licensed Unit on

leave and license basis for a period of 5 years commencing from 26.12.2017 and ending on 25.12.2022.

6. According to Clause 4.1 of the agreement, the Corporate Debtor was liable to pay to the petitioner the higher of the amounts of the Fixed License Fees i.e. Rs. 2,50,000/- plus applicable taxes or Revenue share i.e. 12% of the Net Sales of the Business conducted in the licensed Unit from commencement of Business, on a monthly basis for the use and occupation of the Licensed Unit on leave and license basis. Clause 4.1 of the Leave and License Agreement is as follows:

"4.1 With effect from the Commencement Date, the Licensee shall without any demand, pay to the Licensor, the higher of the following amounts ("License Fees"), on a monthly basis for the use and occupation of the Licensed Unit on leave and License basis. In case of a store shut down due to Force Majeure, maintenance by the Licensor or any reason beyond Licensees control, the Licensee shall not pay the MG and pay License fees as per 12% Revenue Share only if applicable for the relevant shutdown period in question.

(a) Fixed License fee shall be paid on monthly basis by the Licensee to the Licensor in the following manner.:

<i>Sr. No.</i>	<i>Term</i>	<i>Fixed License Fees</i>
<i>1.</i>	<i>Throughout the first year of License Period i.e. from 26/2/2017 till 31/12/2018</i>	<i>Rs. 2,50,000/- (Rupees Two Lacs Fifty thousand Only) per month plus all applicable taxes.</i>
<i>2.</i>	<i>Throughout the second year of License Period</i>	<i>Rs. 2,50,000/- (Rupees Two Lacs Fifty thousand</i>

	<i>i.e. from 01/01/2019 till 31/12/2019</i>	<i>Only) per month plus all applicable taxes.</i>
3.	<i>Throughout the third year of License Period i.e. from 01/01/2020 till 31/12/2020</i>	<i>Rs. 2,50,000/- (Rupees Two Lacs Fifty thousand Only) per month plus all applicable taxes.</i>
4.	<i>Throughout the fourth year of License Period i.e. from 01/01/2021 till 31/12/2021</i>	<i>Rs. 2,87,500/- (Rupees Two Lacs Eighty Seven thousand Five Hundred Only) per month plus all applicable taxes.</i>
5.	<i>Throughout the fifth year of License Period i.e. from 01/01/2022 till 25/12/2022</i>	<i>Rs. 2,87,500/- (Rupees Two Lacs Eighty Seven thousand Five Hundred Only) per month plus all applicable taxes.</i>

Revenue share that is 12% of the net sales of the business conducted in the License unit from commencement of business.”

7. As per clause 5.2, the Corporate Debtor will pay to the Petitioner CAM charges at a tentative fixed rate of Rs. 40 per square feet plus all applicable taxes in advance on a quarterly basis. the relevant portion of Clause 5.2 is as follows:

"5.2 The parties agree that the CAM charges have been tentatively fixed including all the above at Rs. 40 (Rupees Forty only) per square feet of unit area (3030 sq. feet) which shall be paid by the Licensee to the Licensor in advance on a monthly basis. After completion of each financial year, the

actual amount incurred by the Licensor by way of CAM charges (along with such additional service charges and taxes as mentioned in Clause 5.1 hereinabove) shall be compared with the total CAM charges paid by the Licensee to the Licensor. The parties explicitly agreed that (i) in the event the Licensor has received any excess amount over and above the expense incurred by the Licensor towards CAM charges (along with such additional service charges and taxes as mentioned in Clause 5.1 hereinabove) then such excess amount shall be set off with the CAM charges for the following financial year; or (ii) in the event the Licensor has incurred more expense than what has been paid to the Licensor by the Licensee by way of CAM charges (along with such additional service charges and taxes as mentioned in Clause 5.1 hereinabove), then such differential amount shall be immediately paid by the Licensee to the Licensor."

8. As per Clause 6, the Corporate Debtor agreed to pay charges for all the other utilities, electricity and other charges even if not specifically mentioned in the agreement.
9. As per clause 4.7, 5.6, 6.1 (h), 6.2 (b) and 6.3 (b), the Corporate Debtor has agreed to pay interest on delayed payment of License Fee as well as delay in payment of other charges at the rate of 24% as per the Leave and License Agreement dated 28th December 2017.
10. The Petitioner has raised following invoices towards charges and interest component, as follows:
 - i. 15 Invoices towards License Fees.
 - ii. 4 Invoices towards CAM charges.

- iii. 19 Invoices towards HVAC Cost.
 - iv. 9 Invoices towards Water charges.
 - v. 4 Invoices towards Interest charges.
11. The Director of the Petitioner suffered disqualification under Section 164 (2) which was restricted to re-appointment. The dissolution of Horizon Realty Pvt. Ltd. was challenged in the National Company Law Tribunal under Section 252 of the Companies Act, 2013 and the said appeal was allowed vide Order dated 10th October 2019 passed by this Hon'ble Tribunal and the company was restored to the register of companies.
12. The Petitioner issued the Demand Notice under Section 8 of the Code on 21.12.2019 whereby they demanded repayment of the dues to the extent of Rs.97,12,911/- inclusive of interest. However, the Corporate Debtor neither replied to the Demand Notice nor repaid the dues.
13. The Petitioner enclosed Affidavit as required u/s 9(3)(b) of the Code stating that no reply has been received from the Corporate Debtor relating to a dispute of the unpaid operational debt.
14. The Petitioner has filed an Interim Application bearing No. 613 of 2021 under Section 60(5) of the Code for initiation of CIRP against the Corporate Debtor.

Contentions of the Corporate Debtor:

15. The Corporate Debtor is a company incorporated under the Companies Act, 1956 having registered office at A-101/102,

Navbharat Estate, Zakaria Bunder road, Sewri (West),
Mumbai 400015.

16. The Corporate Debtor in its reply filed reply to the Petition submitted that the contents of the said application are false and baseless and Corporate Debtor denies each and every allegation set out in the Application. The Petitioner has deliberately not disclosed various facts of the matter and thus, Petitioner is guilty of *suppressio veri* and *suggestio falsi*.
17. Corporate Debtor further submitted that the agreement was executed by Mr. Sagar Sharma (Authorized representative of Petitioner), who was disqualified w.e.f. 01st November 2016 and thus, being disqualified Director, Mr. Sagar Sharma could not have entered into the agreement. Mr. Sagar Sharma, in spite of having knowledge of being disqualified, illegally and fraudulently executed the agreement. The aforesaid act itself shows mala fide on their part and their intention to deceive. As a result of which, Corporate Debtor faced various problems and issues right from inception.
18. Further, the Corporate Debtor has filed one Commercial Arbitration Application bearing No. 141 of 2020 before the Hon'ble Bombay High Court under Section 11 of the Arbitration and Conciliation Act, 1996. The Hon'ble Bombay High Court has appointed Advocate Manjiri Shah as the sole Arbitrator which shows that there are disputes.
19. Corporate Debtor submitted that one of the financial creditor (Phoenix ARC Private Limited) preferred an Application

under Section 7 of the Code against the Corporate Debtor bearing No. 1458/IBC/NCLT/MB/MAH/2017 before this Hon'ble Tribunal which was admitted and pursuant to which Mr. Jayesh Shah was appointed as the Interim Resolution Professional to conduct the Insolvency Resolution Process. In pursuance of the said Order, IRP started handling the day to day activities of the Petitioner. There were various difficulties faced by the Corporate Debtor to which IRP failed to take any steps.

- i. The Corporate Debtor was not being provided with the various amenities and facilities that were assured and promised.
- ii. In the month of February 2019 to April 2019, all the Licensees operating from Corporate Debtor started facing various issues with regards to the various operational facilities provided by the Petitioner.

20. In this submission, the Corporate Debtor has referred to several emails addressed to the IRP when the IRP had demanded payment of part dues of the Corporate Debtor.

21. The corporate Debtor also mentions that it has filed a claim with IRP while the Petitioner was under CIRP and thus the same would constitute "dispute".

22. The Corporate Debtor states that the perusal of all the documents on record clearly demonstrates that multiple disputes existed and therefore, the present petition is not maintainable and deserves to be rejected.

FINDINGS:-

23. This Company Petition No. 1284/2020 u/s 9 has been filed by Operational Creditor/ Applicant M/s. Hotel Horizon Pvt Ltd against M/s Degustibus Hospitality Pvt Ltd Respondent/ Corporate Debtor. Both the parties had signed a license agreement through which Operational Creditor had agreed to grant the license to the Corporate Debtor for running a restaurant and occupy the licensed unit on leave and license basis for a period of 5 years commencing from 26.12.2017 and ending on 25.12.2022. The Bench notes that as per the agreement entered between the parties, the Corporate Debtor was to pay license fee, CAM charges, charges for all other utilities as well as interest on delayed payment. However, the Corporate Debtor failed to pay the same. The break-up of the total amount claimed is given in Part -IV of the Petition which is as under:-

PARTICULARS	AMOUNT
License Fee	Rs. 30,15,009/-
CAM Charges	Rs. 15,47,069/-
HVAC Running Cost	Rs. 33,06,419/-
Water Charges	Rs. 2,90,360/-
Interest on delayed payment	Rs. 49,94,020/-
TOTAL AMOUNT OF DEBT	Rs.1,31,52,877/-

24. The working for computation of amount along with dates of default has been given in a tabular form in the Petition. Clause 4.7 of the Agreement between the parties clearly mentions that

interest is chargeable on delayed payment @ 24% per annum compounded annually.

25. The Bench notes that all the disputes raised by the Corporate Debtor are only after the demand notice was issued to them on 21.12.2019. Here, the Bench also notes that based on an Application preferred by Phoenix ARC Pvt Ltd u/s 7 of the Code, Hotel Horizon Pvt Ltd the Applicant/ Operational Creditor vide an Order dated 29.01.2019 was admitted under CIRP and in view of settlement with the Financial Creditor the CIRP ended on 10.10.2019. During the short period when the Petitioner was under CIRP, letters/ mails were addressed by the IRP whereby the IRP has found fault with the functioning of the Respondent and had made demands for arrears of payments.
26. It is only when the IRP started asking for payments that the Corporate Debtor raised issues regarding deficiency of services. It is to be noted here and as mentioned earlier that these issues were raised only after the demand notice was issued by the Petitioner to the Corporate Debtor on 21.12.2019. The Bench also notes that the IRP has rejected the claims of the Respondent and directed the Respondent to make payment of arrears. This is clear from the IRP's letter dated 09.04.2019.
27. The Bench notes that the Respondent in his reply has mentioned about certain disputes with relation to leave and license agreement. The issues raised by the Respondent and the views on the same are as under:-

The Respondent mentions that the use of elevator was reserved for customers and guests and that the Petitioner had allowed it to third party vendor. Therefore, as per the Respondent, it is a breach of the agreement. In this regard the Bench notes that Clause 14(12)(b)(v) of the leave and license agreement reads as under:-

“the licensee and/or its employees shall not use the customer lifts or the escalators for the transport of goods, merchandise, garbage or any other equipment, of any nature whatsoever. Exception can be made in case of disruption in service lift operations. However, the use in such case will be kept to minimum and during off peak hours.”

28. The Bench also notes that the Respondent has not paid the charges towards use of the elevator etc. (CAM Charges) from January 2019 onwards. The Bench notes that the Corporate Debtor had to ensure that the payment obligation in the leave and license agreement are discharged failing which the Petitioner cannot be held responsible for any disruption in service or maintenance as mentioned in Clause 16.2.a of the leave and license agreement reads as under:-

“The Licensor agrees to:

(a) Make reasonable endeavour to keep and maintain the said Hotel in good order and cleanliness, subject to however to the Licensee’s compliance with its financial and other obligations under this Agreement.”

Similarly, the Bench notes that the Petitioner was even providing HDAC services (water services, etc.) despite non-payment of

charges for the entire period of occupancy by the Respondent, i.e., from May 2018 to December 2019. For HVAC services and water charges from July 2018 to July 2019, the Respondent's plea that there was disruption of electricity and, therefore, they did not pay is again a frivolous plea as the Clause 6.1(c) of the leave and license agreement provides that the Petitioner would not be liable for any disruption in supply of electricity to the Respondent.

29. The Bench further notes that even when the Company was under Corporate Insolvency Resolution Process, the IRP had asked for the payments of the dues vide his email dated 17.07.2019, 18.07.2019, 19.07.2019 and 24.07.2019 and, in fact, in his email dated 26.07.2019 the IRP had asked the Respondent to pay the due arrears amount owed by the Respondent to the present Petitioner which was under CIRP then.
30. The Petitioner has included all the invoices towards payment of license fee, CAM charges HVAC cost and invoices towards water charges and interest. The unpaid dues pertains for the period from May 2018 to December 2019. A demand notice was issued to the Respondent on 21.12.2019, reply to which was given by the Respondent only on 29.01.2020. This Petition was filed after that on 18.08.2021. The Bench also notes that Respondent has time and again acknowledged its liability towards the Petitioner under leave and license agreement by making part payment as well as making payment towards TDS for the charges falling due and payable from time to time. The Bench further notes that the payment towards license fee in the month of May 2019 not only

extends the period of limitation but also constitutes an acknowledgement of liability. Besides, the Bench notes that between May 2018 and October 2019 the Respondent has been making payment of TDS towards invoices raised by the Petitioner from time to time. The Corporate Debtor has been making such payments under Section 1941(b) and 194C of the Income Tax Act, 1961 towards heads of rent.

31. The Petitioner in this regard has relied on NCLT Mumbai judgment in the case of Amluckie Investment Co. Ltd vs Skil Infrastructure Ltd. wherein at Para 28 it has explicitly held that payment of TDS constitutes an acknowledgment of debt and liability. The relevant extract of *Amluckie Investment Co. Ltd.* is reproduced below :-

“28._Payment of TDS on interest is not only an acknowledgment of debt which constitutes a confirmation of debt by Corporate Debtor that is liable to pay the principal sum borrowed and further extends the limitation of liability from the date of payment of last tranche of monies to the Income Tax department as reflected in Form 26 AS.”

32. Therefore, the Bench notes that the Corporate Debtor has admitted its liability not only by way of part payment towards license fee but also by TDS deposits under Form 26AS and, therefore, the Respondent cannot raise a defence to contend that there is a dispute between the parties. In this regard the Petitioner has referred to Hon'ble Supreme Court judgment in the case of *N. Subramanian vs Aruna Hotels Ltd. (Civil Appeal No. 187 of 2019)* which reads as under:-

“10. Having heard learned counsel for both parties, what becomes clear is the fact that from the date of last acknowledgement i.e. 30.09.2014 till the date on which the petition before the NCLT was filed i.e. 27.07.2017, three years have not elapsed. Therefore, at least to the extent of an acknowledgement made by the then Managing Director of the Corporate Debtor, the arrears of salary due for a period of at least 3 years prior to 30.09.2014 would certainly be within limitation, and therefore payable to the Appellant. This being the case, it is clear that the NCLT judgment is correct in admitting the Section 9 application by the Appellant. Mr. Rai correctly points out that the Employees Provident Fund letter dated 13.04.2016 was only a red-herring, and has nothing to do with the arrears of salary which had to be paid. **It is clear that there is an acknowledgement of liability, which therefore shows that there is no “dispute” as to amounts owned to the Appellant.** The impugned NCLAT judgment is accordingly set aside. Consequently, the NCLT judgment is restored to the file. The alternative argument of Mr. Parasaran also stands dismissed in view of what has been held by this judgment.”

33. In conclusion, the Bench notes that the demand notice u/s 8 of the IB Code was issued on 21.12.2019 and before the demand notice dated 21.12.2019, no dispute was ever raised by the Corporate Debtor in relation to the Petitioner. It is only after the issue of demand notice that the Corporate Debtor has raised unsubstantiated terms as a dispute. In view of the above it is clear to the Bench that there is a ‘debt’ in terms of Section 3(11) and there is ‘default’ in terms of Section 3(12) of the IB Code.
34. As a consequence, keeping the admitted facts in mind that, the Operational Creditor had not received the outstanding Debt from the Corporate Debtor and that the formalities as prescribed under

the Code have been completed by the Petitioner/ Operational Creditor, it is our conscientious view that this Petition deserves “Admission”.

35. The Operational Creditor has not proposed the name of the Interim Resolution Professional and left it to this Bench to appoint the Insolvency Resolution Professional. Accordingly, this Bench appoints Mr. Arun Kishanlal Bagaria, Registration No. IBBI/IPA-002/IP-N00278/2017-18/10836, email arun@gagariaco.com, Address: 701, Stanford, Junction of S.V. Road & Burfiwala Lane, Andheri (West), Mumbai – 400 058. Upon Admission of the Application and declaration of “**Moratorium**” the Insolvency Process such as Public Announcement etc. shall be made immediately as prescribed under section 13 read with section 15 of The Code. He shall perform the duties as an Interim Resolution professional as defined under Section 18 of the Code and inform the progress of the Resolution process and compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.
36. Having admitted the Petition/ Application the provisions of “**Moratorium**” as prescribed u/s. 14 of the Code shall come into operation. As a result, institution of any suit or parallel proceedings before any Court of Law are prohibited. The assets of the Corporate Debtor must not be liquidated until the Insolvency Process is completed. However, the supply of essential goods or services to the Corporate Debtor shall not be suspended or interrupted during “**Moratorium**” period. This

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT- 5, MUMBAI BENCH**

C.P. No.1284/MB/I&B/2020

direction shall have effect from the date of this Order till the completion of Insolvency Resolution process.

37. Accordingly, CP(IB)-1284/MB/2020 stands **“Admitted”**.
38. The Corporate Insolvency Resolution Process shall commence from the date of this order.
39. Registry is directed to communicate this order to both the parties and the IRP immediately.

Sd/-
Chandra Bhan Singh
Member (Technical)

Sd/-
Suchitra Kanuparthi
Member (Judicial)