



IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD

COURT – 2

ITEM No.301

CP(IB)/180(AHM)2021

Order under Section 9 IBC

IN THE MATTER OF:

Jagadish

.....Applicant

V/s

OYO Hotels & Homes Pvt Ltd

.....Respondent

Order delivered on: 16/02/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

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**DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)**

-sd-

**CHITRA HANKARE
MEMBER (JUDICIAL)**

IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD (COURT - II)

C.P. (IB) No. 180 of 2021

(Filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016)

IN THE MATTER BETWEEN

M/s Jagadish

... Operational Creditor

Vs.

OYO Hotels and Homes Pvt Ltd

... Corporate Debtor

Order pronounced on 16.02.2024

Coram:

**MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)**

**MR. VELAMUR G VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)**

MEMO OF PARTIES

M/s Jagadish

No. 51, Old No. 664,

11th Main Road, 4th Block, Jayanagar,



Bangalore - 560011

...Applicant/Operational Creditor

Versus

OYO Hotels and Homes Private Limited

(Formerly known as Alcott Town Planners Pvt. Ltd.)

Ground Floor – 001, Mauryansh Elanza,
Shyamal Cross Road, Nr. Parekh Hospital,
Satellite, Ahmedabad,
Gujarat, India – 380015.

.....Respondent/ Corporate Debtor

Present:

For the Applicant : Mr. T S Suresh, Adv. a.w Ms. Aparna
Hiremath

For the Respondent : Mr. Saurabh Soparkar, Sr. Adv. a.w
Mr. Rohan Lavkumar, Adv. & Ms. Anushree
Soni, Adv

JUDGEMENT

1. Under consideration, is an application filed by the Operational Creditor viz. M/s Jagadish under Section 9 of Insolvency and Bankruptcy Code 2016 (hereinafter referred to as "IBC, 2016") against the Corporate Debtor viz. OYO Hotels and Homes Private Limited seeking thereof to initiate



Corporate Insolvency Resolution Process (CIRP) as against the Corporate Debtor.

2. In Part II of the application it is stated that the Corporate Debtor was incorporated on 21.04.2015 with the Authorised Share capital of Rs.189,47,79,310/- (Rupees One Hundred and Eighty Nine Crores, Forty Seven Lakhs, Seventy Nine Thousand, Three Hundred and Ten only) and the paid up share capital of Rs. 188,79,30,170/- (Rupees One Hundred and Eighty Eight Crores, Seventy Nine Lakhs, Thirty Thousand, One Hundred and Seventy only). In Part IV of the application the default amount is stated to be Rs.2,52,54,277.99/- (Rupees Two Crore Fifty-Two Lakhs Fifty-Four Thousand Two Hundred Seventy Seven and Ninety-Nine Paisa Only) and date of default is mentioned as September 2019.
3. Applicant submitted that Corporate Debtor entered into a Management Service Agreement (hereinafter referred to as "Agreement") with Operational Creditor with respect to Property bearing No.51 (Old No.664), 4th Block, 11th Main, Jayanagar, Bangalore – 560011 on 12.07.2017 for a term of nine years, with a three-year lock-in period. As per Clause 3



of the Agreement, a Benchmark Revenue was to be paid to the Operational Creditor for the period starting from July 2017 was fixed at Rs.14,50,000/- (Rupees Fourteen Lakhs, Fifty Thousand Only) per month which was subject to an increment of 5% every 12 (twelve) months. It is stated that Corporate Debtor has made unjustifiable random deductions while paying the Operational Creditor its Benchmark Revenue to the tune of Rs.19,68,241/- and also violated terms of Section 7.11 of the Agreement. Applicant submitted that on 09.09.2019, it received a baseless and spurious Breach and Cure Notice from “Team OYO” which was issued on the letterhead of, and signed by one MyPreferred Transformation and Hospitality Private Limited (“MyPreferred”) with whom the Operational Creditor had no contractual relationship, whether relating to the Hotel Property or otherwise. The Operational Creditor submitted that it responded to the above Breach and Cure Notice vide mail dated 30.09.2019 denying any contractual relationship with MyPreferred and objected to such assignment of the contractual obligations. It is submitted to receive reply of Corporate Debtor vide e-mail dated 11.11.2019 with the



false claim that they had previously notified the Operational Creditor of such assignment and from that date Corporate Debtor discontinued services and abandoned and vacated the Hotel Property without securing or locking the Hotel premises and without proper handover to the Operational Creditor. It is submitted that Corporate Debtor has also failed to pay the Operational Creditor the Benchmark Revenue for the period commencing from September 2019 to August 2020 (Lock-in period) to the tune of Rs.1,59,86,250/- along with interest calculated @24 per annum (59,19,029.51)/- for delayed payment.

4. The respondent submitted that on 12.07.2017, the Applicant and the Respondent entered into a Management Services Agreement (“Agreement”) with respect to Property bearing No. 51, Old No. 664, 4th block, 11th Main, Jayanagar, Bangalore 560011 (“Hotel Property”). It is submitted by the respondent that as per the terms of the Agreement, in consideration of the services rendered by the Respondent, the Applicant was to pay the Respondent, a share of the Total Gross Revenue (from rooms) which amounted to 90% of the Total Gross Revenue and the



remaining 10% was to be paid to the Applicant. In this arrangement, the Applicant was entitled to a minimum monthly revenue of INR 14,50,000/-("Benchmark Revenue"), subject to such deductions which were agreed upon and made in terms of the Agreement. The respondent submitted that the Agreement was intended to operate for a total period of 9 (nine) years, with an initial 3-year lock-in period for both the Applicant and the Respondent, during which the parties were to not terminate the Agreement. The Agreement, during the lock-in period, was terminable by the Respondent (later Mypreferred) upon the Applicant's breach or misrepresentation or on the Applicant's failure to secure or maintain necessary permissions, licenses and approvals, in accordance with the terms of Clause 7 of the Agreement.

5. Respondent further submitted that owing to an internal restructuring and transfer of business of the Respondent to Mypreferred, a transition letter dated 30.04.2019 ("Transition Letter") was issued to the Applicant for assignment of rights and liabilities from the Respondent (erstwhile Alcott Town Planners Pvt. Ltd) to Mypreferred with effect from 01.06.2019. The said Transition Letter was



sent to the Applicant via email on 31.05.2019. It is submitted that the Applicant was well aware that both the Respondent and Mypreferred were group companies and 100% subsidiary of the same parent entity, and no prejudice or loss will be caused to the Applicant by such transfer. Therefore, the Applicant never objected to such transfer. The Transition Letter, further, categorically stated that acceptance of payment made to the Respondent by Mypreferred shall constitute an acceptance and confirmation of the restructuring. Accordingly, it is submitted that the Applicant did accept the transition, which is evident from the fact that the Applicant neither objected to the invoices that were issued in the name of Mypreferred nor raised any objection to the payment of Benchmark Revenue being made by Mypreferred.

6. Respondent further submitted that on 21.06.2019, the Applicant and three of his henchmen had locked the Hotel Property with the Respondent's guests and staff inside the hotel. They were forced to stay indoors under lock and key from around 4 to 10:30 PM, post which also the Respondent's manager and staff were threatened so as to



force cessation of the hotel business. As a result of such wrongful restraint and in light of other past instances of interference and misbehaviour, the General Manager of the Respondent has lodged an FIR at Jayanagar Police Station (Bangalore) on 22.06.2019. It is submitted that on 25.06.2019, the Respondent filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 ("Application for Interim Relief") before the Hon'ble Court of the LXXXII Addl. City Civil & Sessions Judge at Bengaluru bearing Comm. A. A. No. 69 of 2019, praying for an interim order of injunction temporarily restraining the Applicant, their henchmen, servants and agents.

7. It is submitted that consequent to the sustained failure to amicably resolve the issues, the Respondent was constrained to invoke the arbitration agreement contained in Clause 10 of the Agreement and sent a notice of arbitration to the Applicant ("Arbitration Notice") on 04.08.2019. The Arbitration Notice stated that the conduct of the Applicant in light of the various aforementioned instances. Respondent further submitted that a communication was issued by Mypreferred on 28.08.2019



wherein the Applicant inter-alia was informed about a new commercial model was envisaged wherein the existing monthly commitment amount would be changed to a combination of revised monthly commitment and a share in net revenue generated from the Hotel to enable joint participation in the business. This partner communication dated 28.08.2019 was responded to by the Applicant on 15.09.2019, refuting the new commercial terms proposed therein, reiterating that the Agreement continued to subsist un-amended and claiming that the Applicant had no contract/agreement with Mypreferred and was not obliged to agree to the new model proposed. It is submitted that on 06.09.2019, the Applicant replied to the Arbitration Notice ("Reply to the Arbitration Notice") issuing a blanket denial to all instances of obstruction in the business operations. The Applicant falsely stated that none of these instances had taken place while also claiming that the absence of a conference for settlement as stipulated under Clause 10.1 of the Agreement meant that the invocation of arbitration was premature. The Applicant also disagreed with the arbitrators suggested by the Respondent herein and



nominated its own choice of arbitrators which establishes the fact that the Applicant has admitted that there was an existing dispute between the parties herein.

8. It is submitted that in 2019, MyPreferred was conducting an internal audit and realised that the Applicant had not furnished all the required documents. Mypreferred has issued a Breach and Cure Notice ("BS Notice") (Annexure G) to the Applicant requesting to provide licences approvals which had not been provided by the Applicant. Respondent states that the B&C Notice was never replied to by the applicant on its actual merit but only a sham defence was taken by the Applicant as an afterthought on 30.09.2019 i.e. absence of privity of contract with Mypreferred (Annexure H1). Since the Applicant failed to cure the defects and provide the necessary licenses and approvals, the Agreement, upon the expiry of the 30 days period, stood terminated. It is submitted that in furtherance of non-remedy of breaches mentioned in the B&C Notice, on 16.10.2019, the Respondent filed a memo for withdrawal of the Application for Interim Relief before the Hon'ble Court of the LXXXII Addl. City Civil & Sessions Judge at Bengaluru.



The Respondent's submission was that on account of the Applicant's repeated breaches of the Agreement as well as its failure to remedy the breaches by securing the requisite licenses as per the B&C Notice, the Agreement stood terminated.

9. It is submitted that subsequent to termination of the Agreement, Mypreferred (Agent of respondent) issued a legal notice dated 11.11.2019 for recovery of outstanding dues from the Applicant, amounting to INR 25,59,083/- along with interest @18% p.a. thereupon ("Recovery Notice"). The Applicant responded to the Recovery Notice on 21.11.2019 by reiterating that it did not have any contractual relationship with Mypreferred and as regards the Respondent, it had not been in breach of the Agreement and is therefore not liable to pay the quoted sum. It is submitted that on 16.07.2021 applicant issued a demand notice to the Respondent ("Demand Notice") in respect of an alleged unpaid operational debt amounting to INR 5,52,46,871.40/-. It is submitted that upon receipt of the Demand Notice, a reply was sent on behalf of the Respondent on 29.07.2021. Respondent further submitted that this sum allegedly



constitutes a claim of INR 1,59,86,250/- on account of benchmark revenue for the remaining lock-in period, a sum of INR 59,19,029.51/- as interest calculated on the aforementioned benchmark revenue, a sum of INR19,68,241/- on account of alleged random deductions/short payments by the Respondent and INR 13,80,757.48/- as interest on the unpaid amount due to these short payments. The cumulative claim amount of INR 2,52,54,277.99/- is, a much lower amount than that claimed under the Demand Notice being INR 5,52,46.871.40/-.

10. It is submitted that respondent disputes and states that the present Application is not maintainable and is liable to be disputed on the following grounds:
 - I. there is a pre-existing dispute between the parties as regards the amount claimed to be in default
 - II. the applicant does not qualify to be an operational creditor
 - III. the amount of benchmark revenue claimed for the remaining lock-in period is of the nature of damages and does not constitute debt for the purposes of an application under section 9 of the code



- IV. interest is not payable on damages for loss suffered by the applicant in the unexpired lock-in period on termination of the contract/ any such interest is not operational debt
- V. on exclusion of claim of benchmark revenue for the unexpired lock-in period and the interest claimed thereupon, the threshold of minimum amount of default fails to be satisfied
- VI. there exist discrepancies between the demand notice and the application
- VII. a part of claims of benchmark revenue for the unexpired lock-in period is hit by section 10a of the code

OBSERVATIONS OF THE TRIBUNAL

11. The petitioner applicant and the respondent were heard. Perused judgements cited & documents filed. The Debt due to the OC was stated to be Rs.2.52 crores and as a service provider was within the ambit of Sec 5(21) of the IBC 2016 to file the application, further the CD was under huge debt as observed in the balance sheet amounting to Rs.1286.5 crores for the year 2022-23. His contention that the rights and liabilities cannot be done without the contracting party's consent (Respondent transferring his rights to "M/s



Mypreferred Transformation and Hospitality Pvt Ltd”) was never communicated to the OC by the CD. The observation further made is that the assignment could not have been made, particularly when the MSA provides for “permitted assigns” to ensure that rights and obligations/liabilities without the consent of other party. Applicant submits the case by reference to Kapilaben and Others V Ashok Kumar Jayantilal Sheth through Poa Gopalbhai Madhusudan Patel and others, SCC Online SC 1512 and Raksh Yadav v OYO Hotels and Homes Pvt Ltd. The stated lodging of FIR and the dispute, if any, are denied. Arbitration case before the City Civil Court was withdrawn by the respondent. It was MyPreferred that issued the breach and cure notice on 9 Sept 2019 and the CD abandoned the property without proper handover on 11 Sept 2019. While admitting that the amount claimed as debt due in the application is less than the demand notice amount, it is above the statutory minimum amount needed to file this application. The respondent in reply has stated that as per the Management Services Agreement dated 12 July 2017 both parties have consented for the assignment of the agreements, with



relevant clause “shall mean to include (its/his/her) affiliates, group companies, heirs, receivers and permitted assigns.” Further there is an email transferring the rights and assignments to “My Preferred” with effect from 1 June 2019 and certain payments were made which were received by the applicant (stated to have been kept in Sundry Deposit Account on realisation). There were certain disputes, stated to have been that guests and staff of hotel were kept locked in the hotel and police cases filed and also an Arbitration Notice and termination of contract (Breach and Cure Notice on 9 September 2019). There was a counter recovery notice from the respondent’s assignee. There were disputes prior to the demand notice dated 16th July 2021 when the applicant had served a demand notice of Rs.5.52 crores which is far above this application amount and the Assignee M/s MyPreferred had filed an Arbitration Petition for appointment of sole arbitrator on 7th September 2022. Further the Arbitration Petition pertaining to the violation of terms of agreement CMP No.742 of 2022 with next date of hearing on 14th March 2024 before the Hon’ble High Court of Karnataka.



12. The main prayer for the reduced claim by the applicant who is the owner of the property is that there were various amounts for which benchmark revenue that was not paid by the applicant (lock in period as per the management service agreement) amounting to Rs.15,98,625/- each for months starting from 15 September 2019 to 15 June 2020 totalling an amount of R.1,59,86,250. The applicant has loaded the interest amount on this along with interest @ 24% per annum. The main grievance is that on account of the termination of the agreement, absence of proper maintenance is loss of revenue and business on the Hotel property by the service provider (respondent) which was initially in the name of Alcott Town Planners Pvt Ltd for managing the property. Further in clause 2.6 of the Master Agreement, it is clearly stated that the operator shall not enter in to any agreement to sell or transfer substantial rights in its business or the property to any person. Operator shall give the service provider a written notice of such intent to transfer, and both the Operator and Service Provider shall, during the period of 1 month after such notice, attempt in good faith to negotiate a mutually



satisfactory agreement for transfer of such rights to the Service Provider or any other person recommended by the Service Provider. If they are not able to arrive at mutually acceptable agreement for such transfer within 1 month of the notice then, operator shall be free to transfer her rights to a third party on terms that are not worse than what was offered by. Operator undertakes that he shall not terminate the Agreement during the initial term of 3 years from the Execution date (Operator Lock in Period). If the Operator terminates this agreement during the lock in period on account of any material breach of this Agreement by the Service Provider, the Service Provider shall be liable to pay an amount equivalent to the applicable Benchmark revenue for every month of the remaining portion of the Service Provider Lock – in Period. However, the Operator (respondent) has transferred his rights which was within his powers and as per the agreement and the assignee has exercised the rights to transfer. Now the Service Provider (Property) has charged the termination loss charges due and payable on which there has been a dispute and an arbitration case filed. The dispute, if any, out of the



Agreement, the parties as per Para 10 of the Agreement shall refer the dispute to a single arbitrator who shall be mutually appointed and the proceedings shall be governed by the provisions of Arbitration and Conciliation Act, 1996. From a perusal of the period of the dispute in question when the lock in period is mentioned where charges have been raised by the applicant it pertains to the period during which 10 A provisions apply. The Period when the default arising on or after 25th March 2020 during COVID period is not exceeding for 1 year from such date. It becomes applicable only for the defaults from 8th to 10th default (15.4.2020 to 15.6.2020) then making the amount due less than the threshold less than Rs.1 crores(without applying interest). But the question before this Tribunal is whether this is a liability which can be disputed and settled only through arbitration as per the agreement and on which there is no crystalised liability on the balance sheet (no records produced of the Operating Creditor or the Corporate Debtor) which is similar to a commitment fee to continue to make good the losses within lock in period if they do run the business for a continued period of 3 years cannot be



construed as a debt to be reckoned under Section 9 of the IBC 2016.

13. In the matter of Delhi Control Devices (P) Limited vs Fedders Electric and Engineering Ltd, the NCLT Ahmedabad bench held that “Unpaid instalment as per the settlement agreement cannot be treated as operational debt as per section 5(21) of IB Code and cannot be ground to trigger CIRP against CD under the provisions of IBC 2016 and remedy may lie elsewhere not necessarily before the Adjudicating Authority. There are also other issues as per the contract breach which cannot be examined by this Tribunal in deciding this application which is restricted to the debt and default due on which insolvency is to be decided. However, the Tribunal observes if there is a dispute on the contract which has been terminated and amount to be claimed by way of a lock in period as damages or loss of business compensation, that has to be settled before the Arbitrator or any other authority between the applicant and the assignee or respondent. Further, the Hon’ble NCLAT New Delhi has in the matter of Amrit Kumar Agarwal Vs Tempo Appliances P Ltd held that a mere obligation to pay



does not bring the liability within the ambit of “financial debt” as defined under IBC and the debt along with interest, if any, should be disbursed against the consideration for the time value of money and such breach does not fall under the scope of Sec 5(8) of IBC so as to constitute a “Financial Debt”.

14. This Tribunal based on the submissions, documents and judgments produced concludes that this would not be the forum to decide the matter on the amount to realised as damage/loss of business or compensation and this application cannot bring insolvency of the respondent as it is not to be construed as a firm financial debt that has been defaulted.

15. Hence we are passing the following order:

ORDERS

The CP(IB) 180 of 2021 is rejected.

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DR. V. G. VENKATA CHALAPATHY

CHITRA HANKARE

MEMBER (TECHNICAL)

MEMBER (JUDICIAL)