

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH
KOLKATA**

C.P (IB) No.408/KB/2021

In the matter of

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. And

In the matter of:

Square Four Housing & Infrastructure Development Private Limited, having its registered office at 238A, A.J.C. Bose Road, 2nd Floor, Suite No.2B, Kolkata-700020.

... Operational Creditor

Versus

In the matter of:

Phonex Logistics Private Limited, having CIN: U74999WB2011PTC167184, having its Registered office at A-1/46/1, Paharpur Road, P.O. & P.S. Rabindranagar, Kolkata-700066.

...Corporate Debtor

Date of hearing :15/07/2022

Order Pronounced on : 18 /07/2022

Coram:

Mr.Rohit Kapoor, Member (Judicial)

Mr.Harish Chander Suri, Member (Technical)

Counsels appeared:

1 Mr. Zeeshan Haque, Adv.] For Operational Creditor
2 Mr. Kaushik Banerjee, Adv.

1 Mr.K.Thakar, Adv.] For Corporate Debtor
2 Ms. S.Thaker, Adv.

ORDER

Per: Harish Chander Suri, Member (Technical)

1. This petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy Rules, 2016 (Application to Adjudicating Authority) has been filed by Square Four Housing & Infrastructure Development Private Limited, through its Mr. Asit Dutta duly authorised vide Board Resolution dated 26.11.2021 (hereinafter referred as the Operational Creditor), seeking initiation of Corporate Insolvency Resolution Process in respect of Phonex Logistics Private Limited, having its Registered office at A-1/46/1, Paharpur Road, P.O. & P.S. Rabindranagar, Kolkata-700066, (hereinafter referred as the Corporate Debtor).

2. It is submitted that the Operational Creditor is, inter alia, engaged in the business of dealing with storing and handling of containers, logistic services, etc. which are essentially used in shipping Industry and for the purpose of carrying on the said business, the Corporate Debtor had entered into a Memorandum of Understanding on 23rd August, 2017 (MoU), whereby the Corporate Debtor was allowed by the Operational Creditor to use its leasehold land being the Plot No.A-23 containing an area of land measuring about 8128 sq.mtrs. comprised in Brooklyn Shed Nos.12 & 17 and the Plot No.A-24 containing an area of land measuring about 7621 sq.mtrs. comprised in Brooklyn Shed Nos.13 & 18 respectively inter alia on the following terms:

- a) The Corporate Debtor shall pay a monthly charge to the Operational Creditor @ Rs.8.10 per square feet per month together with GST. The said monthly charge shall automatically be increased or revised at such rate/percentage as the Kolkata Port Trust Authority (who being the original owner of the said property has leased out the same to the Operational Creditor) shall increase or revise the rents/charges payable by the Operational Creditor to KoPT Authority;
- b) The tenure of the said arrangement under the MoU is for a period of 5 years commencing from 23rd day of August, 2017 and ending on 22nd day of August, 2022;

- c) The monthly charges was payable by the Corporate Debtor to the Operational Creditor Party within 7th day of each month for which the said charges was payable;
- d) The Corporate Debtor shall keep a sum of Rs.1 crore deposited with the Operational Creditor, which is refundable without any interest upon expiry and/or termination of the said tenure;

3. The Ld. Counsel appearing on behalf of the Operational Creditor submitted that in terms of the said MoU between the parties, the Corporate Debtor had been paying the said monthly charges till November, 2019 without any demur or protest.

4. It has been further submitted that since the Corporate Debtor declined to pay increased rent in terms of the MoU, the Operational Creditor by its letter dated 4th April, 2019 (*Annexure-B*) had revised the clause of increment of monthly charges, which was duly accepted by the Corporate Debtor.

5. Thereafter, the Corporate Debtor upon being asked by the Operational Creditor vide letter dated 18th December, 2019 (*Annexure-D*) to contribute 50% share of the Property Tax, the Corporate Debtor vide its letter dated 19.12.2019 (*Annexure-E*) had confirmed their acceptance.

6. It is submitted that in spite of the said confirmation and acknowledgement, raising bills regularly by the Operational Creditor and following up with the Corporate Debtor by the Operational Creditor, the Operational Creditor failed and/or neglected and/or avoided to make the payments to the Operational Creditor without raising any disputes or showing any reason whatsoever.

7. The Ld. Counsel appearing on behalf of the Operational Creditor further submitted that having failed to receive any response from the Corporate Debtor, the Operational Creditor sent a Notice on 8th September, 2021 under Registered Post with A/D. and through email dated 21st September, 2021 under section 8 of IBC, under Rule 5(1)(a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, to the Corporate Debtor at its registered office calling upon the Corporate Debtor to pay the outstanding sum of

Rs.4,58,20,473/- within a period of 10 days from receipt of the said notice. The notice was duly delivered to the Corporate Debtor. Copy of the Postal receipt, Track report and Email has been collectively annexed as Annexure G.

8. The Ld. Counsel appearing on behalf of the Operational Creditor submitted that the Corporate Debtor through the above notice was duly intimated that in the event of failure on the part of the Corporate debtor to pay the outstanding amount so demanded within the stipulated period, the Operational Creditor would initiate Corporate Insolvency Process against the Corporate Debtor under Insolvency and Bankruptcy Code, 2016. It is further submitted that in spite of receiving the said Notice, the Corporate Debtor did not pay any heed and remained silent, which compelled the Operational Creditor to initiate this instant proceedings against the Corporate Debtor on or about 17th December, 2021.

9. It is submitted that after initiation of the instant proceedings against the Corporate Debtor and serving copy of the Application upon the Corporate Debtor, the Corporate Debtor vide its letter dated 12th February, 2022 addressing the Operational Creditor invoked Arbitration suggesting Mr. Amitesh Banerjee, Sr. Advocate as sole Arbitrate on false, flimsy, untenable and baseless grounds, which was duly replied by the Operational Creditor vide its letter dated 8th March, 2022 denying the allegations and rejecting the proposal of appointing any arbitrator since no dispute arose with regard to the claim and entitlement of the Operational Creditor in terms of the MoU.

10. It is submitted that the contentions raised by the Corporate Debtor are absolutely mala fide and have been made for an ulterior motive to delay the proceedings. The Corporate Debtor is also liable to pay further interest on the outstanding dues @ 14.25% p.a. since October, 2021 together with further monthly charges and interest thereon until full payment.

11. It is stated that at no point of time the Corporate Debtor had raised any dispute with regard to the outstanding dues of the Operational Creditor and when the Corporate Debtor is unable to pay is purposefully avoiding its liability to pay the outstanding amount.

12. The Operational Creditor has submitted that the period of default in payment the outstanding operational debt is since December, 2019 and is still continuing.

13. The Operational Creditor has enclosed with the petition, the following documents:-

- a) Memorandum of Understanding dated 23.08.2020 signed between the Operational Creditor and the Corporate Debtor regarding the Sub-lease for plot No. A-23 at Brooklyn Shed No. 12 and 17 and Plot No. A-24 at Brooklyn Shed No.13 and 18.
- b) Bills dated 30.05.2019 raised by the Operational Creditor to the Corporate Debtor.
- c) Letter dated 18.12.2019 issued by the Operational Creditor to the Corporate Debtor asking to pay a sum of Rs.28,87,372/- being 50% of the property tax along with GST.
- d) Letter dated 19.12.2019 sent by the Corporate Debtor, confirming and agreeing to pay 50% of the property tax including the GST, with regard to the said two plots.
- e) Statutory Notice dated 08.09.2021 issued by the Operational Creditor to the Corporate Debtor.

14. In **reply** to the petition, the Corporate Debtor has filed reply affidavit through its Authorised Representative Rehan Khan and submitted that there is no debt due or payable by the Corporate Debtor to the Operational Creditor and the claim of the Operational Creditor does not constitute a debt within the provisions of the Insolvency & Bankruptcy Code, 2016.

15. It is further contended that Sometime in November, 2019, the Corporate Debtor's ingress and egress in the land was restricted by the Kolkata Port Trust being the owner thereof.

16. The Learned Counsel representing the Corporate Debtor further contended that the Operational Creditor had compelled the Corporate Debtor to

agree to contribute 50% share of the Property Tax by stating falsely that the property tax has been substantially increased.

17. It is further contended that the Operational Creditor did not obtain permission from Kolkata Port Trust for sub-letting the said land and defaulted payment of lease rental to the Kolkata Port Trust and as a result of which, by a letter dated 6th January, 2020 (*Annexure A to the Reply*), the Corporate Debtor had terminated the MoU and asked refund of the Security Deposit of Rs.1 crore and in order to repay the security deposit, the Operational Creditor has instituted the instant proceedings.

18. The Learned Counsel on behalf of the Corporate Debtor further contended that by a letter dated 17th February, 2022 (*Annexure B to the Reply*), the Corporate Debtor has invoked Arbitration clause, against which reply has been given by the Operational Creditor vide letter dated 8th March, 2022 (*Annexure C to the Reply*).

19. It is submitted that the corporate debtor is a solvent entity and is able to discharge its liabilities as and when they arise and submitted the audited balance sheet for the financial year ended 31st March, 2021 (*Annexure D to the Reply*).

20. The Learned Counsel for the Corporate Debtor denied all allegations contained in Parts I to V of the Application filed by the Operational Creditor and submitted that the Application filed by the Operational Creditor with mala fide intent to harass the Corporate Debtor and the Proceedings is not maintainable under Section 9 of the Insolvency and Bankruptcy Code, 2016.

21. In the **Rejoinder** to the reply filed by the Corporate Debtor, the Operational Creditor has denied the contentions of the Corporate Debtor that there was any defect in the petition or that there is no default. It is denied that the Operational Creditor has failed to show existence of debt or occurrence of default on the part of the Corporate Debtor. It is denied that there is no operational debt due to the Operational Creditor or there has been any suppression of material fact. It is denied that the instant Application is not maintainable or that there was any dispute as to the claim of the Operational Creditor. The Operational Creditor denies that there were any genuine or

pre-existing or contemporaneous disputes against the claim of the operational creditor. It is denied that the question of initiating insolvency proceedings against the Corporate Debtor does not arise. It is denied that there are any bona fide disputes to the claim of the Operational Creditor or that the instant proceedings have been filed solely with mala fide intention to recover debt.

22. It is stated by the Operational Creditor that there was no suppression of any fact regarding the land given to the Corporate Debtor for carrying on its business thereat and knowing fully well about the right of the Corporate Debtor in the said land, the Corporate Debtor had entered into the said MoU agreeing to comply with the terms and conditions stipulated therein

23. Learned Counsel of the Operational Creditor has further contended that the purported letter of termination issued by the Corporate Debtor on 6th January, 2020 was never served upon the Operational Creditor.

24. It has been further contended that the letter dated 19.12.2019 issued by the Corporate Debtor itself shows that there was no dispute between the parties and the Corporate Debtor had agreed to pay 50% of the property tax upon mutual discussion with the Operational Creditor.

25. Learned Counsel of the Operational Creditor further contended that the plea of the Corporate Debtor regarding restricting their access to the land by the Kolkata Port Trust is absolutely a cock & bull story and such plea is absolutely baseless and without any evidence.

26. It is contended that the Corporate Debtor is bound by the terms of the MoU and is not in any way concerned regarding the relationship and or agreement between the Operational Creditor and the Kolkata Port Trust.

27. The Operational Creditor has duly complied with all the procedural formalities in filing the petition and has filed affidavit under section 9(3)(b), the petition is complete in all respects.

28. **During the course of argument, the Ld. Counsel for the Operational Creditor** submitted that the Operational Creditor had provided storage facilities to the Corporate Debtor in terms of the MoU dated 23/08/2017 at a monthly

consideration of Rs.16,19,692/- and the parties had subsequently mutually agreed that 50% of the Property Tax would also be paid by the Corporate Debtor, as is evident from letters dated 18/12/2019 and 19/12/2019.

29. It is further submitted by the Ld. Counsel for the Operational Creditor that Clause A of the MoU clearly shows that the Corporate Debtor had verified all documents and satisfied itself with regard to the right of the Operational Creditor in respect of the said property. Clause 5 of the MoU of the Operational Creditor clearly records that there is no transfer of possession but only a temporary occupation for providing storage facilities being given to the Corporate Debtor subject to payment of the aforesaid charges. The Corporate Debtor had failed to make the payment of the monthly charges to the tune of Rs.4,58,20,473/- as unpaid operational debt which is due and payable from December, 2019. A statutory demand notice dated from September, 2021 in Form -3 under Section 8 of the Code was also issued to the Corporate Debtor but in spite of the notice having been received, the Corporate Debtor has neither replied to the same nor raised any dispute as regards the unpaid operational debt.

30. The arguments of the Ld. Counsel for the Corporate Debtor, is that there is no debt is due or payable to the Operational Creditor. It is submitted that the Kolkata Port Trust under whom the Operational Creditor was given the land had obstructed the ingress and egress of the corporate debtor to the said premises since the Operational Creditor had not paid lease rent to Port Trust, as a result of which, Kolkata Port Trust is considering resumption of the land and will confiscate the containers of the Corporate Debtor.

31. **Ld. Counsel for the Corporate Debtor** has further submitted that MoU was insufficiently stamped and is cannot be looked into. It is submitted that the Corporate Debtor had paid Rs.50,00,000/- on account of each of the said plots. It is submitted that the Operational Creditor had not taken permission for subletting from the Port authorities, who were landlords, and that the Corporate Debtor could not make use of the said plots, and it surrendered the sub lease by letter dated 6th January, 2020.It is submitted that the however, due to inadvertence of letter dated 6th January,2020 was not annexed with the reply.

32. It is submitted that there is no invoice for monthly rent or letter demanding payment of rent from Operational Creditor after 6th January, 2020 till Form No. 3 notice was sent on 9th September, 2021. It is submitted that the Corporate Debtor did not pay the monthly rent for three consecutive months when it was in possession of the said plots. The Operational Creditor was entitled to terminate the MoU. It is submitted that no termination notice of MoU has been disclosed by the Operational Creditor.

33. It is submitted that the reimbursement of 50% of Property Tax being claimed by the Operational Creditor is invalid and illegal as the rent is inclusive of prevailing Property Tax.

34. **Ld. Counsel for the Operational Creditor** has submitted that the Corporate Debtor has itself accepted its liability to pay the Property Tax of Rs.28,87,372/- and the outstanding arrears in service charges having been received the bills and invoice raised by the Operational Creditor at page 37 of the C.P.

35. It is submitted that there has been no termination of MoU by the Corporate Debtor which will be evident from the letter dated 6th January, 2020 wherein the Corporate Debtor has merely vacated the said premises. There is no whisper of termination in the said letter dated 6th January, 2020.

36. It is submitted that letter invoking the arbitration Clause 23 of the MoU was issued by the Corporate Debtor on 8th March, 2021 i.e. more than 6 months after receiving statutory notice of demand under section 8 of the Code and 4 months after the filing of the present petition. On 6th December, 2021. As such, it is clear that the request for arbitration had been made only by way of an afterthought, so as to denude the jurisdiction of this Adjudicating Authority.

37. It is submitted that since the Corporate Debtor has taken the benefit of the MoU since 23rd August, 2017 and if there is some deficiency in the stamp duty. The Corporate Debtor also cannot seek to take advantage of its own wrong and the Corporate Debtor is, therefore, estopped from raising such a plea. The MoU had been admitted by both parties and there was no dispute with regard to

the same. The Corporate Debtor had relied on the terms of the MoU in the reply affidavit and therefore cannot now seek to challenge the validity of the same.

38. We have heard both sides and carefully examined all the documents submitted by the parties in support of their respective contentions. Even though the Corporate Debtor has tried to convince this Adjudicating Authority as regards some pre-existing disputes and has raised certain frivolous grounds of defence but we are not convinced with any of the grounds of defence taken by the Corporate Debtor. Moreover, the Corporate Debtor has neither filed any evidence that they had duly served the notice of termination upon the Operational Creditor nor has raised any dispute prior to the filing of this proceedings nor replied to the statutory noticed sent by the Operational Creditor.

39. We are, therefore, convinced that this petition deserves to be admitted and therefore, pass the following orders:-

ORDER

- i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, is hereby admitted.
- ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.
- iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. being appointed hereby shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

- a) 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;
- b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
- c) 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);
- d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- v) The supply of essential goods or services rendered to the Corporate Debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

- ix) The Operational Creditor has proposed name of **Mr. Bijay Murmuria** having IP Registration No.IBBI/IPA-001/IP-N00007/2016-17/10026, E-mail:bijay_murmuria@sumedhamanagement.com for appointment as Insolvency Resolution Professional annexing his Bio-Data with the Rejoinder. Therefore, after perusing the Bio-Data and considering the proposal of the Resolution Applicant and in accordance with the provisions of Section 16(3) (a) of the IBC, we appoint **Mr. Bijay Murmuria, IRP** to act as Interim Resolution Professional (IRP). He shall file Form-2, and that no disciplinary proceedings are pending against him with the Board.
- x) **Mr. Bijay Murmuria IRP**, is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.
- xi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- xii) The Operational Creditor/Applicant is directed to deposit **Rs.1,00,000/- (Rupees One Lakh only)** with the IRP appointed hereinabove within three days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

40. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.

41. List the matter on 31/08/2022 for filing of **Progress Report**.

42. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

**(Harish Chander Suri
Member (Technical))**

**(Rohit Kapoor)
Member (Judicial)**

Order signed on this, the 18 day of July, 2022

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