

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**AHMEDABAD**  
**DIVISION BENCH**  
**COURT - 1**

**ITEM No.303 - C.P.(IB)/179(AHM)2021**

**Order under Section 9 of the IBC, 2016**

**IN THE MATTER OF:**

Jagadish .....Applicant

V/s

OYO Hotels and Homes Pvt Ltd ....Respondent

**Order delivered on 05/07/2024**

**Coram:**

Mr. Shammi Khan, Hon'ble Member(J)

Mr. Sameer Kakar, Hon'ble Member(T)

**PRESENT:**

For the Applicant :

For the Respondent :

**ORDER**

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

**-SD-**  
**SAMEER KAKAR**  
**MEMBER (TECHNICAL)**

**-SD-**  
**SHAMMI KHAN**  
**MEMBER (JUDICIAL)**

SEN

**BEFORE THE ADJUDICATING AUTHORITY  
NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH -I, AHMEDABAD**

**C.P(IB)/179(AHM)2021**

*(Application for initiation of Corporate Insolvency Resolution Process U/s 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 of

**M/s. Jagadish**

Having address at:  
No.51, Old No. 664,  
11<sup>th</sup> Main Road, 4<sup>th</sup> Block,  
Jaynagar, Bangalore-560011.

**... Applicant/Operational Creditor**

**VERSUS**

**OYO Hotels and Homes Private Limited**

Having address at:  
Ground Floor-001, MauryanshElanza,  
Shyamal Cross Road, Nr. Parekh Hospital,  
Satellite Ahmedabad,  
Gujarat-380015.

**... Respondent/Corporate Debtor**

**Order Pronounced on 05.07.2024**

**CORAM :**

**SH. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)  
SH. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)**

**APPEARANCE:**

For Operational Creditor : Mr. T S Suresh, Advocate a. w.  
Ms. Aparna, Advocate

For Corporate Debtor : Mr. Saurabh Soparkar, Senior  
Advocate a. w. Mr. Rohan  
Lavkumar, Advocate & Ms  
Anushree Soni, Advocate

**O R D E R**  
**(PER: BENCH)**

1. The present application is filed on 26.08.2021 under inward no. 5961 by the Applicant- M/s. Jagadish (hereinafter referred to as **'Operational Creditor'**) against the Respondent- OYO Hotels and Homes Private Limited (hereinafter referred to as **'Corporate Debtor'**) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **"IBC, 2016"**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as **"IB (AAA) Rules, 2016"**) for initiation of Corporate Insolvency Resolution Process (**CIRP**), to appoint Interim Resolution Professional (hereinafter referred to as **"IRP"**) and declare the moratorium for having defaulted in payment of the operational debt including interest.
  
2. This Tribunal vide its order dated 19.07.2023 passed in IA/712(AHM)2023 allowed the Applicant to amend the main petition i.e., CP(IB)/179(AHM)2021. Accordingly, the amended petition was filed 03.10.2023 under

inward diary no. D3817 seeking the condonation of delay 9 days in filing the amended petition.

3. An affidavit verifying the petition has been filed Mr. P. Rakesh in his capacity as a partner in Partnership Firm i.e., M/s. Jagadish. A copy of the same is annexed at page no. 607-608.
4. Perusal of Part-I of amended Form 5 reveals that Operational Creditor is one M/s. Jagadish, having PAN: AAKFJ2247G, GSTIN: 29AAKFJ2247G1Z8, and having its address at No. 51, Old No.664, 11<sup>th</sup> Main Road, 4<sup>th</sup> Block, Jaynagar, Bangalore-560011.
5. Perusal of Part-II of amended Form 5 reveals that the Corporate Debtor is one OYO Hotels and Homes Private Limited, who was incorporated on 21.04.2015 under CIN: U74900GJ2015PTC107035. The registered address of the Corporate Debtor is at Ground Floor-001, Mauryansh Elanza, Shyamal Cross Road, Nr. Parekh Hospital, Satellite Ahmedabad, Gujarat-380015.

6. On perusal of Part-III of the Form-5 reveals that the Operational Creditor has not named any IP under section 13 (1)(c) of the Code to act as Interim Resolution Professional (**IRP**).
7. Perusal of Part-IV of amended Form 5 reveals that total amount of debt is Rs.7,13,20,712.64 as on 15.08.2021 which includes:-
- i) Rs.4,78,48,500/- on account of Benchmark Revenue for the remaining period of the lock in period after the abandonment of the Hotel Property as per Annexure-B1.
  - ii) Rs.2,14,60,485.70 on account of interest on the foregoing calculated as on 15.08.2021 as per Annexure-F.
  - iii) Rs.10,62,898 on account of random deductions/short payments made as per Annexure-B.
  - iv) Rs.9,48,828.94 on account of interest on the short payments calculated as on 15.08.2021 as per Annexure-B2.
8. In the application, the Applicant has stated that the:-
- I. M/s. Jagdish – Operational Creditor/Applicant is a Micro, Small and Medium Enterprise (“MSME”),

inter alia, engaged in the business of establishing and operating hotels and restaurants and providing travel services. The Respondent entered into a Management Service Agreement (“**Agreement**”) with the Applicant in regard to Property bearing No. 124, situated at Brigade Road, Bangalore, Karnataka-560025 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. A copy of the said agreement is annexed as Annexure-A at page nos. 20-50.

- II. As per Clause 3 of Annexure-D of the Agreement, a Benchmark Revenue for the period starting from July 2017 was fixed at Rs.24,50,000/- per month which was subject to an increment of 5% every 12 months. From the date of commencement of Agreement, the Respondent has failed and neglected to perform its obligations and to adhere the terms and conditions of the Agreement. The Respondent unfairly, baselessly and illegally made deductions from the Applicant’s share of

Benchmark Revenue and failed to make full payment of the assured Benchmark Revenue. The total amount of claim towards the aforesaid unfair deduction payment is Rs.10,62,898/- which is payable by the Respondent. Additionally, interest calculated @ 24% per annum for the unfair and baseless deductions/short payment amounts to Rs.9,48,828.94.

III. On 23.12.2018, a fire incident occurred at the Hotel Property. The Applicant was informed via telephonic call that a fire broke out at the Hotel Property. The Applicant immediately called the Fire Department and the fire fighting team. The fire started at the first floor of the Hotel Property which was managed by the Respondent and the fire further spread to the basement, ground, second and third floor. The Respondent's employees who were responsible for maintaining the Hotel Property ran to their safety putting the lives of the customers in grave danger.

- IV. The Applicant ensured that all the required functional fire safety equipments were duly installed in the Hotel Property. However, during the transformation of the Hotel Property, the Respondent's team had removed/disconnected the same. Despite repeated reminders the Respondent failed to re-install the fire safety equipment. A copy of email dated 03.01.2018 and 17.07.2018 seeking installation of fire safety equipment is annexed as Annexure-C1 and C2.
- V. Pursuant to the Hotel Property being repaired and restored by the Applicant, the Respondent inspected the Hotel Property on 23.02.2019 and 25.02.2019 and no update on reoccupying the Hotel Property by the Respondent was provided to the Applicant. Hence, an email dated 26.02.2019 was sent to the Respondent recapping that the Hotel Property had been renovated completely and is ready for the Respondent to resume its operation and take charge of the Hotel Property, failing which it was informed that they would be



liable to pay the Applicant its share of the Benchmark Revenue as per the terms of the Agreement. A copy of email dated 26.02.2019 is annexed as Annexure-D.

- VI. Since January, 2019, the Respondent has failed and neglected to pay the Applicant the Benchmark Revenue and has not taken possession of the Hotel Property despite several requests made by the Applicant. Nonetheless, the Respondent is liable as per Agreement to pay the Applicant Benchmark Revenue for remaining period of Lock-in amounting to Rs.4,78,48,500/-.
- VII. Additionally, interest calculated @ 20% per annum for the delay payment of the said Benchmark Revenue amounting to Rs.2,14,60,485.70 (calculated till 15.08.2021), which the Respondent is liable to pay as per Clause 2 of Annexure-D of the Agreement, along with continued interest calculated from 16.08.2021 till actual realisation of the total unpaid operational debt.

- VIII. The interest amount claimed herein will fall within the ambit of 'operational debt' in terms of Section 5(21) of the Code and, hence, can be claimed by the Operational Creditor.
- IX. The Operational Creditor filed the proof of claims in Form B before the IRP Mr. Keyur Jagdishbhai Shah who was appointed by this Tribunal in CP(IB) No. 40 of 2020 in the matter of Rakesh Yadav v. OYO Hotels and Homes Private Limited which was taken on record. But, subsequently the petition was withdrawn due to settlement between the Petitioner and the Respondent and owing to the order of Hon'ble NCLAT dated 23.06.2021 allowing the same, Applicant's submission of the claim in Form B was rendered infructuous.
- X. Thereafter, a Demand Notice dated 16.07.2021 in Form 3 was issued by the Applicant on 17.07.2021 demanding payment of Rs.7,89,59,704.85 a.w. future interest calculated @ 24% per annum and the said Demand Notice

was delivered on 20.07.2021. A copy of demand notice is annexed as Annexure-F.

XI. Therefore, in the light of the Corporate Debtor's inaction in furnishing a reply to the Demand Notice, the present application is filed. The consolidated debt amount of Rs.7,13,20,712.64 is due as on 15.08.2021 and further interest @ 24% per annum as per Clause 2 of Annexure-D of the Agreement from the date of institution of the present application till actual payment thereof.

9. The list of documents relied upon by the Operational Creditor are as under:-

- I. *Copy of the Management Service Agreement is attached herein as Annexure -'A'*
- II. *Detailed calculation for the remaining lock-in period of Benchmark Revenue is attached herein as Annexure-'B1'.*
- III. *Detailed calculation of the unfair and baseless deductions/short payments and interest thereon is attached herein as Annexure - 'B2'*
- IV. *Copy of the e-mail dated 3<sup>rd</sup> January 2018 sent by the Operational Creditor asking the Corporate Debtor to re-install the fire safety equipment as Annexure 'C1'.*
- V. *Copy of the e-mail dated 17<sup>th</sup> July 2018 sent by the Operational Creditor once again asking the Corporate*

*Debtor to re-install the fire safety equipment as Annexure 'C2'*

- VI. *Copy of the e-mail dated 26<sup>th</sup> February 2019 sent by the Operational Creditor asking the Corporate Debtor to reoccupy the Hotel Property is attached herein as Annexure - 'D'*
- VII. *Interest Calculation Table is attached herein as Annexure 'E'.*
- VIII. *Copy of the Form 3 along with all the annexures is attached herein Annexure 'F'.*
- IX. *Copy of Master Data of the Corporate Debtor downloaded from the website of Ministry of Corporate Affairs, Government of India is attached herein as Annexure 'G'*
- X. *Copy of the Latest Financial Statements of Corporate Debtor is attached herein as Annexure 'H'.*
- XI. *Copy of the Registration Certificate issued by UDYAM certifying that the Operational Creditor is registered as a Micro, Small and Medium Enterprise (MSME) is attached herein as Annexure-'J'.*
- XII. *Copy of the Bank Statements of the Operational Creditor commencing from August 2017 to January 2019 is attached herein as Annexure 'K'.*

10. Reply was filed under Inward Diary No. D856 dated 22.02.2022 by Mr. Nayan Patel, the authorized representative of the Corporate Debtor. In the reply, it is stated that:-

- I. The Agreement was entered into for engaging the services of the Respondent for managing the

hospitality establishment developed and operated by the operator in the said portion of the said building as provided under the Agreement. Therefore, it is the Respondent which provided its services to the Applicant. In consideration of the services rendered by the Respondent, the Applicant was to pay the Respondent a share of 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 24,50,000/- (“Benchmark Revenue”), subject to such deductions which were agreed upon in the Agreement.

- II. The Agreement was intended to operate for a total period of 9 years, with an initial 3-year lock-in period. The Agreement, during the lock-in period was terminable by the Respondent 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 Clause 7 of the Agreement.

III. Upon an inspection and an independent audit report by ARS Fire & Safety Solutions (“Fire Audit Report”), the root cause of the fire broke out at the Hotel Property on 23.12.2018 was identified to be a short circuit at the electrical system located in the basement room and the same basement was not under the possession of the Respondent but was being managed and controlled by the Applicant itself. In fact, Ground, First and Second Floors which were managed by the Respondent were badly impacted in the fire.

IV. On 23.01.2019 a meeting was held between both the parties to ascertain the damage and cost of repair and restoration that was required. As per Clause 2.4 of the Agreement, the Applicant being the ‘Operator’ was obliged to maintain the structural integrity and upkeep the Hotel Property etc. Accordingly, in the light of the discussion undertaken between the parties on 23.01.2019,

the Respondent sent a communication to Applicant on 28.01.2019 as below:-

- a. As per meeting held on 23.01.2019, the Respondent had only agreed to bear the cost of refurbishing the property as a gesture of goodwill while the responsibility of structural repairs towards the damage caused by the fire, was to lie with the Applicant and the Respondent had made no commitment towards such costs;
- b. As per independent audit report by ARS Fire & Safety Solutions, root cause of the fire was a short circuit at the electrical system located in the basement room and access was with the owner only. Due to delay caused by owner's staff in unlocking the door. substantial damage was already done to the property;
- c. Refusing to conduct the structural repair will be a material breach;
- d. As part of agreement compliance, the Applicant shall ensure that all mandatory provisions for fire regulations to deal with and avoid occurrence of a similar event in the future should be performed by the Applicant before the Respondent can start smooth operations at the Hotel Property;
- e. Till the property is restored, operations shall be suspended and the Respondent shall not pay any Benchmark Revenue to the Applicant

A copy of the email dated 28.01.2019 is marked as Annexure R-1.

- V. In response to the email dated 28.01.2019, the Applicant responded by its email dated 15.02.2019 disputing the contents of the email dated 28.01.2019 stating that the Respondent is liable to pay the Benchmark Revenue. More importantly, the Applicant invoked the arbitration as provided in Clause 10 of the Agreement for dispute resolution. A copy of the email dated 15.02.2019 is annexed as Annexure-R-2.
- VI. Thereafter, the Applicant by its email dated 28.02.2019 informed the Respondent that property was completely restored and ready to be handed over. Hence, Respondent should resume operations. A copy of email dated 28.02.2019 is annexed as Annexure-R-3.
- VII. Thereafter, the Respondent on 01.03.2019 collectively responded to the Applicant by advancing the following points:-
- a. Sharing the cost of structural repair was never in the discussion, rather it would be against the spirit of the Agreement.



- b. Payment of Benchmark revenue is contingent upon the owner's actions to fulfil the contractual obligations.
- c. It would be a false statement to say that the fire was caused by the Respondent's negligence and Respondent's staff did not take actions to mitigate the same. In fact, one of the Respondent's staff member saw the smoke coming out of the basement.
- d. As soon as, the Respondent's staff saw the smoke coming out of the basement, the staff member informed the Applicant's representative as the basement was in the Applicant's possession.
- e. The Applicant had informed that any amount that is received by insurance company, shall be used for renovation of the property and this was even though the Applicant did not have any related insurance for the property.
- f. The Applicant is liable to bear the cost of major repairs, not the Respondent and that the Respondent would claim damages.
- g. Root cause of the fire was electrical short circuit in basement only which was locked and in the Applicant's possession. Further, it took 60 mins for the Applicant's staff to reach and unlock the basement room which caused a huge delay.
- h. Operations shall remain suspended until the structural repairs are completed by the Applicant as per applicable regulatory permits and thereafter the Respondent installs the furnishing.
- i. The Applicant had reiterated that the repair shall be completed by 20.02.2019, however, the same was not completed until 28.02.2019.

j. The Respondent also proposed to meet on 05.03.2019 to discuss and resolve the issue amicably.

A copy of email dated 01.03.2019 is annexed as Annexure-R-4.

VIII. Thereafter, on 02.03.2019, the Applicant refused the proposed meeting and stated that possession or handover of the property has nothing to do with the said meeting. Hence, the Respondent shall be responsible to pay the Benchmark Revenue post 20.02.2019. A copy of the email dated 02.03.2019 is annexed as Annexure-R-5.

IX. On 11.03.2019, the Respondent sent an email to the Applicant stating that until the repair work is completed a.w. Respondent's furnishing, the Respondent shall not be paying any monies and requested to procure all the approvals and licenses and further proposed for a joint inspection to discuss the issue immediately. A copy of email dated 11.03.2019 is annexed as Annexure-R-6.

- X. On 13.03.2019, the Applicant proposed to meet on 14.03.2019 for joint inspection. Since the Applicant provided only one day's time, the Respondent on 15.03.2019 requested for another date with at least 48 hours. The Applicant on 15.03.2019, proposed to meet the Respondent on 18.03.2019. A copy of email dated 13.03.2019 and 15.03.2019 is annexed as Annexure-R-7.
- XI. On 18.03.2019, the representative of Respondent met the Applicant and following points were noticed by the Applicant which are in contravention of Agreement:-
- a. The Applicant conveyed that he would not bear a loss of rent for the 3 months when the property was not operational;
  - b. The Applicant asked the Respondent to refund the costs of structural repairs at the property undertaken by him;
  - c. The Applicant does not furnish to the Respondent the requisite licenses required under the law (including Fire NOC, OC and CC).
- XII. On 02.04.2019, the Respondent issued a Breach and Cure Notice ("**B&C Notice**") through its

counsel reiterating that unless the Applicant provides the certified copy of the necessary licenses, approvals, the Respondent cannot take back the handover. The same B&C Notice further stated that:-

- a. The liability to pay the benchmark revenue shall also remain suspended;
- b. The Applicant/owner has failed to provide necessary certificate for OC/CC and also the fire safety certificate despite multiple follow-ups;
- c. The Respondent had requested the owner to undertake an independent audit inspection to check the compliance on 15.03.2019 but to no avail;
- d. Joint inspection was conducted on 01.04.2019, however, the Applicant refused to sign the sheet maliciously and acknowledge the conduct of the joint inspection. Hence, this amounts to a material breach.

Accordingly, the Applicant was asked to cease and desist from raising unreasonable demand in relation to repair which clearly was Applicant's responsibility and from raising Benchmark Revenue without providing the necessary approvals and licenses. By way of B&C Notice, the Applicant was provided an opportunity to cure its breaches within seven days failing which the

Respondent reserved the right to terminate the Agreement. Copy of B&C Notice dated 02.04.2019 is annexed as Annexure-R-8.

XIII. Since, the Applicant failed to cure the defect, the Agreement stood terminated w.e.f. 09.04.2019. The Applicant, in fact, instead of curing the defect issued Demand Notice in respect of an alleged unpaid operational debt amounting to Rs.7,89,59,704.85. Keeping in view the correspondences, it can be seen that fire break out before the issuance of Demand Notice and there has been a clear dispute between the parties with respect to the alleged payments. There is no admitted claim in respect of the claim maintained by the Applicant. Further, upon receipt of Demand Notice, reply was sent by the Respondent on 29.07.2021, highlighting the following issues, to establish that no dues are payable by the Respondent to the Applicant:-

- a. There is pre-existing dispute between the parties;
- b. There is a fatal defect of concealment of facts;

- c. The claims in the Demand Notice primarily comprises of damages and interest and estimates of repair and as per settled law, cannot be made part of an operational debt;
- d. Demand Notice is non-est and bad in law.

XIV. The application liable to be rejected on the following grounds:-

- i) There is a pre-existing dispute between the parties as regards the amount claimed in default.
- ii) As regards to the dispute between the parties as to whether the Benchmark Revenue is payable or not, it can be ascertained from the correspondence exchanged between the parties that there has been non-consensus with respect to the payment of the Benchmark Revenue.
- iii) The Respondent has never admitted/acknowledged any outstanding payment to the Applicant.
- iv) The Applicant has already invoked arbitration in terms of Clause 10 of the Agreement vide letter dated 15.02.2019 i.e., much prior to issuance of Demand Notice. It is thus clear that there is a pre-existing dispute.
- v) The Applicant does not qualify to have an Operational Creditor. The terms of the Agreement and the contractual relation between the parties cannot be termed to be an Operational Creditor. Further, the Applicant does not qualify as an Operational Creditor as defined under Section 5(20) r.w. Section 5(21) of the Code for triggering the CIRP.
- vi) The amount of Benchmark Revenue claimed for 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.

- vii) 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.
- viii) On exclusion of claim of Benchmark Revenue for the expired lock-in period and the interest claimed thereupon, the threshold of minimum amount of default fails to be satisfied.
- ix) The Applicant has approached this Tribunal with unclean hands.
- x) The provisions of the Code do not provide a recovery forum.

11. Rejoinder was filed under Inward Diary No. D2647 dated 26.05.2022. In rejoinder, the Applicant has denied the objection of the Corporate Debtor and has stated that the application is maintainable and Respondent has placed the wrong facts.

12. The Applicant has filed a compilation of judgment under inward no. D3724 dated 01.05.2024 and supplementary affidavit dated 03.05.2024 along with Form-C of NeSL. But in the said affidavit, Form D of NeSL is not attached with the said affidavit. Another supplementary affidavit was filed on 24.06.2024

attaching NeSL record of default with Form-D. It is seen that status of the same is “Disputed”.

13. The Applicant has also filed an additional affidavit under inward no. D3788 dated 24.06.2024 which is taken on record.
14. The Applicant has filed the written submission on 28.06.2024 and the Respondent has filed the written submission on 01.07.2024 through online. We have considered the same.
15. We have heard the learned counsels for both sides and perused the material on record. It is noted that this Tribunal vide its order dated 19.07.2023 and thereafter on 11.09.2023 had granted one weeks’ time to file the amended Form 5. However, there has been delay of 9 days in filing the amended Form 5. The Applicant had prayed to condone the delay of 9 days in filing the amended Form 5 which is condoned.
16. It is noted that both the parties have entered into an Agreement on 12.07.2017 in regard to Property bearing No. 124, situated at Brigade Road, Bangalore,



Karnataka-560025 for a term of nine years, with a three-year lock-in period as per Clause 7.1 and 7.2. On 23.12.2018, a fire broke out at the Hotel Property. Thereafter, various emails were exchanged between the Applicant and the Respondent and on 09.04.2019, the Agreement stood terminated as the Applicant failed to cure the defect as highlighted in the B&C notice dated 02.04.2019 issued by the Respondent.

17. Both the parties raised a dispute on each other and the application filed for an amount of Rs.7,13,20,712.64 which pertains to the debt due up to 15.08.2021 which are essentially the damages for breach of the lock in period under the Agreement on which there is a dispute. As per Clause 10 of the Agreement, there is a provision for 'Dispute Resolution' and as such this petition is beyond the scope of Section 9 of the IBC, 2016 where the provisions to admit would restrict to a debt and default wherein there is no proven dispute.
18. There is also a Breach & Cure notice dated 02.04.2019 issued by the Respondent in accordance with the agreement owing to the non-submission of material

documents by the Applicant which is prior to the Demand Notice dated 16.07.2021 issued by the Applicant. If the Agreement is a service contract subject to certain compliance, the same has been breached or not complied. The Applicant, from the documents and submissions, is observed to have not cured the defect, and thus, there is a dispute. The remedy for such defect does not fall within the purview of IBC, 2016 which permits the Adjudicating Authority to decide a default. This is a compensation due treated as a debt due, which is also due on the date of application, is a dispute stands unpaid due to mutual claims between the Applicant and the Respondent and the remedy for both parties is available under the Contract Law as specified in the agreement than before IBC.

19. The claim of the Applicant is in the nature of liquidated damage which does not fall within the definition of 'operational debt'. In the decision of **Delhi Control Devices Pvt. Ltd. Vs. Fedders Electric and Engineering Ltd.**, the NCLT held that "failure of breach of settlement agreement cannot be a ground to

trigger the CIRP against the Corporate Debtor as it cannot be treated as operational debt under Section 5(21) of the IBC, 2016 and remedy may lie elsewhere not before this Adjudicating Authority”.

20. From the perusal of additional affidavit filed by Respondent under diary no. D3787 dated 08.05.2024, it seen that:-

i. Initially the affidavit under Section 9(3) was filed with the application under Form 5 dated 17.08.2021 wherein the Applicant has stated as under:-

*“The Operational Creditor had sent a Demand Notice (form 3 dated 17.07.2021 under Section 8 of the Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor demanding payment of certain sums of money owed to the Operational Creditor. The Corporate Debtor vide its email dated 29.07.2021 sent a holding reply, raising a mala-fide and false allegations against the Operational Creditor, as a clear afterthought and a mere attempt to raise a fictitious dispute to avoid liability. The Corporate Debtor’s holding reply also mentioned that a detailed reply will be sent, however, the Operational Creditor has not received the detailed reply till date”.*

ii. The Applicant thereafter sought to amend the present application under Section 9, Form V of

the IBC, 2016 which came to be allowed. However, the Applicant has removed original Annexure G which contained a Reply dated 29.07.2021 to the Demand notice dated 16.07.2021.

iii. It is the Applicant's case that this is not a reply to the present demand notice addressed by the Applicant since the address referred to in the demand notice does not pertain to the property in question. Whilst the address refers to the principle place of business erroneously as the property, everything else in the demand notice indicates that this is in response to the present demand notice Annexed at Annexure F to the Amended Petition.

a. The amount mentioned in the demand notice and the reply disputing the demand notice are the same and match. The exact claim amount stipulated in the Applicant's Demand Notice i.e., Rs.7,89,59,704.85 has been disputed by in the reply. This is evident from para I of the Reply.

- b. Furthermore, the amounts in dispute in CP (IB) No. 180/AHM/2021 was Rs.5.52 cr and in the disputed amount in CP(IB) No. 182/AHM/2021 was Rs.1.84 cr. There have been no other demand notices issued by the Applicant.
- c. There is no averment in the reply to the Demand Notice, with respect to assignment of agreement to MTH as made in CP(IB) No.179/AHM/2021, whereas in other two matters i.e., CP(IB) 180/AHM/2021 and CP(IB)182/AHM/2021, the Respondent has also raised contentions for assignment to MTH are reflecting in the respective two replies.
- d. In all replies to the Demand Notice, the OYO property IDs has been mentioned in the subject line. In the present case, it is BLR665(Brigade Road). Whereas the Property ID for Jayanagar has been mentioned as BLR666 and the property ID for BLR674, Sector-7, HSR Layout.
- e. Considering the above, there can be no doubt that this was in fact a reply to the Demand Notice in CP(IB)179/AHM/2021.

21. Reply to the Demand Notice was seen from the record.
22. As recorded in order dated 22.04.2024, it can also be seen that three similar matters of the present application of the same Operational Creditor has already been dismissed by Coordinate Bench of this Tribunal being Court No.2, which is mentioned below:-
1. *CP (IB) 180 of 2021 dated 16.02.2023*
  2. *CP(IB) 28 of 2023 dated 30.11.2023*
  3. *CP(IB) 226 of 2022 dated 04.04.2024.*
23. In view of the above, we are of the view that the present application is not maintainable.
24. Accordingly, C.P. (IB) No. 179(AHM)2021 is hereby rejected and disposed off.
25. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

**-SD-**  
**SAMEER KAKAR**  
**MEMBER (TECHNICAL)**

**-SD-**  
**SHAMMI KHAN**  
**MEMBER (JUDICIAL)**

**SEN**