

IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH

C.P. No. 567/IB/2018

Under section 9 of the IBC, 2016

In the matter of

M/s. Citicare Super Specialty Hospital  
....Operational Creditor

v/s.

Vighnaharta Health Visionaries Pvt. Ltd.  
.... Corporate Debtor

Order Delivered on 11<sup>th</sup> March.2019

Coram:

Hon'ble Shri V. P. Singh, Member (Judicial)

Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Operational Creditor: Mr Mahesh Athavle a/w.

Mrs. Anagha Anasingaraju, Practising  
Company Secretary.

For the corporate Debtor: Mr Rohit Totala, Advocate

Per V. P. Singh, Member (Judicial)

ORDER

1. It is a Company Petition filed u/s 9 of Insolvency & Bankruptcy Code by the Operational Creditor M/s. Citicare Super Specialty Hospital against the Corporate Debtor Vighnaharta Health Visionaries Pvt.Ltd., stating that the Corporate Debtor defaulted in making payment of ₹3,41,30,397.50/-, given the same, this

Company Petition is filed for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. The Counsel for the Operational Creditor states that the Operational Creditor and the Corporate Debtor had entered into Leave and License Agreement on 05.02.2015, wherein it was agreed that the Corporate Debtor would use the Hospital Premises of the Operational Creditor on Lease for the term of 5 years. The said Agreement was duly registered on the same date. The whole Leased premises was divided into two parts, i.e. part A and part B. It was agreed that if the Corporate Debtor uses only part A, then the License Fee will be ₹15 Lacs per month with an increase of 7.5% per year. It was also agreed that after two years, or commencement of usage of Part B (whichever is earlier), the Licence fee would be the ₹20 Lacs per month with an increase of 10% per year. It was also agreed that once this charge takes place, then it would be irrevocable and the same shall continue for rest of the license period.

3. It was also agreed between Operational Creditor and Corporate Debtor that the Licence Fee would be paid by 7<sup>th</sup> of succeeding month. The Corporate Debtor has regularly paid said Licence fee till December 2016. The licence fee for January 2017 has been defaulted by the Corporate Debtor, which was to be paid on 07.02.2017. From 07.02.2017 the License fee and charges for usage of basement payable by the corporate debtor become due, and the equipment cost is due from June 2015.

4. The Counsel for the Operational Creditor states that as per the Agreement the Operational Creditor has an Interest Free refundable security Deposit of ₹40 Lacs. Further, the Operational Creditor and Corporate Debtor have entered into a contract of the purchase of medical equipment on 06.02.2015. The total value of this Agreement is ₹98,59,000/-. However, the principal amount of ₹34,87,119/- and with interest of ₹6,39,645/- remained outstanding.

The Counsel for the Operational Creditor states that the ₹60,00,000/- has been paid by the Corporate Debtor.

5. The counsel for the Operational creditor states that the Operational Creditor had issued a letter dated 28.03.2015 stating that the Basement area of the same building wherein the leased property is situated will be handed over by the Operational Creditor to the Corporate Debtor and for the same, the Corporate Debtor will pay **₹30 per square feet**. Further, the Corporate Debtor was under obligation to pay for insurance premium during the lease period. However, Corporate Debtor failed to comply with the same. Hence, the Operational Creditor has paid the Insurance Premium.

6. The Counsel for the Operational Creditor had requested for the making payments, but the Corporate Debtor did not make the payment. The Operational Creditor had issued Legal notice dated 29.06.2017 and after that, issued Demand Notice dated 28.02.2018 which was duly replied by the Corporate Debtor on 08.03.2018 wherein the Corporate Debtor merely denied his liability without any proof.

7. The Ld. Counsel for the Corporate Debtor states that the present petition is based on claim towards alleged outstanding rent/ licensee fee payable and is not in respect of any goods or services and thus the alleged claim for outstanding rent/ license fees does not come within the meaning of "Operational Creditor" as defined under sub-section 20 read with sub-section 21 of section 5 of the Insolvency and Bankruptcy Code, 2016. In these circumstances, the Petition is not maintainable and liable to be dismissed.

8. The Counsel for the Corporate Debtor also raised the issue of a defect in the Company Petition, stating that the Operational Creditor has not produced Bank Statement on record. The Bank Certificate dated 20<sup>th</sup> March 2018 annexed in the Petition does not

reflect the correct picture as the Corporate Debtor has made payments to Operational Creditor.

9. The Counsel for the Corporate Debtor also states that there is an existence of a dispute between the parties. Before the Demand Notice dated 28.02.2018 by Operational Creditor, email dated 22.02.2018 issued by the Corporate Debtor to Operational Creditor which records the understanding arrived and acted upon between the parties.

10. The Counsel for the Corporate Debtor states that the Company Petition for recovery of license fees rent is not maintainable under Insolvency and Bankruptcy Code, 2016 as already referred above and in any event, it is a settled law that IBC, 2016 shall not be used as a substitute for recovery of money.

11. As per oral understating arrived and acted upon between parties, only rent till March 2017 was payable by corporate Debtor, which has already been adjusted towards the security deposit. The Operational Creditor has not issued any invoice towards license fees after 31<sup>st</sup> March 2017 and thus on this count alone, the Company Petition deserves to be dismissed with heavy costs.

12. The Ld. Counsel states that the Operational Creditor has never demanded the said amount allegedly payable by the Corporate Debtor and has never raised any invoices claiming the said amount. In the absence of any contemporaneous demand or invoice being raised, it cannot be assumed that there is a crystallised sum of money allegedly due and payable by the Corporate Debtor to the Operational Creditor. Thus, in the absence of any such contemporaneous demand or invoice, the jurisdiction of this Tribunal cannot be invoked, and relief can be granted.

13. The Ld. Counsel for the Corporate Debtor states that the given Clause 13 of Memorandum of understating dated 5<sup>th</sup> February 2015, the Corporate Debtor by its letter dated 11.05.2018 invoked the Arbitration Clause and nominated Hon'ble Justice P.V. Hardas, Retired High Court Judge to adjudicate the dispute arisen between the parties. The said letter has been received by Mr Yogesh Vargantwar on 12.05.2018.

14. The Ld. counsel for Corporate Debtor, relied upon Mobilox Innovation Pvt. Ltd. v. Kirusa Software Pvt. Ltd., Under I&B Code, it need not be seen whether the company is unable to make payment or that the relief sought has bonafide or not. The only criterion to be looked into is as to whether debt and default are in existence as on the date of filing case. To see how this clause "existence of dispute" plays out, we have to read the judgment of Hon'ble Supreme Court delivered in Mobilox Innovations Private Limited v. Kirusa Software Private Limited (September 21<sup>st</sup> 2017) as to this; the para relevant is as below:

"40. 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."

15. Ld. Counsel for the Corporate Debtor has emphasised that this Company petition has been filed for recovery of license fees/rent which is not maintainable under IBC, 2016. It is further contended that the alleged debt is not an 'Operational Debt' and Petitioner is not the 'Operational Creditor'. Therefore, Petition is not maintainable.

16. Ld. Counsel for the Corporate Debtor has relied on the case law of Jindal Steel & Power Ltd vs DCM International Ltd, dated 6.10.2017. In the above case, the Corporate Debtor has taken a plea that an amount of claim in the petition itself cannot be categorised as Operational Debt, the applicant/Petitioner cannot claim itself to be Operational Creditor within the meaning of Section 5(20) of IBC, 2016, as the amount which is claimed to be in default does not arise in relation to the amount payable towards supply of goods or rendering services or in connection with the employment or in relation to the statutory dues as prescribed under Section 5(21) of IBC, 2016 and hence the Petitioner is not entitled to maintain the petition as an Operational Creditor.

17. In this case, it has been observed by the Tribunal that the amount claimed as due by a person representing as Operational Creditor should demonstrate firstly that the said amount in default falls within the definition of 'Claim' as defined under Section 3(6). Such a claim, secondly should be capable of being treated as a 'debt' as defined under Section 3(11) of IBC, 2016 and finally the 'debt' should fall within the confines of Section 5(21) of IBC, 2016, i.e. it

should be capable of being treated as an 'Operational debt' and such an operational debt must be owed by the Corporate Debtor to a credit who can then be considered as an Operational Creditor as defined under Section 5(2) of IBC, 2016.

18. It has been further held that "as recently as 28.9.2017, this Tribunal in the matter of Divine Infracon Pvt Ltd in IB-209/ND/2017 has held after a detailed discussion that in relation to transaction of immovable property the same cannot be considered as a transaction falling under the term 'operation' and 'Operational Debt' unless such a transaction having a correlation of direct input to the output produced or supplied by the Corporate Debtor and hence we do not have any hesitation looking at any way in holding that the petitioner will not fall under the definition of Operational Creditor and the claim which is sought to be made cannot be considered as an Operational Debt."

19. It is pertinent to mention that appeal filed against the order mentioned above passed in 'Jindal Steel" supra, and it was decided by NCLAT in Company Appeal (AT)(Insolvency) No.288 of 2017 that:

"Admittedly, the appellant is a tenant of Respondent-Corporate Debtor. Even if it is accepted that a Memorandum of Understanding has been entered between the parties in regard to the premises in question, the Appellant being a tenant, having not made any claim in respect of the provisions of the goods or services and the debt in respect of the repayment of dues does not arise under any law for the time being in force payable to the Central Government or State Government, we hold that the Appellant tenant do not come within the meaning of 'Operational Creditor' as defined under sub-section (20) read with sub-section (21) of Section 5 of the IBC, 2016 for triggering insolvency and bankruptcy process under Section 9 of the IBC."

20. In this case, admittedly here, Petitioner has filed this Petition relating to the claim following amount as mentioned in Annexure IV of the petition which is given below:

ANNEXURE

TOTAL AMOUNT RECEIVABLE FROM CORPORATE DEBTOR		
S.NO.	DESCRIPTION OF THE CLAIM AS PER SHEETS HEREWITH.	AMOUNT IN RS.
1	AMOUNT RECEIVABLE TOWARDS LICENSE FEES OF HOSPITAL PREMISES + INTEREST AS PER CLAUSE 4.1 OF THE REGISTERED LEASE AND LICENSE AGREEMENT DATED 05.02.2015	29,544,583.50
2	AMOUNT RECEIVABLE TOWARDS CHARGES FOR BASEMENT MEDICAL AND CASUALTY AREA IN THE BUILDING AS PER AN AGREEMENT ON VHVPL'S LETTER HEAD. DATED 28.03.2015	426,550.00
3	AMOUNT RECEIVABLE ON ACCOUNT OF PURCHASE OF MEDICAL EQUIPMENT AS PER AGREEMENT DATED 05.02.2015	4,126,764.00
4	AMOUNT RECEIVABLE TOWARDS REIMBURSEMENT OF INSURANCE OF THE BUILDING AND OTHER ITEMS AS PER CLAUSE NO. 14.1 OF THE REGISTERED LEASE AND LICENSE AGREEMENT BELONGINGS WHICH WAS PAID BY LICENSOR FOR 16-17 AND 17-18	30,500.00
	<b>GRAND TOTAL OF THE AMOUNT RECEIVABLE FROM CORPORATE DEBTOR</b>	<b>34,130,397.50</b>
	Rupees Three crores forty one lakhs thirty thousand three hundred ninety seven and paise fifty only	

21. On perusal of the above chart, it is apparent that the petitioner/operational creditor has claimed the license fee of the hospital premises, amount receivable towards charges for basement and casualty in the building as per the agreement, along with the claim of amount receivable on account of purchase of medical equipment, the amount receivable towards reimbursement of insurance of building and other items as per clause 14.1 of the registered Lease and License Agreement. Details of license fees are given in the chart form on Page No.22 of the petition which shows that the Petitioner is claiming ₹2,95,44,584/- as total amount receivable from the Corporate Debtor till 31.1.2018. The alleged amount includes interest and basic amount of license fees

@Rs.18,00,000/- from January, 2017 to 7.6.2017 and @Rs.19,80,000/- per month from July 2017 to January 2018

22. Thus petitioner's claim is relating to the arrears of license fee for the hospital premises and interest thereon. The details are provided below:

TOTAL LICENSE FEES RECEIVABLE FROM CORPORATE DEBTOR FOR THE HOSPITAL PREMISES AND THE INTEREST THEREON FOR DELAY													
SR NO. OF THE PART OF THE BUILDING	DESCRIPTION	MONTH	DUE DATE	BASIC AMOUNT OF LICENSE FEES	GROSSST APPLICABLE (%)	SERVICE TAX / GST APPLICABLE (IN RUPEES)	AMOUNT RECEIVED FROM CORPORATE DEBTOR	TOTAL AMOUNT RECEIVABLE FROM CORPORATE DEBTOR	TAX DEDUCTED AND PAID BY CORPORATE DEBTOR	NET AMOUNT RECEIVABLE FROM CORPORATE DEBTOR	DELAY IN COMPLETED MONTHS TILL 31 JANUARY 2018	INTEREST FOR DELAY @ 15% PM	TOTAL AMOUNT RECEIVABLE FROM CORPORATE DEBTOR TILL 31.01.2018
1	A-B	Jan-17	7-Feb-2017	1,800,000.00	15%	270,000.00	1,035,000.00	1,035,000.00	180,000.00	855,000.00	12.0	153,900.00	1,008,000.00
2	A-B	Feb-17	7-Mar-2017	1,800,000.00	15%	270,000.00	-	2,070,000.00	180,000.00	1,890,000.00	11.0	311,850.00	2,201,850.00
3	A-B	Mar-17	7-Apr-2017	1,800,000.00	15%	270,000.00	-	2,070,000.00	180,000.00	1,890,000.00	10.0	283,500.00	2,173,500.00
4	A-B	Apr-17	7-May-2017	1,800,000.00	15%	270,000.00	-	2,070,000.00	0.00	2,070,000.00	9.0	279,450.00	2,349,450.00
5	A-B	May-17	7-Jun-2017	1,800,000.00	15%	270,000.00	-	2,070,000.00	0.00	2,070,000.00	8.0	249,600.00	2,318,600.00
6	A-B	Jun-17	7-Jul-2017	1,980,000.00	15%	293,550.00	-	2,273,550.00	0.00	2,273,550.00	7.0	228,217.50	2,401,767.50
7	A-B	Jul-17	7-Aug-2017	1,980,000.00	15%	293,550.00	-	2,273,550.00	0.00	2,273,550.00	6.0	210,276.00	2,508,826.00
8	A-B	Aug-17	7-Sep-2017	1,980,000.00	15%	293,550.00	-	2,273,550.00	0.00	2,273,550.00	5.0	175,230.00	2,511,630.00
9	A-B	Sep-17	7-Oct-2017	1,980,000.00	15%	293,550.00	-	2,273,550.00	0.00	2,273,550.00	4.0	140,184.00	2,478,584.00
10	A-B	Oct-17	7-Nov-2017	1,980,000.00	15%	293,550.00	-	2,273,550.00	0.00	2,273,550.00	3.0	105,138.00	2,441,538.00
11	A-B	Nov-17	7-Dec-2017	1,980,000.00	15%	293,550.00	-	2,273,550.00	0.00	2,273,550.00	2.0	70,092.00	2,406,492.00
12	A-B	Dec-17	7-Jan-2018	1,980,000.00	15%	293,550.00	-	2,273,550.00	0.00	2,273,550.00	1.0	35,046.00	2,371,446.00
13	A-B	Jan-18	7-Feb-2018	1,980,000.00	15%	293,550.00	-	2,273,550.00	0.00	2,273,550.00	0.0	-	2,336,400.00
												<b>28,544,584.00</b>	

23. Given the law laid down by Hon'ble NCLAT in case of "Jindal Steel" supra, it is clear that Petitioner's claim does not fall within the definition of 'Operational Debt' and Petitioner cannot be treated as 'Operational Creditor'. Since the alleged debt is not 'Operational Debt' and Petitioner is not the 'Operational Creditor'. Therefore, the Petition is not maintainable under Section 9 of IBC, 2016. Hence, the Petition deserves to be rejected on this ground.

24. The petition is dismissed as not maintainable.

Sd/-

RAVI KUMAR DURAISAMY  
MEMBER (TECHNICAL)

Sd/-

V. P. SINGH  
MEMBER (JUDICIAL)