IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
COURT - 2

ITEM No.303

CP(IB)/182(AHM)2021

Order under Section 9 IBC

IN THE MATTER OF:

Jagdish **.....Applicant**
(Operational Creditor)
V/s **.....Respondent**
OYO Hotels & Homes Pvt Ltd

Order delivered on: 09/05/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)
Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

PRESENT:

For the Applicant : Ms. Aparna Hiremath, Adv. for Mr. T S Suresh, Adv.
For the Respondent : Mr. Saurabh Soparkar, Sr. Adv. a.w Mr. Rohan Lavkumar, Adv. a.w Ms. Anushree Soni, Adv.

ORDER

Heard arguments of applicant counsel and reply of respondent.

The case is fixed for pronouncement of the order.

The common order is pronounced in the open court, vide separate sheet.

Sd/- Sd/-

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

CHITRA HANKARE
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD (COURT - II)

C.P. (IB) No. 182 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

Versus

OYO Hotels and Homes Pvt. Ltd.
(Formerly known as Alcott Town Planners Pvt. Ltd.)
… Corporate Debtor

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

Order pronounced on 09.05.2024

Coram:
MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)

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

Present:

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

For the Respondent : Mr. Rohan Lavkumar, Adv. & Ms. Anushree Soni, Adv.

JUDGEMENT

1. The present application is filed by M/s Jagadish (hereinafter referred to as **"Operational Creditor"**) is a partnership firm and a MSME for initiating the Corporate Insolvency Resolution Process (CIRP) under Section 9 of Insolvency and Bankruptcy Code 2016 (hereinafter referred to as "IBC, 2016") on 26 August 2021 against M/s. OYO Hotels and Homes Private Limited (hereinafter referred to as **"Corporate Debtor"**).

2. The Operational Creditor stated in Part II of the application 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). It is also stated in Part IV of the application that the total default amount is Rs.1,10,77,454.07/- (Rupees One Crore, Ten Lakhs, Seventy - Seven Thousand, Four Hundred and Fifty- four and Seven Paisa Only) which includes interest and random deductions and the date of default is mentioned as September 2019.

3. The Operational Creditor submitted that the Corporate Debtor entered into a Management Service Agreement (hereinafter referred to as "Agreement") with Operational Creditor with respect to Property bearing No. 1428, Sector - 7, HSR Layout, Bangalore 560102 (hereinafter referred to as "Hotel Property") on 12.07.2017 for a term of nine years, with a three-year lock-in period as per Clause 7.1 and 7.2 of the Agreement. It was agreed that the Corporate Debtor would rebrand the Operational Creditor's hotel and provide all services pertaining to the operation of the property

during the stated period. As per Clause 3 of the Agreement, Benchmark Revenue was to be paid to the Operational Creditor for the period starting from July 2017 which was fixed at Rs.7,00,000/- per month, which was subject to an increment of 5% every 12 (twelve) months.

4. It is also submitted that the Corporate Debtor failed and neglected to perform its obligations. It is also submitted that the Corporate Debtor has avoided payment of OC's share of the Benchmark Revenue despite of agreeing to the same. The Corporate Debtor has unfairly, baselessly and illegally made deductions from the OC's share of Benchmark Revenue and for this they are liable to pay an amount of Rs. 3,74,422.72/-. Additionally, interest calculated @ 24% per annum for the unfair and baseless deductions/short payments amounts to Rs. 1,28,068.83./-.

5. The Operational Creditor also submitted that vide e-mail dated 9th August, 2019 sent by the Corporate Debtor, have amended the agreement unilaterally by levying asset management fees, which was strongly objected by the OC vide emails dated 13th August, 2019 and 15 September, 2019.

6. The Operational Creditor further submitted that on 04.09.2019, it received a baseless and spurious Breach and Cure Notice from "Team OYO" which was issued on the letter head of the MyPreferred Transformation and Hospitality Private Limited ("MyPreferred") with whom the Operational Creditor had no contractual relationship, whether relating to the Hotel Property or otherwise.

7. It is also submitted that the Operational Creditor responded vide email dated 30.09.2019 to the above Breach and Cure Notice denying any contractual relationship with MyPreferred and objected that they had not permitted the assignment of the contractual obligations of the Corporate Debtor under the Agreement to any other party. It is also submitted by the OC that CD in turn responded with the claim that they had previously notified the OC of such assignment of contractual rights and obligations to Mypreferred, which the OC wholly denies. Moreover, such an assignment is impermissible in law, since a party may also assign its contractual rights, and not its obligations or liabilities, to a third party, without the consent of the other party to the contract.

8. It is further submitted that the CD without any prior and proper written notice to the OC irresponsibly abandoned and vacated the Hotel Property without securing or locking the Hotel premises and without proper handover of the Hotel Property to the Operational Creditor leading to material breach of the terms of the Agreement and the CD has not replied to this point. It is also submitted that Corporate Debtor has also failed to pay the Operational Creditor the Benchmark Revenue for the period commencing from June 2019 to August 2020 (Lock-in period) to the tune of Rs.77,17,500/- along with interest calculated @24 per annum (28,57,462.52/-) for delayed payment.

9. It is further submitted that after a joint inspection conducted on 31.05.2019 by the OC and the CD, it was found that the CD had damaged the Hotel Property and had illegally removed some of the furniture/equipment, thereby the CD has violating Clauses 7.10 and 7.11 of the Agreement.

10. It is submitted that the OC filed the proof of claims in the prescribed Form-B before the IRP appointed by this

Tribunal in CP(IB) No. 40 of 2020 in the case of Rakesh Yadav Vs. OYO Hotels and Homes Pvt. Ltd. which was taken on record. But, subsequently, the petition was withdrawn due to a settlement between the petitioner and the CD, thus OC's submission in Form - B was rendered infractuous.

11. A demand notice vide Form -3 under IBC, 2016 dated 16th July, 2021 was issued by the OC and the same was delivered on 19.07.2021. Thereafter, the Operational Creditor received a holding reply from the CD vide email dated 29.07.2021 raising a fictitious dispute and stated that a detailed reply would be sent in due course of time, however no reply has been sent till date.

12. The Corporate Debtor filed its reply wherein it is submitted that the CD has been wrongly impleaded as a party in the application as there is no surviving privity of contract between the OC and CD. The CD has transferred its rights and obligations under the MSA dated 12.07.2017 to another group company being Mypreferred and therefore, this application is not maintainable and is liable to be dismissed. The CD further submitted that on 12.07.2017, the Applicant and the Respondent entered into a

Management Services Agreement (“Agreement”) with respect to Property bearing No. 1428, Sector -7, HSR Layout, Banglaore - 560102 (“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 7,00,000/-("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.

13. 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. 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.

14. 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 ("BC Notice")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 by the applicant on its actual merit but only a sham defence was taken by the Applicant as an afterthought. 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 on 04.10.2019.

15. 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 815,654/-along with interest @18% p.a. However, the Applicant neither responded to the Recovery Notice nor made any payments as sought under the Recovery Notice. On, 17.07.2021, while

being fully aware that all due and entitled amount as payable to the Applicant i.e. Rs.1,71,49,856 had already been paid, the Applicant with an intent to not pay the amount as claimed under the Recovery Notice and as a mere afterthought issued a demand notice to the Respondent in respect of an alleged unpaid operational debt amounting to Rs. 1,84,00,498.19 /-. It is submitted that upon receipt of Demand Notice, a reply was sent on behalf of the Respondent on 29.07.2021.The applicant had served demand notice dated 16.07.2021 of Rs. 1,84,00,498.19 which is far above the total default amount stated in this application i.e. Rs. 1,10,77,454.07/-. 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. Absence of a detailed reply to the demand notice is not fatal to the respondent's case ;

VIII. The applicant has approached this Hon'ble Adjudicating Authority with unclean hands ;

IX. IBC is not a recover forum

16. Heard the submissions made by the Learned Counsel for Respondent. Though, Applicant was heard on previous dates, on the date of last hearing, they were asking for adjournment. So they are directed to file written

submissions but Applicant failed to file written submissions and matter was reserved for orders on 15 April 2024. Thereafter, Applicant filed IA No.726 of 2024 on 17 April 2024 (e filing) praying for allowing them to argue in the matter. It was allowed on 9 May 2024 and arguments of Applicant is heard. It is pertinent to note that till date, Applicant had not brought to our notice regarding filing of an appeal before Hon'ble NCLAT with respect of similar order passed on 16 February 2024 in CP IB 180/AHM/2021. However, Learned Counsel for the Respondent submitted that it was a different matter including the property and have no bearing with this matter.

Observations:

a) There were disputes prior to the demand notice dated 16th July 2021 when the applicant had served a demand notice of Rs.1,84,00,498.19 which is far above this application amount i.e. Rs. 1,10,77,454.07/-, 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.

b) The main prayer for non - payment of the Benchmark Revenue by the CD to OC for the period commencing from 15 June 2019 to August 2019 totalling an amount of Rs.77,17,500/- is payable to the OC for the above mentioned three months and for the remaining period of lock- along with interest @ 24% per annum for the delayed payment is Rs. 28,57,762.52/-. 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).

c) Further in clause 2.6 of the Master Agreement, it is clearly stated that the operator shall not enter into 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 that 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.

d) 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) thereby making the amount due less than the threshold less than Rs.1 crores(without applying interest).

e) As per the agreement examined on submission 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 liability on the balance sheet (no records produced of the Operating Creditor or the Corporate Debtor). A liability on account

of a debt 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.

17. 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.

18. Hence we are passing the following order:

ORDERS

The Application being CP (IB) No. 182 of 2021 is Rejected.

Sd/- Sd/-

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

CHITRA HANKARE
MEMBER (JUDICIAL)

R.S.