

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH - I
KOLKATA**

C.P (IB) No. 1067/KB/2019

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.

In the matter of:

J N Hotels Private Limited [CIN U55100JH1984PTC002062], having its registered office at P.O.- Hinoo PS- Doranda, Ranchi – 834002, Jharkhand.

...Operational Creditor

Versus

Shraddha Health & Fitness Private Limited [CIN U74140BR2012PTC019655], having its registered office at H/O Mrs. Vidyawati Sinha, Road # 6 Rajendra Nagar Patna - 800016.

...Corporate Debtor

Date of Hearing: 02.08.2022

Date of pronouncing the order: 28.10.2022

Coram:

Shri Rohit Kapoor : ***Member (Judicial)***
Shri Balraj Joshi : ***Member (Technical)***

Appearances (through Video Conferencing/physical hearing)

For the Operational Creditor : Mr. Ankan Rai, Adv.
: Ms. Ankita Singh, Adv.
For the Corporate Debtor : Mr. Sahil Chandra, Adv.
: Mr. Rajesh Upadhyay, Adv.

ORDER

Per Balraj Joshi, Member (Technical)

Prologue

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Sudhir Kumar Chopra, Director, J. N. Hotels Private Limited (*'Operational Creditor'*), duly authorised *vide* Board Resolution dated 01 June, 2019¹ for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Shraddha Health & Fitness Private Limited (*'Corporate Debtor'*).
3. The present Petition was filed on **11 July, 2019** before this Adjudicating Authority. The total amount claimed in default is Rs.1,22,61,809/- (Rupees One Crore Twenty Two Lakh Sixty One Thousand Eight Hundred Nine only) as on 31 March, 2019, plus interest @24%. The ***date of default*** is stated to be on **31 March, 2021**.
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.1,00,00,000/- (Rupees One Crore only) with subscribed share capital of Rs.47,50,000/- (Rupees Forty Seven Lakh Fifty Thousand only).
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Operational Creditor is the owner of the entire first and second floor (i.e., 10,812 sq. ft.) and an area of 5,406 sq. ft. on the ground and mezzanine floor of the building situated at plot nos. 749, 750, 751 and 752 at Kadru, P.S. Doranda, Thana No.208, being Doranda Municipal Holding No.55, Ward No.26, District – Ranchi (*'leased premises'*).
 - 5.2 The Operational Creditor had leased out the first and second floor to the Corporate Debtor by way of a lease deed dated 08 February, 2013 (*'first*

¹Annexure – IV, page 414 of the Petition.

lease’) and the ground and mezzanine floor by way of lease deed dated 28 May, 2016 (*‘second lease*’).

5.3 Despite several reminders issued by the Operational Creditor to the Corporate Debtor for the payment of the rents of the leased premises. However, the Corporate Debtor failed to pay rents of the leased premises in terms of the lease agreement.

5.4 In these circumstances, the Operational Creditor issued a demand notice dated 25 April, 2019 under section 8 of the Code to the Corporate Debtor. And the same was delivered on 29 April, 2019.

6. *Submissions by the Ld. Advocate appearing on behalf of the Corporate Debtor.*

6.1 This instant petition has been filed by the Operational Creditor to harass the Corporate Debtor. The Operational Creditor has been approaching various forums in respect of the same dispute.

6.2 The amount claimed by the Operational Creditor as unpaid debt is not admitted by the Respondent and is strongly disputed. The scope of the Code is not for recovery of money claims but rather to act as a mechanism for the resolution of the Corporate Debtor.

6.3 Over a period of time, the Corporate Debtor discovered that the Operational Creditor misrepresented the facts; the Operational Creditor is not the owner of the leased premises. As per the municipal records, the said leased premise belongs to Mr.K.K. Chopra and Mr. Sudhir Chopra.

6.4 The second lease was predominantly was executed between the parties for the purpose of running a swimming pool by the Corporate Debtor. Further, upon a bare perusal of the second lease it would reveal that the Operational Creditor represented to the Corporate Debtor that the said leased premises has been constructed in conformity with the sanctioned plan and was is in compliance with the related municipal laws and by laws and other laws and regulations.

6.5 However, upon inspection by the authorities of Ranchi Municipal Corporation in the month of May, 2018, a show cause of notice was issued and legal proceedings were initiated against the Corporate Debtor for running an

unauthorized swimming pool in the basement of the leased premises. Penalty of Rs.1,00,000/- (Rupees One Lakh only) was also imposed on the Corporate Debtor as per section 428 of the Jharkhand Municipal Act, 2011., this resulted in severe inconvenience and monetary losses to the Corporate Debtor. Because of such misrepresentations by the Operational Creditor, the Corporate Debtor has been facing several issues with respect to enjoying the leased premises.

- 6.6 The Operational Creditor had also stopped supply of water at the leased premises since May, 2019, which is contrary to the terms and conditions of the lease agreement. Further, as per the lease deed, ample parking space was to be provided to the Corporate Debtor but the Operational Creditor failed to adhere to the agreed terms and conditions. Notwithstanding its own liabilities, the Operational Creditor threatened to initiate legal proceeding against the Corporate Debtor.
- 6.7 *Vide* letter dated 27 June, 2019, the Corporate Debtor invoked the arbitration clause in terms of clause 40 of the first lease deed and clause 41 of the second lease deed. Justice Jayanandan Sing (Retd.) was appointed as the arbitrator to adjudicate the matter between the parties, arising out of the lease deed. Aggrieved with the deadlock with respect to the appointment of the Arbitrator, the Corporate Debtor has filed two petitions being Arb. Petition No.17 of 2019 and Arb. Petition No.18 of 2019 before the Hon'ble High Court of Jharkhand under section 11(6) of the Arbitration and Conciliation Act, 1996. The said petitions are pending before the Hon'ble High Court of Jharkhand.
- 6.8 The Operational Creditor has also filed two petitions before the Ld. Rent Controller cum Sub-Divisional Magistrate, Sadar, Ranchi being J.B.C. case No. 53 of 2019 and J.B.C. case No. 54 of 2019 under section 19(1)(a) and 19(1)(d) of the Jharkhand Building (Lease, Rent and Eviction) Control Act, 2011 seeking a decree of eviction of the Corporate Debtor from the Leased Premises.
- 6.9 Hence, the objections of the Corporate Debtor can be divided into four limbs;
- (i) Suppression of the material facts and documents from this Adjudicating Authority.

- (ii) Pre-Existing Dispute
- (iii) Unpaid Lease Rentals is not an Operational Debt
- (iv) No valid notice was served under section 8 of the Code prior to the institution of the present proceedings.

7. *Rejoinder of the Operational Creditor to the reply of the Corporate Debtor.*

7.1 There is no bar in pursuing alternatives remedies along with seeking remedies before this Adjudicating Authority. Further, the Corporate Debtor had filed the application under 11(6) of the Arbitration and Conciliation Act, 1996 after the issuance of the demand notice under section 8 of the Code. The Corporate Debtor also failed to reply notice under section 8 of the Code.

7.2 The penalty imposed by the Ranchi Municipal Corporation in Misc. Case No.45 of 2018 was passed on 26 June, 2018 and has no relevance in the present proceedings, which is much prior to the dispute in the present proceeding.

7.3 No objections has been raised by the Corporate Debtor with respect to the amount due and payable by the Corporate Debtor in their letter dated 21 February, 2019 and 22 February, 2019. The objections raised by the Corporate Debtor are technical in nature. But there is no denial of the claim of the Operational Creditor.

8. *Issues*

8.1 Whether the unpaid lease rentals fall within the purview of the term Operational Debt?

8.2 Is there any Pre-existing dispute?

Analysis & Findings

9. We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor and perused the record.

10. As envisaged under Section 5(21) of the Code "***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.

11. The first issues in this instant matter is similar to the issues raised before the five member bench of Hon'ble NCLAT in *Jaipur Trade Expocentre Private Limited v. Metro Jet Airways Training Private Limited*² on 05 July, 2022; the issue was 'whether the licensee fee, which is claimed to be due from the Corporate Debtor, is an 'Operational Debt' within the meaning of section 5(21) of the Code.?' [Para 13]. Wherein, the Hon'ble NCLAT has held that the claim of Licensor for payment of license fee for use of Demised Premises for business purposes is an 'Operational Debt' within the meaning of Section 5(21) of the Code [Para 40].
12. In the said Judgment, reference has also been made to the Bankruptcy Law Reforms Committee report submitted on 04 November, 2016³
- "Paragraph 5.2.1 – Who can trigger the IRP?*
- Here, the Code differentiates between financial creditors and operational creditors. Financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or a debt security. Operational creditors are those whose liability from the entity comes from a transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by the car mechanic and who gets paid only after the spark plugs are sold is an operational creditor. Similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease. The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt. While both types of creditors can trigger the IRP under the Code, the evidence presented to trigger varies. Since financial creditors have electronic records of the liabilities filed in the*

² Company Appeal (AT) (Insolvency) No.423 of 2021 decided on 05 July, 2022

³ At pages 76 – 77 of the Report

Information Utilities of Section 4.3, incontrovertible event of default on any financial credit contract can be readily verifiable by accessing this system. The evidence submitted of default by the debtor to the operational creditor may be in either electronic or physical form, since all operational creditors may or may not have electronic filings of the debtors liability. Till such time that the Information Utilities are ubiquitous, financial creditors may establish default in a manner similar to operational creditors.”

13. Further with respect to the second issue, it is pertinent to mention that as per the records at page 196 of the Petition, the demand notice under section 8 of the Code was delivered to the Corporate Debtor on 29 April, 2019. Whereas, the Corporate Debtor invoke the Arbitration Clause *vide* letter dated 11 July, 2019, which is way after than the demand notice under section 8 of the Code was delivered to them.
14. The Hon’ble Supreme Court in catena of Judgments has opined that in an Application under Section 9, the Corporate Debtor can point out any ‘Pre-Existing Dispute’ raised prior to the issuance of Demand Notice under Section 8, IBC, 2016⁴. Further, as laid down in *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*⁵ it says that the dispute must exist before the receipt of the demand notice or invoice, as the case may be (*Para 33*). However, in this matter it is apparent that the Corporate Debtor never raised any dispute before the demand notice under section 8 of the Code. Further, as envisaged under section 9(3)(b) of the Code, an affidavit has been filed by the Operational Creditor.
15. Notwithstanding, the above facts and circumstance is also pertinent to mention that as per the Petition at page 4 the debt fell due on 31 March, 2019 but as per the written submission by the Operational Creditor the date of default is 23 September, 2018.

⁴ Company Appeal (AT) (Insolvency) No. 695 of 2020.

⁵ 2017 (1) SCC Online SC 353

- 16.** In light of the above facts and circumstances, we are satisfied that the present petition made by the Operational Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time. Further, no disputes were ever raised by the Corporate Debtor.
- 17.** It is, accordingly, hereby ordered as follows:-
- a) The application bearing **CP (IB) No. 1067/KB/2019** filed by J. N. Hotels Private Limited, the Operational Creditor, under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Shraddha Health & Fitness Private Limited, is **admitted**.
 - b) There shall be a moratorium under section 14 of the Insolvency & Bankruptcy Code, 2016, and moratorium 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 property including any action under the Securitisation 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 the possession of the corporate debtor.

- c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- e) **Mr. Yogesh Gupta**, registration number **IBBI/IPA-001/IP-P00349/2017-18/10650**, email: **yogeshgupta31@rediffmail.com**, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the Code. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- g) The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- h) The Operational Creditor shall deposit a sum of **Rs.4,00,000/- (Rupees Four Lakh only)** with the IRP to meet the expenses arising out of issuing

public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

- i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
 - j) Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
- 18.** *CP (IB) No. 1067/KB/2019* to come up on **30 November, 2022** for filing the periodical report.
- 19.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

The order is pronounced on 28th day of October, 2022

SA [LRA]