

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL**Company Appeal (AT) (Insolvency) No. 251 of 2017**

(Arising out of Order dated 28th September, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi in CP No. IB/209/ND/2017)

IN THE MATTER OF:**Parmod Yadav & Anr.****...Appellants****Vs.****Divine Infracon Pvt. Ltd.****...Respondent****Present: For Appellants:- Mr. Sakal Bhushan, Advocate.****For Respondent:- Mr. Soumyajit Pani, Ms. Inayat Ahmed and Ms. Rehana Ahmed, Advocates.****J U D G M E N T****SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellants preferred application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for initiation of 'Corporate Insolvency Resolution Process' against Divine Infracon Pvt. Ltd. ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), New Delhi, rejected the application by impugned order dated 28th September, 2017 on the ground of 'existence of dispute'.

2. The factual matrix for filing the application under section 9 of the 'I&B Code' was noticed by the Adjudicating Authority is as follows:

“2. The Applicants being mother and daughter state that they are owners of service apartment bearing No. 915-A, 9th Floor, Soul City Service Apartment Complex situated at Plot N.4, Sector-13, Dwarka, New Delhi-110078. According to the Applicants, the built up area of the Service Apartment is 34 mtrs. and the super built area is of 68 sq.mtrs. It is further stated that in relation to the said property a lease agreement was entered into between the owners being the Applicants as 'Lessors' with the 'Corporate Debtor' being the 'Lessee' on 16.8.2014. However, lease was made effective retrospectively on and from 10.1.2012 correlating with certain agreement having nomenclature of Hotelier-Buyer agreement. The duration of the lease it is claimed is for a period of 15 years effective from 10.1.2012 and the monthly rental payable being Rs.1,37,250/- plus service tax, if any, applicable. The lock-in period in relation to both the parties of the property described as above, it is claimed is for a period of 15 years. While so, it is claimed by the Applicants/ landlords that the Lessee namely the

'Corporate Debtor' had chosen to issue the termination notice dated 4.4.2016 terminating the agreement entered into between the parties before the expiry of lease time period of 15 years, in other words within the lock-in period specified in the agreement. It is also stated that at the time of terminating the same, Rs.12,62,700/- was due by way of rentals and interest was also due for the defaulted amount @12% per annum which comes to around Rs.1,95,718.03. In addition to the non-payment of rentals for the period in which the 'Corporate Debtor' was in occupation of the premises, the Applicant has also put forth a claim w.e.f. 10.4.2016 to 9.1.2027 in relation to monthly rentals for the unexpired period of lock-in to the extent of Rs. 2,60,05,539.74 which it is claimed is also payable along with the interest at 12% p.a. The aggregate amount thereby it is claimed by the Operational Creditor is in a sum of Rs.2,74,63,957.77 and in relation to the said sum Applicants state that the notice of demand as required to be issued under Section 8(1) of Insolvency & Bankruptcy Code, 2016 dated 22.4.2017 had been sent which the Applicants claim was also served by courier on the 'Corporate Debtor' on 24.4.2017. In view of the fact that no

payment of the amount claimed in default has been remitted nor the notice of demand being replied to, which it is stated to have made the Operational Creditor to file under Section 9 of IBC, 2016 this Petition for invoking the Corporate Resolution Process (CIRP) against the 'Corporate Debtor'."

3. The 'Corporate Debtor' admitted the claim and stated that the claim is based on the lease agreement dated 16th August, 2014 and was terminated w.e.f. 4th April, 2016 and therefore, no default can be claimed on the basis of their earlier agreement.

4. It was submitted that the application is a counter blast to the claim of the Respondent ('Corporate Debtor') towards maintaining the premises in a sum of Rs. 3,60,841/- required to be paid for the period between April, 2016 to June, 2017 which remained unpaid. Further, the case of the Respondent is that there is an 'existence of dispute'.

5. Learned counsel for the Respondent brought to the notice of the Adjudicating Authority the notice of alleged Arbitration Proceedings issued on 17th January, 2017 by the 'Corporate Debtor' and took plea that in the said notice no attributable dispute has been detailed as required under the provisions of the Arbitration and Conciliation Act, 1996.

6. Learned counsel appearing on behalf of the Appellants referred to the agreement dated 16th August 2014, which came into effect from 10th January, 2012, to suggest that the Appellants are 'Operational Creditor'. It was submitted that the Appellants has leased the premises for commercial purposes which come within the meaning of 'services' for the purpose of sub-section (21) of Section 5 of the 'I&B Code'.

7. It was also submitted that if a premise is leased for commercial purpose, the land-lord on collection is required to pay Service Tax, but in view of exemption of payment of Service Tax upto Rs.10 lakhs, the Appellant has not deposited the Service Tax.

8. From the record we find that notice was issued on behalf of 'Corporate Debtor' on 17th January, 2017 to the Appellants for appointment of a Sole Arbitrator, which reads as follows:

"Dated: 17.01.2017

To

- 1. Mrs. Parmod Yadav W/o Mr. R.C. Yadav
House No. E-2134
Palam Vihar Gurgaon
Haryana*
- 2. Mrs. Sneha Yadav W/o Mr. Siddharth Yadav
House No. E-2135
Palam Vihar Gurgaon
Haryana*

SUBJECT: Appointment of Sole Arbitrator

Dear Sir / Madam,

We M/s Divine Infracon Private Limited having our office at Plot No. 4, Sector-13, Dwarka, New Delhi – 110075 (hereinafter referred to as 'Divine') requests your good-self to resolve through arbitration proceedings, the dispute or disputes, whatsoever arising out of Hotelier Buyer Agreement

dated: 10.01.2012, Sale Deed dated 23.07.2012 and Lease Agreement dated 10.01.2012 between us on one part and your good self on the other. As per the Hotelier Buyer Agreement dated: 10.01.2012, Divine Infracon and your good-self have to mutually decide upon a sole arbitrator, in case of any dispute arises between the parties.

Relevant clause i.e. Clause No. 32 (at page no.8) of the Hotelier Buyer Agreement dated: 10.01.2012 is reproduced herein for your ease of reference;

“Any and all disputes or differences between THE HOTELIER and THE BUYER arising out of or in connection with this agreement or its performance shall be settled amicably within 15 days through consultation between the Parties. Thereafter, if the Parties failed to reach an amicable settlement on any or all disputes or differences arising out of or in connection with this Agreement or its performance, such disputes or differences shall be submitted to Arbitration for final adjudication.

Arbitration proceedings shall be concluded by a Sole Arbitrator to be mutually decided by the Parties. Such arbitration shall be in accordance with the Indian (Arbitration and Conciliation) Act, 1996 (“Arbitration Act”) and the rules made there under and / or any amendments thereof.

The arbitration proceedings shall be held in English and at New Delhi.

Decision of the Arbitrator shall be final and binding upon the parties.

The Courts at Delhi alone shall have the exclusive jurisdiction for the purpose of this Agreement.”

In view of the aforementioned clause prevailing, we do hereby suggest the name of the following arbitrators for adjudicating the existing disputes between your good self and M/s Divine Infracon Private Limited. Details of the proposed arbitrators are laid down below:

1. *Justice (Retd.) N.K. MODY
Former Judge, Madhya Pradesh High Court
Senior Advocate, Supreme Court of India
At: A-192, Defence Colony, New Delhi*
2. *Mr. K. Venkatraman
Advocate
Chamber No. 109
Block – 3, Delhi High Court
Delhi
venkatraj2007@yahoo.com*
3. *Vibhu Shankar*

Advocate

Sector – B, Pocket – 1, Flat No. 1049A

Vasant Kunj, New Delhi – 110 070

shankarvibhu@yahoo.co.in

We, therefore, request you to revert to us within next 30 days of receipt hereof, failure to reply or revert to the instant notice, would imply that your good self have agreed upon the proposed arbitrator as aforementioned to be appointed as Sole Arbitrator for adjudicating the disputes existing between the parties herein.

Yours faithfully

M/s Ddivine Infracon Private Limited

Sd/-

Authorised Representative

9. From the aforesaid letter, it is clear that the ‘Corporate Debtor’ made request under Section 21 of the Arbitration and Conciliation Act, 1996, which reads as follows:

“21. Commencement of arbitral proceedings. –

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular disputed commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

10. In view of the fact that the arbitral proceedings commence since the request made under Section 21 of the Arbitration and Conciliation Act, 1996, we hold that on commencement of arbitral proceedings, it is rightly pleaded that there is an existence of dispute and therefore, the petition under Section 9 was not maintainable.

11. In view of the aforesaid finding, we are not deciding the question as to whether the Appellants are 'Operational Creditor' or not. The appeal is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

4th July, 2018

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