

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 513 of 2018

[Arising out of order dated 23rd July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in C. P. (IB) No. 335/KB/2018]

IN THE MATTER OF:

Sarla Tantia

96, Narkeldanga Main Road,
Kolkata – 700 054.

...Appellant

Vs

Ramaanil Hotels & Resorts Pvt. Ltd.

Registered office at
24, Green Park, Block – A,
Old – 827, Jessore Road,
Kolkata – 700 055.

Corporate Office at
81/2A, Raja Dinendra Street,
Kolkata – 700 006..

....Respondent

Present:

For Appellant: Mr. Vaibhav Gaggar, Mr. Vipul Agrawal, Mr. Arjun Kant, Mr. Adarsh Chamoli, Mr. Soham Goswami, Advocates.

For Respondent: Mr. Sameer Abhyankar and Mr. Akshay Joshi, Advocates.

J U D G M E N T

BANSI LAL BHAT, J.

Appellant, claiming to be an 'Operational Creditor' provided a portion of third floor of her premises No. DD-30, Salt Lake City, Kolkata measuring 2281 sq.ft. 'super built area' to Respondent in terms of Leave and License Agreement executed inter-se the parties on 1st January, 2016 for a period of nine years for license fee of Rs.88 per sq.ft. per month calculated on the basis of 'super built area'. The licensed premises was permitted to be used by the licensee (Respondent-Corporate Debtor) for carrying on business of restaurant under the name and style of 'Ramaanil Hotels & Resorts Pvt. Ltd.' after the same was inspected by the Respondent as stipulated in the Leave and License Agreement spread over page nos. 65 to 76 of the paper book. The Respondent – Corporate Debtor having defaulted in payment of rent with arrears together with interest calculated at Rs.40,96,295/- till 31st December, 2017, demand notice in terms of Section 8 (1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') was issued by the Appellant – Operational Creditor on 1st January, 2018 and served upon the Respondent – Corporate Debtor on 2nd January, 2018. Respondent did not respond to the same. The Appellant filed an application in the prescribed format under Section 9 of the I&B Code before the

Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata for triggering of Corporate Insolvency Resolution Process against the Respondent – Corporate Debtor. However, the application came to be rejected in terms of impugned order dated 23rd July, 2018 passed by the Adjudicating Authority on the ground that the Respondent – Corporate Debtor established that there was a pre-existing dispute in regard to rate of rent on the basis of carpet area and without settling the dispute it could not be held that the adhoc amount paid by the Respondent - Corporate Debtor was towards discharge of entire liability of the rent arrears. Aggrieved by the aforesaid order of rejection, the Appellant – Operational Creditor has filed the instant appeal assailing the impugned order on various grounds set out in the memo of appeal, which shall be adverted to hereinafter.

2. The factum of the licensed premises having been provided by the Appellant to Respondent on leave and license basis w.e.f. 1st January, 2016 for space measuring about 2281 sq. ft. ‘super built area’ on 3rd Floor (southern portion) of the premises no. DD-30, Salt Lake City, Kolkata in terms of Leave and License Agreement executed between the parties on 1st January, 2016 on the agreed license fees for a period of nine years has not been in controversy before the Adjudicating Authority. Even before this Appellate Tribunal factum and validity of the aforesaid Leave and License Agreement is not in controversy. The only issue raised by the Respondent – Corporate Debtor is in regard to existence of a prior dispute disentitling the Appellant to trigger Corporate Insolvency Resolution Process. Appellant’s

case is that the said license was granted in consideration of license fee of Rs.88 per sq. ft. per month calculated on the basis of 'super built up area' of 2281 sq. ft. and in terms of the Leave and License Agreement governing relations inter-se the parties, the Respondent Corporate Debtor was under a legal obligation to pay monthly license fee of Rs.2,00,728/- calculated on the aforestated basis. In this regard, reference is made to clause 2 of the Leave and License Agreement which reads as under:-

“The license fee of the licensed premises had been agreed to be paid by the licensee @ Rs.88/- (Rupees Eighty Eight Only) per sq. ft. per month to be calculated on super built up area, and all other Municipal rates and taxes, service tax and all other statutory liabilities as applicable will be payable extra. All payment shall be made by A/c. payee cheque only.”

3. It is contended on behalf of the Appellant that the Respondent paid the license fee in respect of the licensed premises from January, 2016 to November, 2016 at the agreed rate calculated on the basis of 'super built up area' of 2281 sq. ft. on the basis of invoices raised by the Appellant without demur and no dispute was ever raised by the Respondent regarding the said invoices and payments made during the aforesaid period. It is further contended that the Respondent even did not choose to reply the demand

notice served upon it by the Appellant and failed to give a notice of dispute which clearly demonstrates lack of bonafide and plausible dispute.

4. Per contra learned counsel for Respondent contended that there was ample evidence to indicate the existence of a plausible dispute between the parties prior to issuance of demand notice. Reference is made to Appellant's letter dated 4th September, 2017 addressed to Urban Development Department, rent receipts issued by the Appellant after June, 2017 and inspection report ordered by Executive Magistrate to buttress the point that a prior dispute existed between the parties with regard to calculation of rent on the basis of area of the premises.

5. Heard learned counsel for the parties and fathomed through the depths of the factual matrix as emerging from record.

6. Initiation of Corporate Insolvency Resolution Process at the instance of an Operational Creditor is provided for under the provision engrafted in Section 9 of the I&B Code, whereunder an Operational Creditor may file an application before the Adjudicating Authority for initiating a Corporate Insolvency Resolution Process after complying with the statutory requirements of Section 8. Dwelling on the scope of this provision in "***Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407***", the Hon'ble Apex Court observed as under:

“29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.”

In a later judgment titled in **“Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.**, (2018) 1 SCC 353”, the Hon’ble Apex Court further observed as under:-

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

7. Adverting to the facts of the case in hand be it seen that the status of parties respectively as Operational Creditor and Corporate Debtor was neither in issue before the Adjudicating Authority nor has the same been disputed before this Appellate Tribunal. It is also not disputed that the relations inter-se the parties in regard to the licensed premises are governed

by the Leave and License Agreement which stipulates in unambiguous terms that the license fee @ Rs.88 per sq. ft. per month shall be calculated on the basis of 'super built up area'. Municipal Taxes, Service Tax and other statutory liabilities as applicable will be payable in addition thereto. The stipulations in the aforesaid agreement do not admit of any ambiguity in so far as calculation of license fee on the basis of 'super built up area' is concerned. The aforesaid agreement also brings it to fore that the Respondent had inspected the licensed premises before execution of the aforesaid agreement and agreed to pay the license fee on aforesaid terms. The licensed premises comprising of approximately 2281 sq. ft. was marked and duly inspected by the Respondent before execution of Leave and License Agreement. Clause 30 of the aforesaid agreement provided that in the event of any dispute or difference arising between the parties the same shall be referred to sole arbitration of Mr. Sanjay Kumar Vaid, Advocate Kolkata. It is manifestly clear that the Respondent was sufficiently clear about the area of the licensed premises, which specifically provided for calculation of license fee on the basis of 'super built up area'. It was therefore absurd on the part of Respondent to question calculation of license fee in the aforesaid manner, that too after acting upon the aforesaid agreement by effecting payment of license fee from January, 2016 to November, 2016 without raising any objection or disputing the invoices raised in regard to license fee payable for the aforesaid period. The conduct of Respondent antecedent to the execution of Leave and License Agreement as also subsequent conduct in paying the license fee at the agreed terms on the basis of 'super built up

area' speaks volumes about the hollowness of the plea raised on behalf of Respondent that the Respondent was under obligation to pay rent on the basis of 'carpet area' which, on the face of it, is fallacious.

8. The Adjudicating Authority was not supposed to conduct a roving enquiry though it could have been within its rights to go for a limited exercise of sifting the material available before it for separating the grain from the chaff and to reject the spurious defense. The contractual relations inter-se the parties which are governed by the Leave and License Agreement do not admit of any oral agreement contrary to stipulations therein. Thus viewed, the defense raised by the Respondent that the adhoc amount was paid on the basis of reduced 'carpet area' of the licensed premises or that the oral agreement running parallel to the Leave and License Agreement enjoined upon the Respondent to pay rent on the basis of 'carpet area', which was less as compared to the 'super built up area', was a mere moonshine and could not be entertained as a pre-existing dispute to defeat initiation of Corporate Insolvency Resolution Process. The Adjudicating Authority has clearly landed in error in rejecting the Appellant's version that the license fee was fixed for 'super built up area' and not for 'carpet area' as clearly stipulated in the Leave and License Agreement and the Appellant was under no obligation to reduce the rent. Reliance on irrelevant documents in coming to conclusion that there was a pre-existing dispute was uncalled for. The Adjudicating Authority also failed to notice that the Respondent never sought settlement of any dispute in regard to calculation of rent on 'carpet

area' basis through arbitration which was the agreed mode of resolution of dispute between the parties in terms of the Leave and License Agreement. Significantly, no dispute was raised by the Respondent in reply to demand notice to which he did not at all respond.

9. Having regard for the factual matrix of the matter and the settled law on the subject, we are of the considered opinion that the impugned order suffers from serious legal infirmity and the same cannot be supported. A well merited case has been thrown out resulting in grave injustice. We accordingly, allow the appeal and set aside the impugned order. Since the debt and default is established, the Adjudicating Authority will admit the application under Section 9 of I&B Code after providing an opportunity to the Respondent – Corporate Debtor to settle the claim of Appellant, if it so chooses.

10. The appeal is accordingly allowed. There shall be no order as to costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

26th February, 2019

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