

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 764/MB-IV/2020

Under Section 9 of the I&B Code, 2016

In the matter of:

**CARESTREAM HEALTH INDIA PRIVATE
LIMITED**

[CIN: U29199MH2006PTC165303]

...Operational Creditor/Applicant

V/s

CALVIN ASSOCIATES PRIVATE LIMITED

[CIN: U51100MH1985PTC038339]

...Corporate Debtor/Respondent

Order Dated: 28.04.2023.

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Suyash B, Ld. Counsel.

For the Respondent(s) : Mr. R. Sean Wassoodew, Ld. Counsel

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an Application being C.P. (IB) No. 764/MB/C-IV/2020 filed on 02.03.2020 by Carestream Health India Private Limited, the Operational

Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Calvin Associates Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

2. The Operational Creditor is a company engaged in the business of trading in medical equipment. The Corporate Debtor is engaged in the business of dealing in real and personal property.
3. The total amount claimed by the Operational Creditor as specified in the Part 4 of the Company Petition is Rs. 19,54,167/-, comprised of the Principal sum of Rs.17,12,220/- and interest @18 % per annum (from 04.06.2019 until 28.02.2020) in sum of Rs. 2,41,947/-.
 - 3.1. On 07.05.2019, the Applicant entered into a 'Without Prejudice' letter of intent with the Corporate Debtor, in relation to commercial premises bearing unit no. 701 in the building Silver Metropolis ("Proposed License Premises"), for licensing on terms set forth in the said letter of intent. Accordingly, an advance security deposit, in the sum of Rs. 17,12,220 (Advance Security Deposit) was duly paid by the Operational Creditor to the Corporate Debtor.
 - 3.2. Thereafter, the Original LOI was mutually replaced with a revised "Without Prejudice letter of intent dated 07.05.2019 ("Revised LOI"), deleting the Premises Usage requirement and procurement of corollary certificate.
 - 3.3. Vide an email dated 04.06.2019, a decision to cancel the revised LOI was relayed by the Applicant to the Corporate Debtor, based on enquiries rendering apparent that the Applicant was unable to fulfil the conditions stipulated under the Maharashtra IT/ITES Policy and requested to return the advance 1-month deposit.

- 3.4. On 14.11.2019, the Operational Creditor issued a notice calling upon the Corporate Debtor to refund the Advance Security Deposit along with interest @18 %p.a., compounded at monthly rests, until payment/realization. In response, the Corporate Debtor, issued a reply dated 03.12.2019, asserting that the demand notice was untenable, raising a frivolous demand for a copy of the Revised LOI upon the Claimant.
- 3.5. The Operational Creditor issued demand notice dated 10.02.2020 under section 8 of the Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor, for return of unpaid Operational Debt to the tune of Rs. 19,37,057/- and interest at the rate of 18% per annum with effect from the date of cancellation of the letter of intent, i.e. 04.06.2019 until the date of the Demand Notice due and payable to the Claimant. The Corporate Debtor on 17.02.2020, replied to the said notice and stated that the claim is not in respect of provision of goods and services or employment ; not in nature of an “Operational Debt” as defined u/s 5(21) of the Insolvency and Bankruptcy Code,2016 and a series of false and untenable assertions were raised.
- 3.6. The Operational Creditor filed additional submission dated 28.07.2021 stating that LOIs were executed ‘without prejudice’ and these words are to be taken into consideration while determining binding nature of such documents and these words make it clear that the applicant fulfilled the criterion under IT policy for occupation of such premises as a precursor to binding arrangement, which it could not have as IT policy mandates annual turnover from IT/ITES activities within the said premises should exceed 75% of total turnover;

4. The Corporate Debtor in its reply to dated 01.09.2020 the present petition and subsequent reply(s) dated 02.08.2021 & dated 1st March, 2023 has denied all allegations of the Operational Creditor placing reliance on Hon'ble NCLAT decision in the matter of **M Ravindranath Reddy v. G Krishan & Ors. {Company Appeal (AT) 331 of 2019}** and has raised allegations as there is no operational debt in existence; suppression of certain facts; Existence of prior Dispute. It is stated that the debt arises from the refund of security deposit, the applicant had paid to it, under the leave and license intent ("LOI") precursor to leave and license agreement; that the onus to prove that the revised LOI dated 07.05.2019 transmitted on 21.05.2019 by realty broker was subsequently executed to execution of LOI dated 07.05.2019, as claimed by the applicant, lies on the applicant and requires adjudication; that the applicant terminated the agreement citing LOI dated 07.05.2019 and not revised LOI of even date stating that it can not go ahead with the leasing due to restrictive clauses to abide by ITES certification and there is no solution to remove it, while the Corporate Debtor pleads that it had never confirmed that it can be deleted supporting its contention by the fact it was making efforts to obtain IT certification and it would not have done so if there would have been possibility to remove such clause; that the said premises was eligible for use by ITES units under IT policy and subsequent tenant M/s Reliance Nippon Life Insurance Co Ltd. obtained such certification for occupation of the units, which were to be occupied by the applicant earlier; and there was no serious attempt on the part of the applicant to obtain necessary certification under IT policy for occupation of licensed units.

Findings:

5. We have heard the arguments of the Corporate Debtor/Applicant.

6. As per the material on record this Bench is of the view that, the Operational Creditor is claiming refund of security deposit paid on a letter of intent being a precursor to leave and license agreement, which is not a claim in respect of provision of goods or services. This claim filed by the Operational Creditor is not an Operational Debt u/s 5(21) of the Code, as per the reasons stated in the reply of the Corporate Debtor which clearly shows that this amount as claimed by the Operational Creditor does not fall within the ambit of a "*Operational Debt*".
7. This bench has carefully gone through the documents and pleadings available on record and considered the arguments of both the sides.
8. This Bench finds that the parties entered into a term sheet (referred to as LOI in their communication); the said terms sheet contains the terms and conditions on which the parties had agreed to carry out the transaction of lease of immovable property on payment of license fee; the said term sheet was signed with words "without prejudice" and contains the clause no. 6 & 25 as to restrictive usage and procurement of DOI certificate under IT policy, a clause 7 as to entering into final leave and license agreement to be registered, and a clause no. 17 as to payment of Rs. 17,12,220/- as signing amount prior to execution of said term sheet, and a clause no. 28 stating that this amount shall stand forfeited if a leave and license agreement is not entered into for any reason other than mentioned above. This Bench also finds that the applicant sent a mail dated 18.06.2019 expressing its inability to go ahead due to restrictive clause in clause 6 & 25 of term sheet and stating that it is not eligible to the requisite certificate so as to enable it to occupy the premises and stated to have sent a revised LOI of even date deleting clause no. 6 & 25 so that the term sheet can be acted upon. The Corporate debtor has denied having received any attachment with the mail dated 21.05.2019 sent by reality broker.

9. Considering the facts placed before us, that the term sheet was executed 'without prejudice' and for performance of promise contained in the term sheet, it should not be impossible to either of the parties to perform their part. In this case, it was made empathetically clear that the applicant can not go ahead with the term sheet, and even the reality broker is stated to have shared revised term sheet of even date so as to make it capable of being performed by the applicant. However, the receipt of such term sheet is denied by the Corporate Debtor. This Bench feels that the transaction was being negotiated through a reality broker, who sent the mail to the Corporate Debtor enclosing revised term sheet and that mail is marked to 'Shaliesh Saraf, 'Kaushal Bagadia' and 'Ashwini Patel' persons representing both the parties containing message that "Attached are revised LOIs". However, the Corporate Debtor has not brought on record that it sent any mail responding to this that such mail didn't have any attachment. Nonetheless, this Bench finds that the mail from Mr. Ashwini Patel of the Applicant was also marked to 'Shaliesh Saraf, 'Kaushal Bagadia'. Hence, this Bench feels that the defence of dispute has no substance and there was clear communication between the parties and reality broker mediating the transaction that the term sheet can not be performed. As there came an impossibility to perform in way of the applicant to perform its obligations, the term sheet gets frustrated and can not be relied upon to invoke the forfeiture of the money received by the Corporate Debtor prior to execution of this term sheet.
10. Having said so, it takes us to next question whether the amount claimed in the application is an Operational Debt? This Bench finds that Hon'ble Supreme Court in the matter of **Continental Construction Consortium Limited v. Hitro Energy Solutions (P) Ltd.** 2022 SCC Online SC 142 held that the phrase "in respect of" in section 5(21) of the Code has to be

read in broad and purposive manner in order to include all those who provides or receives operational service from the Corporate Debtor. In this case, there is no dispute that the amount, claimed as debt, was paid towards intended transaction to take certain units under leave & license on payment of monthly leave & license fee. This Bench finds that Hon'ble Co-ordinate Bench of NCLAT's decision in the matter of *M Ravindranath Reddy v. G Kishan* has been over-ruled in the matter of *Jaipur Trade Expocentre Pvt. Ltd. v. Metro Jet Airways Training Pvt. Ltd.* Company Appeal (AT) (Insolvency) No. 423 of 2021 ("Jaipur Trade"), a 5 member bench of the National Company Law Appellate Tribunal ("NCLAT") held that dues in relation to lease and license of immovable property constitute 'operational debt' under section 5(21) of the Insolvency & Bankruptcy Code, 2016 ("IBC"). Hence, the reliance of the Corporate Debtor is misplaced to contend that the amount in question is not an operational Debt.

11. In view of the above, we find that the present case deserves to be admitted under Section 9 of the Insolvency and Bankruptcy Code, 2016.

ORDER

12. The petition bearing CP (IB) No. 764/MB-IV/2020 filed by CARESTREAM HEALTH INDIA PRIVATE LIMITED ("the Operational Creditor"), under section 9 of the IBC read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against CALVIN ASSOCIATES PRIVATE LIMITED., ("the Corporate Debtor") is **Admitted**.

- I. That this Bench as a result of this prohibits:

- 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 Securitization and Reconstruction of Operational Assets and Enforcement of Security Interest Act, 2002;
 - d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to
- a. such transactions as may be notified by the Central Government in consultation with any Operational sector regulator;
 - b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1)

of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.

- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. The bench hereby appoints Mr. Rakesh Bothra, an Insolvency Professional registered with Indian Institute of Insolvency Professionals of ICAI having registration number IBBI/IPA-001/IP-P01758/2019-2020/12675 Email: ip.rakeshbothra@gmail.com . He is appointed as IRP for conducting CIRP of the Corporate Debtor and to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Sections 15,17,18,19,20,21 of the IBC.
- VII. During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. 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 a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- VIII. The Operational Creditor shall deposit a sum of Rs.5,00,000/- (Rupees five 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).

- IX. The Registry is 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.
- X. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, 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.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
28.04.2023.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)