
(2022) 08 NCLT CK 0020

In the National Company Law Appellate Tribunal, Principal Bench, New Delhi

Case No : IB-1084/ND/2019

HDFC ERGO General Insurance Company Ltd

APPELLANT

Vs

M/s Prime Infra Park Private Limited

RESPONDENT

Date of Decision : 12-08-2022

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(20), 9, 8, 13(2), 14(1), 15, 17, 18, 19, 20

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 — Rule 6

Citation : (2022) 08 NCLT CK 0020

Hon'ble Judges : Bachu Venkat Balaram Das, Member (J); Binod Kumar Sinha, Member (T)

Bench : Division Bench

Advocate : Ankur Kumar, Bindu Bhatia

Final Decision : Disposed Of

Judgement

Bachu Venkat Balaram Das, Member (Judicial)

1. This is IB-1084/ND/2019 filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as 'IBC, 2016') R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Operational Creditors, HDFC ERGO General Insurance Company Limited, is seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor viz., Prime Infra Private Limited, to declare moratorium and to appoint Interim Resolution Professional (hereinafter referred as 'IRP').

2. The Operational Creditor/Petitioner has averred as follows: -

a. It is the case of the Operational Creditors that Delhi Metro Railway Corporation (DMRC) had entered into a Concession Agreement dated April 1, 2010 with Pratibha Industries Limited (PIL/Concessionaire), wherein PIL was

awarded concession by DMRC for 30 years to design, develop and maintain integrated parking complex and concession the use of build-up spaces & facilities (the Concession Agreement) for specified purposes.

b. It is submitted that the Concessionaire formed a 100% owned subsidiary for the execution of work under the said Concession Agreement, viz M/s Prime InfraPark Private Limited, and informed DMRC of the same vide letter bearing reference no. PIPL/DMRC/033 dated 06.04.2010, whereupon DMRC consented the request of PIL vide its letter no. DMRC/PD/AM1/NDRS/V5 dated 21.6.2010 addressed to the Concessionaire. Thereafter, M/s Prime InfraPark Private Limited (PIPL) developed a Complex, known as Konnectus Tower, Bhavbhuti Marg, opposite Ajmeri Gate Railway station side, near Minto Bridge, New Delhi which consists of multiple office units (the 'Project Facility')

c. It is further submitted that as per clause 2.3.1 of said Concession Agreement PIL was entitled to sub-licence office units within the Konnectus Tower to sub-licensees, subject to the terms and conditions of the Concession Agreement and applicable laws.

d. It is averred that thereafter, PIPL as Sub-Licensor and HDFC EGRO General Insurance Company Limited (Operational Creditor) signed a binding Memorandum of Understanding dated March 30.2017 (the 'MOU') for sub-license of 12000 square feet of carpet area in Tower-2, office no. 702/B Konnectus Bhavbhuti Marg, New Delhi. Post execution of the MOU; PPIL, PIL and HDFC ERGO initiated negotiation on the terms and conditions of the sub-license agreement. During the course of negotiation, PIPL and PIL impressed Upon HDFC ERGO to pay 50% of the refundable security amounting to Rs. 27,10,656/- and on 16th June, 2017, HDFC ERGO paid a sum of Rs. 27,10,656/- i.e 50% of the security deposit of Rs. 54,21,312/- through NEFT to PIPL. Post concluding the terms and conditions of the sub-license Agreement, PPIL and HDFC ERGO entered into a sub-license agreement dated 19' July, 2017 and proceeded for registration of the sub-license agreement.

e. It is further averred that meanwhile DMRC has already issued a 'Notice to cure cum Termination Notice' dated 27" June, 2017 to PIL giving 30 days to pay the dues and cure all material defaults. However, due to failure of PIL and PIPL to pay the dues and cure material defaults, DMRC vide another notice dated 17' August, 2017 gave another opportunity to PIPL to clear all dues and material defaults. However, due to lack of compliance to the terms of the aforementioned notices, DMRC terminated the said Concession Agreement with PIL vide order dated 1st September , 2017 with immediate effect and also asked PPIL to hand over the project facility within a period of 3 days.

f. It is also submitted that, DMRC vide its letter dated 1st September, 2017 issued to HDFC ERGO, advised HDFC ERGO that the said sub-license agreement with PPIL was co-terminus with the said Concession

Agreement, hence it will automatically terminate on the date of termination of Concession Agreement with PIL. It is also pertinent to mention that PIPL and PIL were well aware that the Concession Agreement with DMRC would be terminated as a result of their uncured breach, consequent to which PIPL will not be entitled to execute the sub-license agreement with HDFC ERGO. PIPL with a malafide intention pressed for registration and immediately proceeded for execution and registration of the sublicense agreement with HDFC ERGO on 19th July, 2017 and obtained 50% of the hefty refundable security deposit amounting to Rs. 27,10,656/- and also did not pay their share of stamp duty and registration charges amounting Rs. 373,600/- thereon. Thus, due to material default on the part on the part of PPIL, DMRC terminated the Concession Agreement on 1st September, 2017, as a result of which the sub-license agreement with HDFC ERGO also stood terminated on the same day.

g. It is further stated that, HDFC ERGO issued a notice dated 27.12.2017 demanding refund of the security deposit and the proportionate share of the expenses incurred towards registration of the Sub-license Agreement. However, there was no response to the same. Again, HDFC ERGO sent an e-mail reminder dated January 28, 2018 asking PIPL and PIL to respond to the aforementioned notice. The email reminder was followed by a letter reminder dated 4 April, 2018. However, neither any response was received nor any action was taken by PIL and PIPL to settle the matter. Operational creditor issued a demand notice dated July 31, 2018 to Prime InfraPark Private Limited under section-8 of IBC code, 2016 for payment of Rs. 27,10,656/- plus whole amount of stamp duty and registration charges of Rs. 7,53,200 (including Rs. 373,600/- paid on behalf of corporate debtor) aggregating to Rs. 34,63,856/- along with interest @ 18% till payment. It is also submitted that there was no response to the said notice by the Corporate Debtor within 10 days. The Corporate debtor has not repaid the amount of default till date even after persistent reminder and notices.

3. Notice was issued to the Corporate Debtor on 10.07.2019. Service was duly effected. The matter was listed on various dates i.e. 10.03.2021, 31.08.2021 and 09.11.2021. However there was no appearance and no averments were made by the Corporate Debtor in this matter and on 09.11.2021, the matter was proceeded as ex parte. The matter was once again listed on 06.04.2022 and was finally heard on 08.07.2022. As the Corporate Debtor remained exparte, we have to decide this application without the benefit of their assistance.

4. We have heard the arguments advanced by Ld. Counsel for the Operational Creditor and also perused the record.

5. The Operational Creditor's claim is based on the fact that a sum of Rs. 27,10,656/- was paid by the Operational Creditor to the Corporate Debtor as 50% refundable security deposit for sub-licensing office space at tower -2, 702/B Konnectus Bhavbhuti Marg, New Delhi in terms of MOU dated 30th March 2017,

which could not be acted upon due to failure on the part of Corporate Debtor to hand over the said office space on account of termination of Concession Agreement in their favour by DMRC.

6. We do not have the benefit of assistance from the Corporate Debtor. However, in this matter, before deciding the issue of admission of the Corporate Debtor into CIRP on the basis of the instant Application filed u/s 9 of the Code, we are required to decide the following question:

"Whether failure on the part of the Corporate Debtor to refund the refundable security deposit amount relating to sub-licensing transaction in immovable property gave rise to an 'operational debt' as per the definition of Operational Debt as stipulated u/s 5(21) of the Code and whether the present applicant can maintain this application as an Operational Creditor to the Corporate Debtor?

7. The following facts are noted:

A) The applicant entered into a sub-licensing agreement dated 19.07.2017 with the Corporate Debtor who was a licence-holder of the property namely, Tower-2, office no. 702/B, Konnectus Bhavbhuti Marg.

B) According to the terms of this agreement, the applicant had to pay a sum of Rs. 27,10,656/- 50% of the security deposit i.e Rs.54,21,312/-as an advance refundable at the end of the sub-license period.

C) The sub licensing agreement could not be performed on behalf of the Corporate Debtor as its licence itself was terminated by DMRC due to breach of their agreement.

D) The applicant made a demand for refund of the aforesaid amount of security deposit, which the Corporate Debtor failed to pay.

8. It is advantageous at this juncture to refer to the recent decision of the Hon'ble NCLAT in the matter of "Vibrus Homes Pvt. Ltd. v. Ashimara Housing Pvt. Ltd." Company Appeal (AT) (Insolvency) No. 80 of 2022 wherein it has been laid down that an interest free security deposit received in respect of a lease or licence transaction with regard to an immovable property will qualify as an operational debt under IBC. The relevant portions of the decision is reproduced below:-

5 . Clause 5 of the Agreement on which learned counsel for the Appellant has given emphasis provides:-

"5. That the licensee shall pay a sum of Rs. 32,43,000 (Rupees Thirty Two Lacs and Forty Three Thousand) and interest free deposit towards advance license fee and the same will be retained as a security deposit by the licensor till the end of the license period. The security deposit shall be refunded at the end of 3 years i.e. once the entire payment of 3 years is received & under no circumstances shall be adjusted to the licensee at the end of 3 years. In

case both parties wish to extend the contract then agreement can be extended with mutual consent."

"6. The payment of Rs.32,43,000/- is contemplated to be payment of interest free deposit towards advance license fee although it was contemplated to be retained as security deposit till the end of the lease period. Present is a case where although Agreement took place between the parties but the project could not take off and it was abandoned. Learned counsel for the Appellant disputes the fact that the project was abandoned. He says that it is matter of dispute. Be it as it may. It is for the Appellant to take remedies out of the agreement and it is open for the parties to take legal proceedings as permitted in law. In view of the fact that the payment made was initially towards the advance license fee it was an operational debt, the Adjudicating Authority has rightly admitted the application under Section 9.

7. In the light of the decision referred to supra, when we consider the submissions of the Operational Creditor for the claims towards the advance payment made as Security Deposits, it appears to us that the same shall also fall within the ambit of the definition of operational debt and the applicant will qualify as an Operational Creditor in terms of section 5(20) of the Code.

8. Since the Corporate Debtor has chosen not to avail the due and sufficient opportunity of being heard as granted on various dates, the averments of the applicant stating that there is a 'debt' which the corporate debtor was liable to pay but failed to do so, remain unrebutted. Therefore, this Adjudicating Authority has no other option but to admit the Corporate Debtor into CIRP under the provisions of the Code.

9. The Operational Creditor has not proposed the name of the IRP, therefore this Adjudicating Authority is inclined to appoint an insolvency professional from the IBBI list as IRP. Accordingly, this Adjudicating Authority appoints Mr. Santanu Kumar Samanta having Regn. No.- IBBI/IPA-001/IP-P02324/2020-21/13511 (Email ID santanukumar@yahoo.com) as IRP from IBBI list. Consent and valid AoA of the IRP must be filed within three days of passing this order. The said IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement under section 15 of the IBC, 2016, within three days from date of receiving the copy of this order and call for submissions of claim in the manner as prescribed.

10. The moratorium is declared which shall have effect from the date of this order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is ordered to prohibit all the following, namely:

a. The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b. Transferring, encumbering, alienating or disposing of by the Corporate Debtor's assets or any legal right or beneficial interest therein;

c. Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

e. The below section - 14 (1) also stipulates "that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period".

11. The supply of essential goods or services of the said project of Corporate Debtor shall not be terminated, suspended or interrupted during moratorium period. The provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.

12. The IRP shall comply with the provisions of Sections 13(2), 15, 17 and 18 of the code. The Directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for discharging his function under section 20 of the IBC, 2016.

13. The Operational Creditor is directed to send the copy of this order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor's assets etc., with respect to said project and make compliance with this order as per the provisions of IBC, 2016.

14. The Operational Creditors are directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect. Further operational creditor shall provide initial finance to the tune of Rs. 2,00,000/- to the aforesaid Interim Resolution Professional within a weeks' time from the date of this order as advance towards initial cost and expenses of CIRP process. The said advance of Rs. 2,00,000/- shall be adjustable as CIRP cost by the Committee of Creditors immediately after its constitution by the IRP.

15. The Registry is directed to send a copy of this order to the Registrar of Companies concerned for updating the status of Corporate Debtor on the MCA-21 site of Ministry of Corporate Affairs for information of all concerned.

16. The order is pronounced by this Adjudicating Authority in virtual Hearing.