

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

C.P.IB-550/ND/2017

Coram: SHRI R.VARADHARAJAN, MEMBER (JUDICIAL)

DR. V.K. SUBBURAJ, MEMBER (TECHNICAL)

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:

ROHIT AGGARWAL,
4, FRIENDS COLONY (WEST),
NEW DELHI 110065

...APPLICANT/OPERATIONAL CREDITOR
VS.

UNIVERSAL FACILITY MANAGEMENT PRIVATE LIMITED
(THROUGH ITS DIRECTOR, MR. RAMAN PURI)
102, ANTARIKSH BHAWAN,
KASTURBA GANDHI MARG,
NEW DELHI 110065



ALSO AT:

8TH FLOOR, UNIVERSAL TRADE TOWER,
SECTOR-29, SOHNA ROAD,
GURGAON, HARYANA

UNIT NO. 08-A & 21, GROUND FLOOR,
UNIVERSAL TRADE TOWER,
SECTOR-29, SOHNA ROAD,
GURGAON, HARYANA

..... RESPONDENT/ CORPORATE DEBTOR

Counsel for the Applicant: Ms. Swaralip Deb Roy, Advocate

ORDER

Order delivered On: 17.09.2018

1. Rohit Aggarwal herein, an individual and the joint owner of the Commercial Space 'Universal Trade Tower' representing himself to be an Operational Creditor of Universal Facility Management Private Limited has filed this Company Petition seeking to initiate the Corporate Insolvency Resolution Process (CIRP) for alleged default committed by the said Corporate Debtor in a sum of Rs. 69,00,000/- which is claimed to be in default according to the



Operational Creditor and arises out of unpaid rent by the corporate Debtor to the Operational Creditor under lease deed dated 16.08.2013 in respect of commercial space taken on lease at 08A and 21, Universal Trade Tower located at Gurgaon-Sohna Road, Gurgaon, Haryana , India. The applicant being the joint owner of the said property leased the property to the Corporate Debtor, and is the joint owner of 1/5 of share in the said property, and was entitled to receive a rent of Rs. 3,00,000/- per month including service Tax. Operational Creditor represents that in relation to lease deed dated 16.08.2013, the Corporate Debtor made the payment of rent from 01.04.2014 to 30.09.2015 but failed to deposit the TDS deducted from 01.04.2014 till 30.09.2015 with the income tax authorities. The TDS is also claimed in the application till 30.09.2015. The registered rent agreement expired on 15.08.2016 but was extended by the Corporate Debtor in writing for a period of another 3 years, vide communication dated 14.08.2016 with the assurance that the hitherto unpaid rent would be paid by or before 31.12.2016.

2. Upon failure to abide by the said assurance and further of written and oral communications by way of reminders, as the same did not invoke any response from the Corporate Debtor, the Operational Creditor issued notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 (for brevity IBC,2016) wherein a sum of



Rs.69,00,000/- based on the lease rent with Service Tax of Rs. 5,40,000/- was claimed as operational debt being the defaulted amount on the date of issue of the notice dated 02.09.2017 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 02.09.2017 is stated to have been delivered to the Corporate Debtor on 09.09.2017 and 13.09.2017 and to its Directors on 08.09.2017 as evidenced by the tracking report of the relevant consignment issued by India Post. Further in the affidavit filed under section 9 (3) (b) it is stated that no notice of dispute has been received from the Corporate Debtor in relation to the claim.

3. Ld. Counsel for the Operational Creditor has also filed written submissions and projected 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 thus 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.



4. The matter was listed before the Tribunal on 29.11.2017 and on subsequent dates. However, in view of a similar issue pending before the Hon'ble NCLAT arising out of the order of this Tribunal passed in *M/s. Parmod Yadav & Another Vs. Divine Infracon (P) Ltd. In C.P. No.IB-209/ND/2017* dated 28.09.2017 the matter was getting adjourned. However the issue of Lease rentals of immovable property and whether the appellant therein can be considered as an 'Operational Creditor' had been left open, in view of a finding of pre-existing dispute, and the Hon'ble NCLAT had been pleased to dismiss the appeal vide its Judgment dated 24.07.2018.
5. This tribunal in the circumstances have already held that lease transactions in relation to immovable property and that the Lessor cannot be considered as an 'operational creditor' nor the debt as an operational debt' in the above referred to matter of *M/s. Parmod Yadav & Another Vs. Divine Infracon (P) Ltd. in C.P. No.IB-209/ND/2017* to the following effect: -

"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. "

As well as in the matter of *Jindal Steel and Power Limited Vs. DCM International Limited* in C.P. No. IB-200/ND/2018.

6. In *Jindal Steel and Power Limited Vs. DCM International Limited* in C.P. no. IB-200/ND/2018 this Tribunal has also dealt with the provisions of Service Tax and how the same cannot be applied in construing the term "Service" under IBC, 2016 as follows:

"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.

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.

7. The above decision of this Tribunal in *Jindal Steel and Power Limited Vs. DCM International Limited* in C.P. no. IB-200/ND/2018 has also been upheld by Hon'ble NCLAT vide order passed in *Jindal Steel and Power Limited Vs. DCM International Limited in Company Appeal (AT) (Insolvency) No. 288 of 2017* dated 28.11.2017.

8. Thus giving by the above rendered decisions of this Tribunal, both of which have also been upheld by Hon'ble NCLAT, we are constrained to dismiss the instant petition, however without costs.

— Sel —
17/9/2018
(Dr.V.K.SUBBURAJ)

MEMBER (TECHNICAL)

U.D.Mehta / K

— Sel —
17.09.18
(JAN)
(R.VARADHARAJAN)

MEMBER (JUDICIAL)