

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
C.P. NO. 1075/I&BP/NCLT/MAH/2017**

Coram: Ina Malhotra, Member (Judicial)

In the matter of **Insolvency and Bankruptcy Code, 2016.**

1. TCI Telenet Solutions Pvt. Ltd.
16th Floor, Nirmal, Nariman Point
Mumbai – 400 021. Operational Creditor/Applicant

2. Millennium Motors Pvt. Ltd.
41, Ex-Servicemen Colony,
Deepak Bungalow,
Paud road, Pune – 411 038, Corporate Debtor/Respondent.

Counsel for the Operational Creditor: Mr. Ajay.

Counsel for the Corporate Debtor: None.

ORDER

(Heard on 19th June 2017)

(Pronounced on 19th June 2017)

The present petition has been filed by the Petitioner, claiming to be a Creditor of the Respondent / Corporate debtor, and has therefore prayed for its initiation of Insolvency Resolution Process under the provisions of the Insolvency and Bankruptcy code 2016 (hereinafter referred to as the 'Code'). The petition is ambiguous on whether the petitioner is a Financial Creditor or an Operational one. While it has based its claims on grounds of having provided services to the Corporate Debtor, it seeks to escape the mandatory compliances of section 9 (3) by addressing itself as a Financial Creditor.

2. Be that as it may, this Bench is of the view that given the background and the facts of the case, the petition does not merit any consideration. My reasons for coming to this conclusion are based on the factual matrix giving rise to the claim and noted hereunder.

3. The petitioner is the owner of non-agricultural land in village Dapodi, Taluka Haveli, Pune measuring about 5,969 Sq. meters with structures measuring 25,400 sq. ft. built thereon. Portion of the same had been given to the Respondent for use and occupation. A leave & Licence agreement was executed between the parties on 06.07.2002 for a period of 33 months on a monthly rent of Rs. 2,00,000/- with the agreement to enhance it periodically every 11 months. As per averments, the respondent Corporate Debtor failed to vacate the said property on determination of the lease / license period. They, however, continued in possession of the said premises without renewal of the licence and have also been in default of payment of the agreed lease rent since from June 2006, which was an admitted amount of Rs. 2,20,000/- per month. The Petitioner, therefore claims a sum of Rs. 2,93,40,000/- from the Corporate Debtor w.e.f. 1.6.2006 till the filing of the present Petition.

4. This bench does not consider it necessary to distinguish whether the document executed was in fact a lease and not a licence (as that has to be determined from the intention of the parties and not by the nomenclature of the document). If considered a lease, then clearly the entitlement would not be considered as a 'debt' within the definition as envisaged under the Code.

5. Ld. Counsel for the petitioner has claimed that the liability arose on the petitioner's extending the facility of use of the premises to the Corporate Debtor, and has termed it as a service provided to them, and under such circumstances, the Petitioner is entitled under the provisions of Code for initiation of

Insolvency and Bankruptcy Resolution Proceedings against the Corporate Debtor.

If the claim is to be considered on the basis of a service provided to the Corporate Debtor, there is complete disregard in compliance of the statutory requirements of section 9 (3) of the Code. This has conveniently been disregarded in view of certain lis pendency that can be inferred from the averments on record, which broadly speaking, arise out of an interim order for deposit of the admitted monthly liability along with arrears under the provisions of order XV-A of the Code of Civil Procedure. The petitioner had filed an eviction petition being Civil Suit No. 433/2006 in the Small Causes Court, Pune.

In the said proceedings, an application under Order XV-A CPC was filed which was dismissed the Ld. Court. Impugning it before the Court of the Ld. District Judge was met with a similar fate. The petitioner then invoked the Writ Jurisdiction of the Hon'ble High Court of Bombay in CWP 4861/2011, which set aside the order of the two lower courts and disposed of the petition vide its order dated 7th January 2013 with the following directions:

- (i) *The impugned order is quashed and set aside and rule is made absolute in terms of prayer clause (a).*
- (ii) *The Respondents are directed to deposit in trial Court an amount of Rs.2,20,000/- per month towards the monthly licence fee/compensation for the use and occupation of the suit premises till the disposal of suit.*
- (iii) *The arrears of licence fee for the period between June 2006 and December 2012 shall be deposited within the period of 10 weeks from today.*
- (iv) *Effective from the month of January 2013, the Respondents shall deposit the monthly licence fee on or before 25th of each month.*

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(v) *The amount so deposited by the Respondents, shall be invested by the learned trial court in FDRs of nationalised bank on yearly basis.*

6. The directions of the Hon'ble High Court of Mumbai were duly upheld by the Hon'ble Apex Court, which dismissed the SLP filed by the Corporate Debtor. In view of the Order dated 22.07.2013 of the Apex, Ld. Counsel for the Petitioner submits that their right to claim the monthly dues attain finality, and on account of the Corporate Debtor failure to honour the directions, despite notice dated 16.03.2017, the petitioner was entitled to invoke the provisions of the Code. Needless to observe that there is cogent explanation for any inaction at the petitioner's end since the dismissal of the Respondent's SLP by the Apex Court on 22.07.2013.

7. I am unable to appreciate the arguments addressed by the Ld. Counsel for the Petitioner. As observed earlier, insofar as his claim is based as a Financial Creditor, this bench does not consider the accruing liability as a "Debt" within the definition under the Code. With respect to the petitioner's claim u/s 9 of the Code as an Operational Debtor, their non-compliance in filing an affidavit that there is no dispute pending or the banker's certificate as required under sec. 9(3) would disentitle them from initiating the Resolution Process. The Corporate Debtor has resisted all proceedings pending before the Courts in respect of eviction as well as recovery of the monthly lease / licence fee. From the submissions made in the Petition, it emerges that the Respondent's defence is based on some Agreement for Sale. The Petitioner has not disclosed the fate or Status of the proceedings of the Suit filed by them. The claim is based on an interim order passed under Order 15-A CPC for compliance during the pendency of the suit. Besides, as per directions of the Hon'ble High Court, the accrued amount was to be deposited in Court to be kept in a Fixed Deposit. There is therefore no finality attached

entitling the Petitioner to recover the same. Moreover, the Petitioner has also initiated contempt proceedings for wilful non-compliance of the directions passed by the Hon'ble High Court.

8. The Petition does not merit any consideration and is being Rejected. This Bench however makes it clear that any observation made in this order shall not be construed as an expression of opinion on the merit of the Petitioner's claim. The right of the Petitioner before any other forum shall not be prejudiced on account of dismissal of the present Petition.

Sd/-

Ina Malhotra
Member (Judicial)