

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI  
BENCH-III**

**C.P. No. IB-306/(ND)/2018**

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

**In the matter of:**

**Hitachi India Private Limited  
Units 802A &B, Tower-2,  
Konnectus Building, Bhavbhuti Marg,  
Near Minot Bridge, Connaught Place,  
New Delhi-110001**

**...Operational Creditor/Applicant**

**Versus**

**Prime Infrapark Private Limited,  
B-85, First Floor, Defence Colony,  
New Delhi-110024**

**...Corporate Debtor/Respondent**

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**Coram:**

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

**Dr. V.K. SUBBURAJ  
Hon'ble Member (Technical)**

Counsel for Operational Creditor: Mr. N. Swaminathan, Advocate  
Mr. Ashok Kumar Singh, Advocate

Counsel for the Respondent: Mr. Tushar Parashar, Advocate



## ORDER

Date: 17 .09.2018

1. This is an application filed by M/s Hitachi India Private Limited (“the Applicant”) seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against M/s. Prime Infrapark Private Limited (“the Respondent”) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“the Code”) for the alleged default in clearing the debt of Rs. 2,05,93,440/- including interest at 18% p.a from the due date i.e. 07.10.2017. The transaction leading to the filing of this application is as follows:

- i. The Respondent, as per its financial statement for the Financial Year ended on 31.03.2016, is a Special Purpose Vehicle (SPV) of Pratibha Industries Limited incorporated to undertake Delhi Metro Rail Corporation project i.e. construction of Multi Level Car Parking with Commercial Development at New Delhi Railway Station cum Airport Terminal of Airport Express Line on BOT model. As per its balance sheet, the Respondent has a right to lease out the office premises and collect car parking charges and lease rental for a period of thirty years including construction period. Thus, the principal and predominant

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business of Respondent, in terms of its financial statement, is leasing and renting of property.

- ii. The Applicant had entered into a Sub License Agreement dated June 19, 2012 (hereafter referred to as the 'said Agreement') with Respondent for licensing to use and occupy the premises no. 802 A & B, 8<sup>th</sup> Floor, Konnectus Tower-2, Bhavbhuti Marg, Near Minto Road Bridge, Connaught Place, New Delhi-110001. The premises have been taken by the Applicant company for setting up of its registered office.
- iii. The Applicant company vide cheque no. 238508 dated 3<sup>rd</sup> May 2012 drawn on Standard Chartered Bank and cheque no. 106544 dated 19<sup>th</sup> June 2012 drawn on Bank of Tokyo Mitsubishi UFJ Limited has paid interest free security deposit of Rs.2,02,93,440/- (Rupees Two Crores Two Lakhs Ninety Three Thousand and Four Hundred Forty Only) to Respondent.
- iv. The Applicant company paid an amount of Rs.3,00,000/- (Rupees Three Lakh Only) to Respondent as refundable security deposit towards electricity connection charges in terms of clause 9.5 of the said Agreement vide Cheque No.802130 dated 30<sup>th</sup>



June, 2013 drawn on Standard Chartered Bank, Barakhamba Road Branch, New Delhi.

- v. DMRC letter terminating the Concession Agreement dated 01.04.2010 for the default committed by the Respondent in making payment to DMRC. Pursuant to clause 2.4 of the said Agreement, the said Agreement was co-terminus with the Concession Agreement and hence the said Agreement also stands automatically terminated. DMRC has further called upon the Applicant company to enter into a fresh agreement for the premises with DMRC and has started collecting lease rent from the Applicant company as well as other tenants in the building with effect from 2<sup>nd</sup> September, 2017.
- vi. The Applicant company has demanded from the Respondent to repay and refund the security deposit of Rs. 2,02,93,440/- (Rupees Two Crores Two Lakhs Ninety-Three Thousand and Four Hundred Forty Only). In the same notice, the Applicant company further demanded to replay and refund an amount of Rs. 3,00,000/- (Rupees Three Lakhs Only) paid to the Respondent as refundable security deposit towards electricity



connection charges. The Respondent has not replied or responded to this notice till the date of filing this petition.

vii. The Applicant company has issued notice u/s 8 of the Code as per Form 3 and the Respondent has neither replied to the said notice nor paid the amount demanded in the said notice.

2. The Applicant company has dispatched through speed post, the copy of the demand notice in Form-3 along with requisite documents to M/s Prime Infrapark Private Limited, the Respondent at its registered office on December 20, 2017 and the same was received by the Respondent on December 26, 2017 as per the track consignment records of the postal department. In compliance of the order dated 27.03.2018 passed by this Tribunal, the dasti notice has been served on the Respondent on 13.04.2018 by the Applicant company and the same has been acknowledged by the Respondent.

3. The learned counsel for the Respondent appeared before this Tribunal on 24.04.2018. However, since the Respondent failed to file reply to the application despite several opportunities and on 19.07.2018 the right to file reply by the Respondent was closed by this Tribunal.



4. The learned counsel for the Applicant argued as to how the Applicant qualifies to be an operational creditor as per the definition given in the IBC, 2016 and how the debt is an operational debt. He has relied on the case of *Mahesh Madhvan vs. Black N Green Mobile Solutions Pvt. Ltd.* in which the Hon'ble NCLT, Chennai vide its order dated 08 December, 2017 admitted the application wherein the operational creditor claimed lease rent for premises sublet by the operational creditor to the corporate debtor and the same was claimed as operational debt.
5. To address the question whether the claim made by the Applicant qualifies as operational debt and the Applicant qualifies as operational creditor it is necessary to refer to the order of this Tribunal in *Jindal Steel and Power Limited vs. DCM International Limited*, where the transaction between the parties was similar to the transaction in the present matter:

*"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*

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*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."*

6. In view of the transaction stated by the Applicant and the observations made in *Jindal Steel and Power Limited* it is held that the Applicant is not an operational creditor as the Applicant has not provided any goods or rendered any services to the Respondent.



Thus, since the Applicant is not qualified to initiate the present proceedings the present application stands dismissed, with no costs.

*Sel - 17/9/2018*  
**(Dr. V.K. SUBBURAJ)**  
**MEMBER (TECHNICAL)**

*Sel - 17.09.2018*  
**(R.VARADHARAJAN)**  
**MEMBER(JUDICIAL)**

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