



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No.1220/MB-IV/2021

Under Section 9 of the IBC, 2016

In the matter of

SUNBOURNE DEVELOPERS
PRIVATE LIMITED

[CIN: U45200GJ2005PTC046759]

...Operational Creditor

v/s.

THYME & REASON HOSPITALITY
LLP.

AAN-0369

...Corporate Debtor

Order Delivered on: 19.04.2023.

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner:

Mr. Jairam Chandnani , Ld. Counsel

For the Respondent:

Mr. Pranav Avhad, Ld. Counsel

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is a Company Petition being C.P. (IB) No. CP (IB) No.1220/MB-IV/2021 filed by Sunbourne Developers Private Limited, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Thyme & Reason Hospitality LLP, Corporate Debtor.



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- 1.1. The petition is filed on 31.08.2021 "*claiming an amount of Rs.2,30,39,702 including interest of Rs. 18,05,898/- towards interest on delayed Licensed Fees @ 18 % per as per the said leave and license agreement till 04.07.2021(inclusive of GST) and further interest calculated @ 18 % p.a. till payment and realisation of the debt*" as Specified in Part -IV in of the petition. The date of default as in the Demand Notice dated 05.07.2021 is 10.03.2019.
2. The Operational Creditor ("Licensor") is the owner of building known as "Inspire BKC" and entered into registered Leave and Licensee Agreement dated 12th October, 2018, for the leave and license of property being the Café admeasuring about 1424 sq. ft. (equivalent to 132.29 sq. mtr.) carpet area on the ground floor of the building on such terms and conditions as more particularly mentioned in the agreement for period of 60 months commencing from 15th September 2018 and ending on 14th September, 2023 with the Corporate Debtor ("Licensee"), who is engaged into business of Hospitality sector.
- 2.1. As agreed between the Operational Creditor and Corporate Debtor, three months License fee free fit out period commencing from 15th October,2018 to 14th January,2019 was granted to the Corporate Debtor.
- 2.2. As per the terms of the said leave and license agreement, the Corporate Debtor was not entitled to terminate the said leave and license agreement for the period of 36 months' lock-in-period commencing from 15th January, 2019 to 14th January, 2022.
- 2.3. The term of the said leave and license agreement mandates that the Corporate Debtor shall make timely payments of the licensee fee, failing which, the Corporate Debtor shall be liable to pay an interest @ 18% pa. on the licensee fee due and payable to the Operational Creditor.



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- 2.4. The Corporate Debtor was under the obligation to pay Common Area Maintenance Charges from the fit-out date and was also under the obligation to pay the applicable utility charges (Water, Electricity, Telephone and Air Conditioning as per BTU meter) in respect of said premises.
- 2.5. On 17.05.2019 and 08.01.2020 Operational Creditor sent notices to pay a sum of Rs. 21,27,599/- and Rs. 51,23,356/-, being the outstanding dues under license Agreement which have become due till date of the respective notice, together along with interest accrued as on date of the aforesaid notice. In the event of termination of the said leave and license agreement during the lock-in-period of the Corporate Debtor, the Corporate Debtor was liable to pay the license fee for the un-expired lock-in-period. Vide letter dated 28.02.2020 the Operational Creditor terminated the said contract. Despite repeated reminders the Corporate Debtor never responded to the said letters.
- 2.6. On 15.12.2020 the Operational Creditor asked the Corporate Debtor to make the payment of total outstanding and to remove the material lying in the premises within 7 days. In spite of repeated reminders, the Corporate Debtor wilfully failed, neglected and avoided to pay the monthly license fees and utility charges towards the use of the said Premises.
- 2.7. The Operational Creditor issued Demand Notice dated 05.07.2021, which was replied by the Corporate debtor vide its reply dated 17.07.2021 and denied each and every allegation made by the Operational Creditor.
3. The Corporate Debtor has filed an affidavit in reply dated 26.02.2022 stating that –
- 3.1. He has faced several challenges such as inaccessible approach road, insufficient electric output for conduction cooking, low occupancy rate,



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3	Gas pipeline	In Process	ADPL	As and When	Internal discussion with management is done and the same is in process from Adani side, as soon as we have a concrete date with us we shall provide the same to all the restaurant owners.
4	Extensive support to be provided to Rest owners in increasing the marketing activities	In Process	ADPL	31 st October 2019	It was also told to the Rest owners that 5% of the rental received will be spent on marketing activities by ADPL (Licensors) Marketing team has been briefed on the support to be extended for increasing the marketing activities and the team is working on the same
5.	Deviation on the rentals, streamlining the rental payments & waiver on the interest	In process	Restaurant Owners	31 st October 2019 for clearing the outstanding	The deviation in rental amounts was refused by the management and further restaurant owners have agreed upon streamlining the rentals which are long pending. As far as the support on the interest to be charged on rental & security deposit was considered. It was discussed that for now the interest



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				adjustments would be kept aside and the same would be recovered in the future (this was as per the request of all the restaurant owners.)
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3.3. The Corporate Debtor extensively communicated its grievances to the Operational Creditor through the email dated 14.12.2020 also. However, the Corporate Debtor received the ultimatum of vacating the Licensed Premises and to make payments of the claimed outstanding amount.

3.4. Vide email dated 27th April 2021, the Corporate Debtor communicated to the Operational Creditor regarding the massive impact of the pandemic on small businesses driving down the Corporate Debtors Cafe and is causing financial losses and disabling from fulfilling its monetary obligations.

3.5. In response to the demand notice raised by the Operational Creditor, the Corporate Debtor had elucidated the existence of a dispute prior to the receipt of the demand notice dated 05th July 2021 and petition seeking initiation of Corporate Insolvency Resolution Process ought to be rejected. The Corporate Debtor has relied upon the decision of the Hon'ble Supreme Court in *Mobilox Innovations Private Limited v Kirusa Software Private Limited (2018) 1 SCC 353*] wherein, the Hon'ble Apex Court has extensively discussed the maintainability of a petition for initiation of Corporate Insolvency Resolution Proceedings in case of a pre-existing dispute. The relevant portions from the judgement of the Hon'ble Supreme Court have been reproduced below:

"It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating



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authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a OF IND record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

Findings:

4. We have heard the arguments of Learned Counsel for Operational Creditor and Corporate Debtor and perused the records.
 - 4.1. We notice from the perusal of the leave and license agreement between both the parties that
 - 4.1.1. Clause 9.2 of the leave and license Agreement provides that *"In case of any failure by the licensee in making the license fee/compensation or the licensee commits default of any of the assurances covenants, terms and conditions of this agreements and such default continues for the period of 30 days after receipt of a written notice from the licensor to that effect,*



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the licensor shall be entitled to terminate the agreement irrespective of the licensors lock-in-period.”

4.1.2. Clause 9.5 provides that *“the licensee is obliged to pay the entire license fee during lock-in-period in full before giving notice of termination to the licensor”*.

4.1.3. Clause 10.4 provides that *“In case of termination during the licensee lock-in-period, the licensee shall pay the entire license fee for the lock-in-period to the licensor.”*

4.2. Further License Agreement Stipulated deposit of Rs.34,17,600, which is admitted to have been paid by the Corporate Debtor to the Operational Creditor. As per the Applicant, it had issued final notice before termination, in compliance of clause 9.2 of the Leave and License Agreement, on 08.01.2020 stating at Para 10 of the notice that *“please note that this is our last and final reminder and on your failure to pay the said total over due as detailed and demanded herein on or before the expiry of the said 30 (thirty) days’ notice period without prejudice to all the rights and remedies as available to us under the leave and license agreement or otherwise. We shall terminate the leave and license agreement without any further reference reminder or notice to you and deduct the unpaid dues from the part of security deposit paid which you may please note”* asking the Corporate Debtor to immediately vacate and remove the material lying in the licensed premises; and reserving right to initiate legal proceedings for recovery of a sum of Rs 161,64,678 in terms of clause 10.4 of the agreement.

4.3. Thereafter, a notice dated 15.12.2020 was issued informing the Corporate Debtor that *“despite the letter dated 28.02.2020 you have again failed to clear the total outstanding amount due and payable by you”* and asking it pay 1,89,21,580/-.



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4.4. We find that the Corporate Debtor was under obligation to pay the amount claimed as due from it in terms of the leave & license agreement between the parties and the said payment has not been made. This takes us to the next question whether there exists a prior dispute in relation to such debt.

4.5. We note that the Operational Creditor had taken the premises on license for running a café, which requires proper access, visibility of the place and foot-fall within the complex where the licensed premises was located. These assurances were given to the Operational Creditor and this fact is also confirmed from the minutes of meeting taken place on 7.10.2019, the contents of which are stated in foregoing paras. Further, there have been exchange of e-mails confirming these facts. Now the question that arises before us, apart from the issue whether the debt in question is an operational debt or not, whether there existed a prior dispute in relation to such debt.

4.5.1. This examination would be in line with the well settled test that has been laid down in Para 34 of **Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (2018) 1 SCC 353** as to how the Adjudicating Authority has to examine an Application under Section 9. Para 34 is to the effect: -

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*



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(iii) *Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act”.

4.5.2. On perusal of the e-mails relied upon by the Corporate Debtor in its defence, though it is abundantly clear that there were deficiencies in the provision of necessary infrastructure structure and the same were admitted by the Corporate Debtor to cure within the agreed period of time, we find that the Operational Creditor has never disputed its liability of pay the monthly license fee in the wake of such deficiencies. We feel that the plea of prior dispute has been raised to defend the present petition only and has no substance in so far as existence of the debt is concerned. Having said so, this leaves to the issue whether the debt in question is an Operational Debt?

4.6. As per Para 41 of written arguments dated 12.12.2022 “*The observation of this Tribunal in the above case in respect of definition of service under Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 are not covered by Section 3(37) of the Code, with regard to which observation, no exception can be taken. However, in the facts of the present case, where Agreement itself contemplate payment of GST for the services under the Agreement, on which GST is payable, the definition of 'service' under Central Goods and Services Tax*



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Act, 2017 cannot be said to be irrelevant. More so, even if an expression is not defined in the statute, the meaning of expression in general parlance has to be considered for finding out the meaning and purpose of expression. After making above observation in Promila Taneja's case (supra), this Tribunal did not dwell with the question as to what is the meaning of expression of 'service' used in Section 5(21) of the Code. Reference to Section 5(8)(d) regarding financial debt' by this Tribunal in the above case also was not relevant for finding out definition of expression 'service under Section 5(21). We, thus, are of the view that both in Mr. M. Ravindranath Reddy and Promila Taneja this Tribunal did not dwell upon the correct meaning of expression 'service' used in Section 5(21) of the Code. In any view of the matter, in the above mentioned two cases, the dues were in the nature of rent of immovable property whereas the present is a case of license granted for use of premises on Warm Shell Building with fittings and fixtures, electrical, flooring as per good corporate standards. Hence, the Licnesee was licensed for a particular kind of service for use by the Licensee for running a business of Educational Institution. Hence, in the present case, debt pertaining to unpaid license fee was fully covered within the meaning of 'operation debt under Section 5(21) and the Adjudicating Authority committed error in holding that the debt claimed by the Operational Creditor is not an 'operational debt'. The judgment of this Tribunal in Promila Taneja's case reiterate the law as laid down in Mr. M. Ravindranath Reddy's case. We having held that judgment of Mr. M. Ravindranath Reddy's case does not lay down correct law, the judgment in Promila Taneja's case can also not be followed.”

4.7. In view of the foregoing, we feel that the amount of license fee and charges for other utilities is an Operational Debt, which exceeds Rs. 1,00,00,000/-, minimum threshold limit prescribed u/s 4 of the Code. The said debt has not been paid by the Corporate Debtor and the plea of



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prior dispute is not maintainable. Hence, we feel that the present application filed u/s 9 of the Code deserves to be Admitted.

ORDER

The petition bearing CP (IB) No.1220/MB-IV/2021 filed by Sunbourne Developers Private Limited (“the Operational Creditor”), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Thyme & Reason Hospitality LLP. (“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



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- 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. Gajesh Labhchand Jain, an Insolvency Professional registered with Indian Institute of Insolvency Professionals of ICAI having registration number IBBI/IPA-001/IP-P01697/2019-2020/12588 Email: gajeshjain@gmail.com Mb No 9167108835. 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.



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- 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)
19.04.2023.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)