

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 150/MB-VI/2022

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

MR. AMIT N. GANDHI &

MR. NAVNITLAL U. GANDHI

Residing at: 22, Sarthak Terrace

Opp. Gandhi Lawns, Kothrud,

Pune- 411038, Maharashtra.

...Operational Creditors

V/s

ASPIRE FITNESS PRIVATE LIMITED

[CIN: U85100MH2009PTCI97625]

Residing at: 801, Mahalaxmi Chambers,

22, Bhulabhai Desai Road

Mumbai- 400027, Maharashtra.

...Corporate Debtor

Reserved: 27.10.2023

Pronounced: 23.11.2023

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SMT MADHU SINHA, MEMBER (TECHNICAL)

Appearances: Hybrid

Operational Creditors: Adv. Sidharth Shankar

Corporate Debtor : None (*ex-parte*).

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. Background

1.1 The instant Application bearing C.P.(IB) No. 150/MB/2022 was jointly filed on 16.11.2021 by Mr. Amit N. Gandhi and Mr. Navnitlal U. Gandhi, the Operational Creditors (OCs), under section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Aspire Fitness Private Limited, the Corporate Debtor (CD). The OCs own and possess the building named Gandhi Empire 1 situated on Plot No.2, St. No. 595/1, Sareen Estate, Kondhwa Road, Bibwewadi, Pune and the CD is involved in Human health activities.

1.2 The OCs entered into a Leave and License Agreement (Agreement) with the CD on 28.01.2018 for 4 terms of 12 months, in relation to premises for the purpose of establishing a health club and gym.

1.3 In accordance with the Agreement, the Licensee (CD) is obligated to pay a license fee that includes maintenance

charges. This licence fee is to be disbursed to both OCs in equal portions via separate cheques. The payment structure of the amount claimed by the OCs is defined as follows:

- i. For 12-month period, commencing from 01.01.2018 to 31.12.2018, the fee amounting to Rs 1,73,250 (One Lakh Seventy-Three Thousand Two Hundred Fifty Rupees) per month for **N.U. GANDHI** and **A.N. GANDHI** separately.
- ii. For 36-month period, commencing from 01.01.2019, to 31.12.2021, the fee stands at Rs 1,99,300 (One Lakh Ninety-Nine Thousand Three Hundred Rupees) per month.

(The rate of increment on charges payable by the CD to the OC, on expiry of this agreement it is to be mutually decided between them).

- 1.4 Along with license fee, electricity bill and water bill separately issued by the Electricity Board and Pune Municipal Corporation (PMC) was to be paid by the CD within the due date. However, a total amount of Rs. 1,34,97,857.84 (One Crore Thirty-Four Lakh Ninety-Seven Thousand Eight Hundred Fifty-Seven and Paise Eighty-Four Rupees) remains in default by the CD to the OCs.

2. **Contentions of OCs**

2.1 The OCs contend that, the CD issued a letter seeking relief, requesting a reduction in rent to a manageable level of Rs. 1,50,000/- or 15% of the revenue share, whichever is higher, for the duration of the crisis on account of COVID-19 pandemic, i.e., from 01.11.2020, to 31.12.2021. The CD also proposed to pay 30% of the rental amount for the lockdown period, acknowledging the challenges faced due to unforeseen conditions.

2.2 The amount payable by CD to OC arises on account of-

a) Idling charges incurred till 30.09.2021 to Mr. A.N Gandhi of Rs.47,89,669.30 and to Mr. N.U Gandhi of Rs.47,89,670.74 along with electricity and water bill of Rs.3,25,526.80 and Rs.92,991.00 respectively, plus damages of Rs.35,00,000.

b) In clause 18 of the agreement, it was mutually agreed upon by the parties that the Licensor (OC) shall retain the right to terminate the Agreement, if the CD failed to vacate the premises upon the expiration of the licensed period, in that event, the OC, without waiving any of their rights, would be entitled, and the CD was liable to pay a

sum of Rs. 15,000 (Rupees Fifteen Thousand Only) per day as damages.

- 2.3 Monthly invoices for the payment of rent/water bill were issued to the CD from November 2019 to January 2021 by the OC.
- 2.4 The OC further submits that since the CD was unable to pay or clear the rent/water bills/electricity bills in due time, in accordance with Clause No.18 of the Agreement, the OC terminated the Agreement *vide* e-mail dated 25.03.2021 calling upon the CD to vacate and clear all the outstanding dues by 31.03.2021. However, in spite of having received the said e-mail, the CD failed to clear the outstanding dues.
- 2.5 In view of the above events, the OC issued a Demand Notice under Section 8 of the IBC on 19.10.2021 to the CD. According to the OC, the CD failed and willfully refused to respond to the Demand Notice and no payment has been released in favour of the OC.
- 2.6 Furthermore, the OC contends that, through verification by Chartered Accountants (DS Sonawane & Company), letter issued on 01.11.2021 stating that OC's banker, i.e., ICICI Bank, had not received any payments in its account from the CD except for receipt of amount on 08.12.2020, 08.02.2021 and 17.02.2021.

3. Contentions of CD

3.1 The CD was already set *ex-parte* on 23.03.2023. Despite being set *ex-parte* on 23.08.2023, we again directed the OCs to issue notice to the CD for appearance by e-mail and post and to file the track report before us. The said notice was delivered to the CD on 30.08.2023 as per the track report. Despite being duly notified, there has been no appearance on the part of the CD since the time OCs filed the Application for initiating CIRP in respect of the CD.

4 Analysis & Findings

4.1 Section 5(20) of the IBC, defines “operational creditor” to be “a *person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred*” The definition of the term “person” as provided under Section 3(23) of the IBC, *inter alia*, includes “(a) an individual” but does not include “individuals” From the plain reading of the above definition of “person”, it can be inferred that the legislative intention with reference to OC is to limit filing of applications under Section 9 by an individual singly, and not individuals jointly or collectively. Further, where Section 7 provides for initiation of CIRP by a financial creditor “either by

itself or jointly with other financial creditors”, Section 8 provides for delivering demand notice by “an operational creditor”, and the recital in Section 9 denotes initiation of CIRP by “the operational creditor”.

4.2 On perusal of the documents filed by the OC before us, we find that the present application is filed by two OCs jointly, on the basis of a Leave and License Agreement which is executed by both of them in the capacity of Licensors. Both the OCs have signed the Application. The settled law with respect to filing of application U/s. 9 of the IBC is that an application can only be filed by individual OC and not jointly by two or more OCs as we have discussed above. The distinction between an application under Section 7 and Section 9 has already been jurisprudentially evolved. The OC has to be a single individual or entity within the definition of “person” as discussed above, whereas the current application is filed jointly by two OCs, which is not maintainable.

4.3 In support of the above legal position, the Hon’ble NCLAT in the matter of ***Uttam Galva Steels Limited vs. DF Deutsche Forfait AG and Ors. (Company Appeal (AT) (Insolvency) 39 of 2017*** dated 28.07.2017, held that:

“19. From the aforesaid provisions of Section 8 and 9 of I&B Code, it is clear that unlike Section 7, a

notice under Section 8 is to be issued by an "Operational Creditor" individually and the petition under Section 9 has to be filed by Operational Creditor individually and not jointly."

Moreover, in the present Application, the total default as claimed by the OCs jointly amounts to Rs. 1,34,97,857.84; however, their individual claim would be below the threshold limit in terms of Section 4 of the IBC. Hence, we do not find any reason to delve into the other merits of the Application. We find that the Application filed jointly by two OCs is not maintainable.

ORDER

This Application bearing C.P. (IB) No. 150/MB/2022 under Section 9 of the IBC, filed by Mr. Amit Gandhi and Mr. Navnitlal Gandhi, the OCs, for initiating CIRP in respect of Aspire Fitness Private Limited, the CD is **Rejected**.

We make it clear that any observations made in this Order shall not be construed as expressing opinion on merits. The right of the OCs available as per law before any judicial/quasi-judicial

forum shall not be prejudiced on the grounds of rejection of the present Application. No orders as to costs. Ordered accordingly.

**Sd/-
MADHU SINHA
MEMBER (TECHNICAL)**

**Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)**

//LRA-Akshata Shah//