

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH - V

C.P. (I.B) No. 1282/MB/2020

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Hotel Horizon Pvt. Ltd.

**Through its Authorised Representative
Vishal Sharma**

Having its registered address at 37, Juhu Beach

Mumbai MH 400049, IN.

.....Petitioner/Operational Creditor

Vs

I Think Fitness Pvt. Ltd.

Having its registered address at 4th Floor, St. Paul Media Complex, 24th road, Bandra (W), Mumbai 400050.

.....Corporate Debtor

Order Dated: 06.11.2023

Quoram:

Ms. Reeta Kohli, Hon'ble Member (Judicial)

Mrs. Madhu Sinha, Hon'ble Member(Technical)

Appearances:

For the Petitioner: Crawford bayley Co. for Operational Creditor

For the Corporate Debtor: Adv. Atul Vinay Singh (AVS Legal)

ORDER

Per: Reeta Kohli, Member (Judicial)

This Company Petition is filed by **Hotel Horizon Pvt. Ltd.** (hereinafter referred as “**the Petitioner/Operational Creditor**”) on 15.05.2020 seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as “**CIRP**”) against **I Think Fitness Pvt. Ltd.** (hereinafter called “**Corporate Debtor**”) by invoking the provisions of **Section 9** of the Insolvency and Bankruptcy Code, 2016 (hereinafter called “**Code**”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for an Operational Debt of **Rs. 2,28,04,550/- (This amount is the cumulative sum of License Fees of an amount of Rs.1,01,24,922/-, CAM Charges of an amount of Rs.34,42,400/- HVAC Running Cost of an amount of Rs.52,27,292/-, Water Charges Rs.6,70,979/- and Interest on Delayed Payments of an amount of Rs.33,38,957/-)**

Brief Facts:-

1. The Petition reveals that the Operational Creditor and the Corporate Debtor entered into a leave and license agreement dated 19.12.2017 for Unit No. 1, admeasuring 6500 sq. ft. carpet area, situated on the lower ground floor, (1st Basement) of ‘C’ Wing of the Hotel (Licensed Premises), for a period of 5 years commencing from 01.01.2018 to 31.12.2022. The Corporate Debtor was thereby providing gymnasium services on the leased premises.
2. Thereafter, the Operational Creditor issued various invoices to the Corporate Debtor which are as follows:

- 9 Invoices towards License Fees, the first being dated 01.03.2019 and the last being dated 01.12.2019
- 5 Invoices towards CAM Charges, the first being dated 01.07.2018 and the last being dated 01.10.2019
- 14 Invoices toward HVAC Running Cost, the first being dated 20.10.2018 and the last being dated 05.12.2019
- 10 Invoices towards Water charges, the first being dated 11.08.2018 and the last being dated 10.04.2019
- 2 Invoices towards Interest on Delayed Payment, the dates being 31.03.2019 and 12.12.2019 respectively.

However, the Corporate Debtor failed to make the payment against any of the above listed invoices.

3. The Operational Creditor has placed on record its Account Statement for the period 21.12.2019 to 20.03.2020 and 20.03.2020 to 11.05.2020 to substantiate its claim of non-receipt of payment from the Corporate Debtor.
4. In pursuance of the above, the Operational Creditor issued a Demand Notice dated 21.12.2019 under Section 8 in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 of the Code.
5. The Corporate Debtor denied the debt by its Reply dated 5th February, 2020 to the Demand Notice. The Corporate Debtor vide this Reply alleged that it suffered Operational Losses on account of unavailability of electricity, waterlogging, water damage from leakages, incomplete construction and non-installation of water meters in the licensed premises in contrast to making commercial benefit. The Corporate Debtor further submitted that ever since the Operational Creditor is declared as a Non Performing Asset in terms

of the guidelines prescribed by the Reserve Bank of India and CIRP process has been initiated against it from 29.01.2019, the licensed premises have been rendered in a completely inoperable state without any management which adds on to the Operational Losses suffered by the Corporate Debtor. The Corporate Debtor thus denied any outstanding liability and hence this Petition.

Submission by the Corporate Debtor:

6. The Corporate Debtor completely disputes that the total outstanding amount of **Rs. 2,28,04,550/-** is due and payable.
7. The Corporate Debtor had also submitted that Mr. Vishal Sharma and Mr. Sagar Sharma having Director Identification Number 00894624 and 00894706 respectively have been disqualified from acting as Directors of companies under section 164 of the Companies Act, 2013 from the period of 01.11.2016 to 13.10.2021 by the Registrar of Companies. This contention of the Corporate Debtor has been substantiated with the DIN Status by the Ministry of Corporate Affairs. In light of such disqualification the execution of the Leave and License Agreement between the parties to the case and this present Petition suffer from technical defects. The Corporate debtor thus claimed to be aggrieved by fraud.
8. The Corporate Debtor submitted that this Petition is not maintainable on account of the existence of Pre-existing Dispute which is substantiated by the following documentary evidence placed on record:-
 - A complaint dated 30.04.2019 to the Juhu Police Station complaining about the stoppage of water and air-conditioning plant services which resulted into loss of considerable business and reputation of the Corporate Debtor. This same complaint also alleges collusion between

the Interim Resolution Professional and the Directors of the Operational Creditor.

- A Miscellaneous Application numbered 2661 of 2019 in Company Petition No. (IB) 1458 of 2017 against the Operational Creditor filed in July 2019 with this Mumbai Bench of NCLT for resolving the issue of stoppage of water and air-conditioning plant services, for seeking reimbursement of all expenses paid by the Corporate Debtor in relation to purchase of water tankers, installation of water meters, implementation of maintenance and sanitation and verification of claims filed with the Insolvency Resolution Professional.
- Emails exchanged with the Resolution Professional of Operational Creditor over a period of September 2019 to January 2020 disputing all obligations to make payment of rentals post April 2019.
- A copy of the Complaint filed by the Corporate Debtor with the Web Portal of the GST Department as it was deprived of the benefit of Input Tax Credit of GST for the sum of Rs. 45,67,521.47 as the Operational Creditor had collected GST of 18% on the Invoice values raised upon the Corporate Debtor but failed to make any deposit with the GST Department.
- The narrative of the Corporate Debtor in the FIR No. 486 of 2021 filed by the Operational Creditor pursuant to the fact that the Corporate Debtor was compelled to vacate the Licensed Premises on 07.01.2020 on account of disconnection of electric connection of the entire premises of the Operational Creditor.

9. However, the Corporate Debtor itself brought to our notice that the Operational Creditor was released from all rigors of Corporate Insolvency Resolution Process through the NCLAT Order dated 05.09.2019.

Findings

10. On close perusal of the following documentary evidence placed on record by the Corporate Debtor namely:

- The complaint dated 30.04.2019 to the Juhu Police Station
- Miscellaneous Application numbered 2661 of 2019 in Company Petition No. (IB) 1458 of 2017
- Emails exchanged with the Resolution Professional of Operational Creditor over a period of September 2019 to January 2020

It is categorically established that the Corporate Debtor had been allegedly grossly aggrieved by the stoppage of water and electricity in the Licensed Premises. It was due to this disconnection of water and electric supply that the commercial exploitation of the Licensed Premises had become an impossible task. Thus all these chain of events constitute the existence of a Pre-existing Dispute.

11. Reliance is placed on the judgement of the Hon'ble Supreme Court in Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd. (2017) ibclaw.in 01 SC with respect to Pre-existing Dispute in which it was held that the breach of the terms and conditions of the Agreement entered into between the parties to the case before the Demand Notice is sent under Section 8 of the Code qualifies to be a Pre-existing dispute and, therefore on the ground of existence of such

a Pre-existing Dispute, an Application under Section 9 of the Code is not maintainable.

12. The Corporate Debtor had in no manner whatsoever accepted its liability. In its Reply dated 05.02.2020 to the Demand notice sent by the Operational Creditor the Corporate Debtor denies any obligation towards the default amount. Therefore, the Corporate Debtor has failed to prove the existence of **“debt”** and **“corresponding default”**.
13. The Registrar of Companies had disqualified Mr. Vishal Sharma and Mr. Sagar Sharma having Director Identification Number 00894624 and 00894706 respectively from acting as Directors of companies under section 164 of the Companies Act, 2013 from the period of 01.11.2016 to 13.10.2021. In the event of such disqualification being in operation the execution of the Leave and License Agreement between the parties to the case in itself is not a legally enforceable agreement.
14. Therefore, on ground of existence of a Pre-existing Dispute, failure on the part of the Operational Creditor to prove debt and corresponding default and Disqualification of the 2 Directors by the Registrar of Companies under Section 164 of the Companies Act, 2013, the present petition is **rejected**.
15. Keeping in view the above stated facts and appreciating the same in the backdrop of the objectives of the Code which in no uncertain terms is for resolution of the Corporate Debtor, to promote entrepreneurship in a time bound manner and this Code cannot be allowed to be abused for recovery of the pending dues and that too by withholding necessary and relevant facts about the pre-existence of dispute from the Tribunal. Such a conduct on the part of the Petitioner withholding the necessary and requisite

information about the pendency of dispute between the parties deserves to be deprecated. **Thus the present Petition is rejected with these observations about the conduct of the petitioner.**

SD/-

MADHU SINHA
MEMBER (TECHNICAL)

SD/-

REETA KOHLI
MEMBER (JUDICIAL)