

**IN THE NATIONAL COMPANY LAW TRIBUNAL
SINGLE BENCH
NEW DELHI**

No.IB-200/ND/2017

Section: Section 9 of the Insolvency and Bankruptcy Code, 2016 read with the Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

**Jindal Steel and Power Limited,
Jindal Centre, 12,
Bhikaji Cama Palace,
New Delhi-110066**

... Operational Creditor/Applicant

**DCM International Limited
UGF, South Wing, NBCC Place,
Bhishma Pitamah Marg,
New Delhi-110003.**

..... Corporate Debtor



Coram:

**R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)**

**Counsel for the Petitioners: Mrs. Ranjana Roy Gawai, Advocate
 Ms.Vasudha Sen, Advocate**

**Counsel for the Respondents : Mr. Amit Agarwal, Advocate
 Ms.Tejaswita, Advocate
 Ms.Nitu Mittal, Advocate
 Mr.Abhishek, Advocate**

Order delivered On: 6.10.2017

ORDER

Jindal Steel & Power Ltd. representing itself to be an Operational Creditor of DCM International Ltd. has filed this Company Petition seeking to initiate the Corporate Insolvency Resolution Process (CIRP) for alleged default committed by the Corporate Debtor namely DCM International Ltd. in a sum of Rs.1.00 crore plus interest at 12% per annum. The above amount which is claimed to be in default according to the Operational Creditor arises out of non refund of security deposit amount given by the Operational Creditor to the Corporate Debtor under lease deed dated 13.5.2009 in respect of offices taken on lease at second and third floors of the DCM



Building, Institutional Plot No.94 in Sector-32, Gurugram. It is also represented by the Operational Creditor that in addition to the second and third floors of the above property again by virtue of lease dated 1.9.2009, the first floor of the said building was also taken on lease from the Corporate Debtor. The amounts paid under the aforesaid lease deeds it is represented was given as refundable security deposit of lease and to be of Rs.1,00,79,750/- and Rs.59,43,840/- respectively. Operational Creditor represents that in relation to lease deed dated 13.5.2009, the lease of the demised premises was terminated vide letter dated 20.1.2012 and in relation to the premises under lease deed dated 1.09.2009, by virtue of efflux of time, the lease got determined on 30.9.2012 and in the circumstances due to the termination of lease as narrated above, the Corporate Debtor is liable to refund the sums paid as security deposit given at the time of entering into the respective leases by the Operational Creditor.

2. Subsequent to the termination of the lease, the Operational Creditor avers that since 2012 it has repeatedly been approaching the Corporate Debtor to refund the security deposit however, without much avail. On 22.7.2014 finally the parties to the Petition it is averred after numerous deliberations entered into a Memorandum of Settlement (MoS) wherein it was agreed between the parties that the Corporate Debtor will refund a sum of Rs.1.50 crores to the Operational Creditor in 3 instalments (i.e.) Rs.50.00

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lakhs to be paid at the time of signing the MoS and the balance amount to be paid in 2 equal instalments of Rs.50.00 lakhs each within a period of 45 days commencing from the date of signing the MoS. The Corporate Debtor it is averred by the Petitioner that while paid a sum of Rs.50.00 lakhs at the time of signing the MoS, but failed to pay the balance amount in a sum of Rs.1.00 crore as agreed under the MoS and despite numerous reminders, as the payment was not forthcoming, the Operational Creditor was forced to issue a statutory notice under the provisions of Section 433(e) of the Companies Act, 1956 for winding up the respondent company based on its inability to pay the admitted debt. The above notice it is represented was given on 20.8.2016 by the Operational Creditor to the Corporate Debtor. Since the same did not invoke any response from the Corporate Debtor, the Operational Creditor was forced to issue notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 (for brevity IBC,2016) wherein a sum of Rs.1.00 crore based on the MoS was claimed as operational debt being the defaulted amount on the date of issue of the notice dated 31.3.2017 and sought for repayment of the unpaid operational debt within a period 10 days from the date of receipt of the notice failing which the Operational Creditor it was stated will be constrained to initiate CIRP against the Corporate Debtor. The notice dated 31.3.2017 is stated had been delivered to the Corporate Debtor on 3.4.2017 as evidenced by the tracking report of the relevant consignment issued by India Post.

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3. Upon receipt of notice dated 31.03.2017 by the Corporate Debtor it had been replied to on the part of the Corporate Debtor through its legal Counsel dated 3.5.2017 wherein the amount claimed had been disputed by the Corporate Debtor and further calling upon the Operational Creditor to withdraw the demand notice dated 31.3.2017. Ld. Counsel for the Petitioner represents that in view of the absence on the part of the Corporate Debtor to refund the amount of security deposit claimed as the defaulted amount, the Operational Creditor has been forced to file the above Petition as narrated earlier for invoking the provisions of IBC, 2016 and for initiating CIRP against the Corporate Debtor.

4. From the order sheet file it is seen that on 10.7.2017 this Tribunal had granted time to the Petitioner to rectify any defects within the stipulated period of 7 days as mandated under the provisions of Section 9 of IBC, 2016. On 20.7.2017, it is seen that the Corporate Debtor has entered appearance through its Counsel and an opportunity was granted to the Corporate Debtor to file its reply which has also been filed and the matter was finally taken up for disposal subsequent to the completion of pleadings on 8.8.2017. Perusal of the reply as filed by the Corporate Debtor shows that the following grounds have been taken to challenge the maintainability of the Petition:

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i) The amount claimed to be in default by the Operational Creditor does not fall within the purview of operational debt as defined under Section 5(21) of IBC,2016.

ii) Since the amount claimed in itself cannot be categorized as "Operational Debt", the applicant / petitioner cannot claim itself to be an "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 amount payable towards supply of goods or rendering services or in connection with the employment or in relation to 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.

iii) In addition to the above, the Corporate Debtor has also contended that there is a pre-existing dispute as between the Operational Creditor and the Corporate Debtor and the adjudication of the dispute cannot be done in a summary manner as it requires leading of evidence and a trial to be conducted.

iv) It is also contended by the Ld. Counsel for the Corporate Debtor that the MoS cannot be relied upon as it virtually seeks to amend the provisions of the lease deed and further it has also been not properly stamped.



5. For all the above said reasons, Ld. Counsel for the Corporate Debtor seeks that the Petition should be dismissed as not maintainable and further contends that the Petition is nothing but an abuse of process of law.

6. Ld. Counsel for the Respondent has relied upon the Judgement of Hon'ble NCLAT rendered in Company Appeal (AT) (Insol.) No.75 of 2017 in the matter of Satish Mittal vs. Ozone Builders & Developers Pvt. Ltd. and particularly draws attention to paragraph 6 of the said judgement to contend that the transaction will not fall within the confines of Section 5 (21) of IBC,2016.

7. Ld. Counsel for the Operational Creditor has also filed written submissions as rebuttal to the above contentions of the Ld. Counsel for the Respondent alongwith certain case law as rendered by Hon'ble High Court of Gujarat at Ahmedabad reported in MANU/GJ/1053/2011 in the matter of Cinemax India Ltd. vs. Union of India in order to project the view that the lease transactions in relation to immovable property, namely, renting of immovable property in furtherance of business or commerce to carry out the activity or business or commerce of service recipient amounts to rendition of service and would fall within the meaning of definition of service tax and hence the contention of the Corporate Debtor that the transaction does not fall under the definition of Operational Debt cannot be taken into consideration as the renting of immovable property should be considered as

"service" thereby satisfying the term 'service' as found in the definition of 'Operational Debt' under Section 5(21) of IBC,2016. Ld. Counsel for the Petitioner has also placed reliance on the report of the Bankruptcy Law Reforms Committee as presented to the Govt. of India particularly at paragraph 5.2.1, which is extracted for ready reference as below:

Here, the Code differentiates between financial creditors and operational creditors. Financial creditors are those whose relationship with the entity is pure financial contract, such as a loan or a debt security. Operational creditors are those whose liability from the entity comes from transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by the car mechanic and who gets paid only after the spark plugs are sold is an operational creditor. Similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three year lease. The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt.

8. Ld. Counsel for the Petitioner/Operational Creditor relies on the above paragraph as extracted to reinforce that the transaction of lease of immovable property will fall within the term of services also under Section 5(21) of IBC,2016.

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9. We have carefully considered the rival pleadings as well as the submissions made by the parties through their Ld. Counsels. It is evident from the documents filed that in relation to the lease agreement dated 13.5.2009 as well as 1.9.2009 the second and third floors and subsequently the first floor in the building known as DCM International Ltd. situated at Institutional Plot No.94 in Sector 32, Gurugram has been leased out by the Corporate Debtor to the Operational Creditor. In other words, the Corporate Debtor is the 'lessor' of the property which had been leased out to the Operational Creditor which happened to be the 'lessee'. Even taking into consideration the report of the Bankruptcy Law Reforms Committee dated 4.11.2015 at face value, it is the Corporate Debtor who can be considered as the 'lessor', and if at all providing services to the Operational creditor by leasing out the immovable property which basically belongs to the Corporate Debtor and not vice versa. Even otherwise, as has been pointed out by the Ld. Counsel for the Respondent in the matter of Satish Mittal vs. Ozone Builders & Developers Pvt. Ltd. the Hon'ble NCLAT has categorically at paragraph 6 held as follows:

"Admittedly, the appellant has not made any claim in respect of goods. The appellant has also not rendered any services for which he is entitled to claim any amount. It is not the case of the appellant that he was in employment or a debt in respect of repayment of dues arising under any law is due to him. As the dues to which the appellant claim does not arise under any law for the time being in force and merely based on the receipt, we find no ground to interfere with the



impugned order of rejection of application under section 9 in absence of any merit. The appeal is dismissed. No cost."

Thus any 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 in 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 creditor who can then be considered as an Operational Creditor as defined under Section 5(20) of IBC,2016.

10. Further, 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 can not be considered as an Operational Debt.

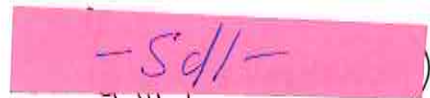
11. Further, from the records it is also seen that by sending the notice of dispute dated 3.5.2017 by the Corporate Debtor in relation to the notice of demand dated 31.3.2017 as sent by the Petitioner, a dispute has been projected on the ground that a portion of the properties leased to the Operational Creditor was not given in time by it even after its termination which has occasioned loss of use of the property by the Corporate Debtor giving rise to financial loss to it. As held by the Hon'ble Supreme Court of India in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited on September 21st, 2017, it is not necessary that a claim of dispute as raised by the Corporate Debtor will ultimately succeed is not required to be established before this Tribunal in order to bring it within the meaning of dispute. A pre-existence of dispute which has plausible chance of success is sufficient and that the ground of dispute which is taken should not be mere sham or elusive. From the perusal of the notice of dispute dated 3.5.2017 we are satisfied that a plausible dispute has been raised by the Corporate Debtor vis-à-vis the Operational Creditor.

12. In relation to the reliance placed by the Petitioner on the decision of Hon'ble High Court of Gujarat, it is to be seen that the same has been rendered in the context of Service Tax Act and not in relation to IBC, 2016 and hence we do not find it proper to impute the definition of 'service' as



given under the Service Tax Act to the provisions of IBC, 2016 as both stand entirely on different footing – one being a fiscal statute for levying taxes on services of which the legislature has cast a wide net, whereas IBC, 2016 is in relation to insolvency which has serious and crippling consequence and hence requires to be strictly construed.

13. Taking all the above into consideration we are not inclined to admit the Petition and the Petition is hence dismissed but without costs.

 -Sd/- 6/10/17
(R.VARADHARAJAN)
MEMBER(JUDICIAL)

U.D.Mehta