NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 951 of 2020

[Arising out of order dated 21.09.2020 in C.P. (IB) 388/2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench]

IN THE MATTER OF:

Crown Tobacco Company Pvt. Ltd.
Everest, 56 Chapel Road,
Bandra West, Mumbai 400050

.... Appellant.
(Operational Creditor)

Versus

1. **Crale Foodlinks Pvt. Ltd.**
301/3rd Floor, Safal Pride,
Sion Trombay Road,
Deonar, Mumbai – 400088. **... Respondent No. 1.**
(Corporate Debtor)

2. **Mrs. Leonys Pereira**
Age 64 Years, Occupation Business
Residing at Damian House
2nd Floor, 10/A Hill Road,
Bandra (West), Mumbai 400050
Maharashtra. **... Respondent No. 2.**

3. **Mr. Craig Pereira**
Age 37 Years, Occupational Business
Residing at Damian House
2nd Floor, 10/A Hill Road,
Bandra (West), Mumbai 400050
Maharashtra. **... Respondent No. 3.**

Present:

For Appellant: **Mr. Mayank Kshirsagar, Ms. Darryl Pereia, Ms. Leandra Silveira, Ms. Sonja Curzai and Mr. Dhruv Chawla, Advocates.**

For Respondents: **Mr. Royston J. Pereira, Advocate for R-1.**
Mr. Apoorv Shukla, Ms. Ishita Farsaiya, Mr. Kunal Cheema and Ms. Prabhleen Kaur, Advocates for R-2 & 3.
Ms. Leonys Pereria.

J U D G M E N T

(30th September, 2021)

Justice Anant Bijay Singh;

This Appeal has been preferred by the Appellant (Operational Creditor) being aggrieved and dissatisfied by the order dated 21.09.2020 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in C.P. (IB) 388/2018 whereby the Ld. Adjudicating Authority has dismissed the C.P. (IB) 388/2018 holding that the Company Petition is not maintainable before this Tribunal and is liable to be dismissed.

2. The facts giving rise to the instant Appeal is as under:

i) That the Appellant (herein) – 'Crown Tobacco Company Pvt. Ltd.' is a private limited company incorporated under the Companies Act, 1956, having its registered address at Everest, 56 Chapel Road, Bandra West, Mumbai.

ii) The Appellant was in possession of a valid Restaurant, Bar, Bakery and Eating House licenses from the ground and first floor premises of a bungalow knows as Pioneer House, situated at 9, St. John Baptist Road, Bandra, Mumbai, but the Appellant company was not in a position to exploit the full potential of the licenses inter alia on account of being involved in other businesses and also for want of modern skills required for running a Restaurant and Lounge Bar.

iii) Further case is that the Respondent No. 1 (Corporate Debtor) - Crale Foodlinks Pvt. Ltd. is also a private limited company, incorporated under the Companies Act, 1956, having its registered address at 301/3rd Floor, Safal Pride, Sion Trombay Road, Deonar, Mumbai, Maharashtra 400088.

iv) The Respondent No. 1 had the requisite expertise and skill in the hospitality industry and therefore, through its Directors, approached the Appellant Company with a proposal to operate a Restaurant and Lounge Bar from the Business Premises.

v) Further case is that the Respondent No. 1 entered into a Business Conducting Agreement (**for short BCA**) with the Appellant Company on 29.04.2010 (at page 65 to 82 of the Appeal Paper Book) which was followed by two Supplemental Agreements dated 30.04.2010 (at page 83 to 97 of the Appeal Paper Book).

vi) The said Business Conducting Agreement was initially envisaged to be operative for a period of 5 years. However, subsequently, it was extended for another 2 years, expiring on 30.09.2017 vide Clause 2 of the Supplemental Agreement -1 dated 30.04.2010. The said extension also entailed a revision of the monthly Business Conducting Fee from the pre-existing 10% of the Gross Revenue (as per Schedule B to the BCA dated 29.04.2010 r/w Clause 12 thereof) to 11% thereof.

vii) That as per Clause 3 of the Supplemental Agreement -1 provided for a minimum monthly conducting fee, subject to yearly revisions, as provided therein. As per the said clause, the minimum monthly conducting fee payable by the Respondent to the Defendant from 01.10.2015 to 30.09.2017 was Rs. 8,00,000/-. Clause 5 (j) of the BCA dated 29.04.2019, read with Clause 7 (a) thereof provided that the Respondent was to reimburse the Appellant, within 7 days of a demand made by the Appellant via a proper invoice, electricity charges, telephone charges or any other charges on account additional electricity or gas supply for the business premises or alternatively pay the bill itself with intimation to the Appellant.

viii) Further case is that the Clause 3 of the Supplemental Agreement –II dated 30.04.2010 provided that any increase in Municipal taxes, levies, cesses or other duties, subsequent to the commencement of the BCA were to be borne by the Respondent, except in the case of Municipal Property taxes, the increase in which was to be shared in equal proportions between the Appellant and the Respondent.

ix) Further case is that as early as in 2016, the Appellant Company had indicated that it did not wish to extend or renew the BCA beyond the expiration dated 30.09.2017. The Respondent No. 2 - Mrs. Leonys Pereira and Respondent No. 3 - Mr. Craig Pereira, however, had other plans. Thus, in July, 2017, shortly before the expiry of the BCA, they, along with Anslem Pereira, filed R.A.D. Suit No. 348 of 2017 before the Court of Small Causes Bandra, claiming tenancy rights in the business premises, despite being fully aware that the Original Owners of the Business Premises had entered into a Leave and License Agreement with the Appellant, and that the Appellant had in turn entered into a Business Conducting Agreement with the Respondent.

x) That on 05.09.2017, the Appellant raised Invoice No. CTC/17-18/06 on the Respondent No. 1 for an amount of Rs. 9,44,000/- (including GST) being the Business Conducting Fee for the month of August, 2017.

xi) Further case is that on 30.09.2017, the BCA expired by efflux of time, and since the Appellant was not interested in continuing with the business arrangement any longer, the Respondent Company vacated the possession of the business premises. However, the Monthly Conducting Fee and the utility bills (electricity, water etc.) for the month of August and September remained unpaid. Further, Municipal Assessment Taxes from June, 2010 to September, 2017 had also not been paid.

xii) That on 01.10.2017, the Appellant sent a letter to the Respondent No. 1 Company seeking clearance of aforesaid outstanding dues. Further, on 07.10.2017, the Appellant also raised Invoice No. CTC/17-18/07 on the Respondent for an amount of Rs. 9,44,000/- (including GST) being the Business Conducting Fee for the month of September, 2017.

xiii) Further case is that on 23.10.2017, meanwhile, in R.A.D. Suit No. 348 of 2017, filed by three individuals of the Pereira family in their personal capacity, seeking tenancy rights in the Business Premises, the Court passed an order confirmed that the Respondent was in fact running a business under the BCA with the Appellant.

xiv) That on 08.11.2017 and 24.11.2017, the Appellant again wrote letters to the Respondent No. 1 Company calling upon it to clear the outstanding amount to the tune of Rs. 35,52,022/-. However, no response from the Respondent No. 1.

xv) That on 15.12.2017, in Commercial Suit No. 187 of 2018 filed by the three individuals of the Pereira family, namely Mr. Craig Pereira, Mrs. Leonys Pereira and Mr. Anslem Pereira under Section 6 of the Specific Relief Act, 1963 seeking possession of the Business Premises, the Hon'ble Bombay High Court granted Status Quo.

xvi) Further case is that finally, with no sight of any repayment from the Respondent Company, the Appellant on 19.02.2018 sent a Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 (**for short IBC**) as prescribed under Form 3, calling upon the Respondent to clear the outstanding amount of Rs. 35,52,022/-.

xvii) That on 01.03.2018 a purported Reply to the aforesaid Demand Notice was received from the Respondent No. 2 and 3 denying the Respondent Company's liability to pay any outstanding amount to the Appellant on frivolous grounds, including the pre-existence of disputes, viz. R.A.D. Suit No. 348 of 2017 pending before the Court of Small Causes, Bandra and the Commercial Suit No. 187 of 2018 pending before the Hon'ble Bombay High Court. Thereafter, the Appellant filed Company Petition (IB) 388/2018 before the NCLT, Mumbai under Section 9 of the IBC and the Ld. Adjudicating Authority, Mumbai Bench vide order dated 21.09.2020 passed the following order:

> *" The above company petition is filed on 12.03.2018. If we examine the above claims, all the claims prior to 12.03.2015 are barred by limitation, since we are dismissing the above Company Petition on the very nature of the claim and the locus*

of the applicant, we are not dealing with each and every contention raised by the respondents.

In view of the above observations, we are of the considered opinion that the above Company Petitions not maintainable before this Tribunal and is liable to be dismissed. Accordingly, the above Company Petition is dismissed without costs and pending IA's if any also stands disposed off.

However, this order does not preclude the petitioners from instituting necessary recovery proceedings against the Corporate Debtor for recovery of their dues in respect of the claims that are within limitation."

Hence this Appeal.

Submissions on behalf of the Appellant

3. The Learned Counsel for the Appellant during the course of argument, also in memo of Appeal and his Written Submissions submitted that the Ld. Adjudicating Authority has failed to consider the particulars of claim of 'Crown Tabacco Company Pvt. Ltd' (at page 171 of the Appeal Paper Book). The outstanding debt falls under the following four heads:

Sr. No.	Particulars	Amount (INR)	Reference under the Business Conducting Agreement
1.	Refund of Municipal Taxes	14,62,205.00	Page No. 94, Para No. 3 of the Appeal Memo.

2.	Conducting fees for last 2 months August 2017 and September 2017	18,88,000.00	Page No. 85 & 86 of the Appeal Memo.
3.	Electricity Bill for the month of September 2017	1,64,730.00	Page No. 68 of the Appeal Memo.
4.	Water Bill for the month of August and September 2017	37,087.00	Page No. 68 of the Appeal Memo.
	Total	**35,52,022.00**	

4. It is further submitted that the entire claim of Rs. 35,52,022/- is based on the Business Conducting Agreement dated 29.04.2010 (at page 65 to 82 of the Appeal Paper Book) which is signed by Directors of both the parties. Thereafter, parties executed First Supplemental Agreement which is duly singed by Directors of both the parties 9page 88 of the Appeal Paper Book). The 2nd Supplement Agreement dated 30th April, 2010 was signed by Directors of both the parties (at page 95 of the Appeal Paper Book).

5. It is further submitted that so far Municipal Taxes is concerned, referred to page 94 of the Appeal Paper Book in Clause 3 deals with the Municipal Taxes, charges, cesses, levies, fees, dues or other duties payable to the Municipal Corporation of Grater Mumbai and same is holly applicable, but this fact has not been considered by the Adjudicating Authority.

6. It is further submitted that the Ld. Adjudicating Authority merely looked at the period 2010, 2011, 2012,2013 and 2014 and concluded that these are time barred debts and hence dismissed the petition of the Appellant.

7. It is further submitted that the claims on Municipal Bill cannot be construed as time barred debt. Similarly, the Municipal Taxes for the period

2011-12, 2012-13, 2013-14, 2014-15 and 2015-16 cannot be construed as time barred debt as the bills itself are dated 16.11.2015 and the last to pay these bills are 14.02.2016.

8. Learned Counsel for the Appellant further referred to page 206 of the Appeal Paper Book which is Reply Affidavit of the Corporate Debtor filed before the NCLT, Mumbai Bench, wherein paragraph 'g' reads as hereunder:

> **" g.** There are several disagreements and serious differences between the Directors of the Company and it is evident that this Company is now not able to continue business activity in its present from with the present management. I say that the other two Directors namely Leonys Pereira and Craig Pereira have no experience and never had any experience in the business of running a restaurant or an eating house as their family business in predominantly of furniture and furnishings. I have been doing business of catering and restaurant since 1997 under names of "China Bistro", "Star Parade", "Oasis" etc. and catering business under the name of "Food-Link".**"**

9. Learned Counsel for the Appellant further referred to page 208 of the Appeal Paper Book which is Reply Affidavit of the Corporate Debtor filed before the NCLT, Mumbai Bench, wherein paragraphs 4, 5 and 6 read as hereunder:

> **" 4.** I say that it is matter of record that the Corporate Debtor paid conducting fees to the Operational Creditor as agreed under the Business Conducting Agreement dated 29th April

2010 and the said fees were paid only until 31st July 2017. The conducting fees and water bills for August and September 2017 were not paid and the electricity bill for September 2017 was not paid. Also, the property tax from 1.6.2010 to 30.09.2017 were not paid.

5. I say that the Corporate Debtor has paid its dues. However, the outstanding debt for 2 months as claimed by the Operational Creditor is not paid because the other two directors i.e. Mrs. Leonys Pereira and Craig Pereira to further their personal interest in the premises, are refusing to sanction payment and without sanction the Company is not authorized to release any payment. Accordingly, the said payment remains outstanding.

6. I say that there are several issues of Oppression and mis-management in the Corporate Debtor, in that the two directors Leonys Pereira and Craig Pereira have no interest in running this Company except to further their personal interest in the premises.**"**

10. It is further submitted that the Ld. Adjudicating authority has failed to consider the averments made in paragraph 5 of the aforesaid affidavit where the Respondent No. 1 accepted the outstanding debt for 2 months as claimed by the Operational Creditor is not paid because the other two Directors i.e. Respondent No. 2 - Mrs. Leonys Pereira and Respondent No. 3 – Mr. Craig Pereira to further their personal interest in the premises, are refusing to

sanction payment and without sanction the Company is not authorized to release any payment. So, based on these submissions the impugned order is fit to be set aside.

<u>Submissions on behalf of the Respondent No. 1</u>

11. The Learned Counsel for the Respondent No. 1 during the course of oral argument and his Written Notes of Argument submitted that it is an admitted position that a Business Conducting Agreement dated 29.04.2009 and the 2nd Supplemental Agreements between the Appellant (Operational Creditor) and the Respondent No. 1 (Corporate Debtor) in terms of which the Municipal taxes, Conducting fees, Electricity Bills and Water Bills were being paid to the Appellant and the same have been reflected in the Balance sheet of the Respondent Company since the year 2009 onwards.

12. It is further submitted that the Business Conducting Agreement has been signed by all the Directors, but the two Directors of the Respondent Company i.e. Respondent No. 2 and 3 herein are not cooperated, the fund could not be release as there is some differences between the Respondent Nos. 2 & 3 and the Appellant.

13. It is further submitted that the two Directors i.e. Respondent No. 2 and 3 have personal interest in grabbing the property by claiming tenancy rights in their personal capacity to which Mr. Sanjay Vazirani, Director, Respondent No. 1 Company has not subscribed. Further, Respondent Nos. 2 and 3 filed Company Petition No. 2355 of 2018 against Mr. Sanjay Manohar Vazirani, Director of the Corporate Debtor for oppression and mismanagement under

Section 241 read with Section 242, 244 and other applicable provisions of the Companies Act, 2013.

14. It is further submitted that the Mr. Sanjay Manohar Vazirani, Director of the Corporate Debtor - Respondent No. 1 filed Company Petition No. 3783 of 2018 against two Directors i.e. Respondent No. 2 and Respondent No. 3 herein for oppression and mismanagement under Section 242 read with Section 242, 244 and other applicable provisions of the Companies Act, 2013. Both the Petitions i.e. Company Petition No. 2355 of 2018 and Company Petition No. 3783 of 2018 are pending.

15. It is further submitted that Mr. Sanjay Manohar Vazirani, Director, has been left all the way alone to shift the Assets of the Corporate Debtor after the expiry of the Business Conducting Agreement terms.

Submissions on behalf of the Respondent Nos. 2 and 3

16. From the perusal of the record it appears that I.A. No. 3026 of 2020 has been filed for impleadment of applicants Mr. Leonys Pereira and Mr. Craig Pereira as party Respondent Nos. 2 and 3. After hearing the parties, this Appellant Tribunal allowed the I.A. No. 3026 of 2020 vide order dated 12.01.2021 and they were added party as Respondent Nos. 2 and 3.

17. The Learned Counsel for the Respondent Nos. 2 and 3 appeared and filed their Reply Affidavit and also Written Submissions and during the course of argument submits that Business Conducting Agreement / service entered between the Appellant and Respondent No. 1 where the Respondent Nos. 2 and 3 have been Directors. The alleged debt on account of Municipal Tax or

rent does not fall within the definition under Section 5(21) of the IBC. The Section 5(21) of the IBC reads as under:

> “ **5(21)** “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;**”**

18. It is further submitted that the agreement dated 30.04.2010 under which the Appellant is claiming that there is an agreement for operating a business, the existence and binding nature of which is itself a subject matter of pre-existing dispute in the suit bearing R.A.D. Suit No. 348 of 2017 pending before the Small Causes Court Mumbai.

19. It is further submitted that unpaid rent / unpaid utility bill does not constitute as an Operational Debt in view of pre-existing dispute between the Appellant and Respondent Nos. 2 and 3.

20. It is further submitted that so far finding of the Ld. Adjudicating Authority, Municipal Taxes are concerned, the Ld. Adjudicating Authority has rightly held that the Appellant cannot said to be an Operational Creditor, in support of this submission judgment passed by this Tribunal in ***Company Appeal (AT) (Insolvency) No. 331 of 2019 dated 17.01.2010*** relevant portion read as hereunder:

> **“** The following question arises for our consideration :

1. Whether a landlord by providing lease, will be treated as providing services to the corporate debtor, and hence, an operational creditor within the meaning of Section 5(20) read with Section 5(21) of the 'Insolvency and Bankruptcy Code, 2016?

2. Whether the petition filed U/S 9 of the Insolvency and Bankruptcy Code 2016 is not maintainable on account of 'pre-existing dispute'?

....

Thus understanding for not increasing the rent of a period of 6 years is a question of fact, which requires further investigation. Thus in the present case, there was a pre-existing dispute, which is proved by the issuance of notice under Section 106 of the TP Act, much before the issuance of demand notice, under Section 8 of the I&B Code. Based on the above, the application filed under Section 9 of the I&B Code could not have been admitted.

We are of the considered opinion that the alleged debt on account of purported enhanced rent of leasehold property does not fall within the definition of the operational debt in terms of Section 5(21) of the Code. On the above basis, it is clear that appeal deserves to be allowed.**”**

21. It is further submitted that based on these submissions there is no merit in the Appeal, the Appeal is fit to be dismissed.

FINDINGS

22. After hearing the parties and going through the pleadings as also Written Submissions, we are of the considered view that the following facts are admitted in the instant Appeal.

- The Appellant is an Operational Creditor who had valid Restaurant, Bar, Bakery and Eating House licenses from the ground and first floor premises of a bungalow knows as Pioneer House, situated at 9, St. John Baptist Road, Bandra, Mumbai.
- The Appellant entered into a Business Conduction Agreement with the Respondent No. 1 (Corporate Debtor) on 29.04.2010 (at page 65 to 82 of the Appeal Paper Book) which was followed by two Supplemental Agreements dated 30.04.2010 (at page 83 to 97 of the Appeal Paper Book).
- Business Conducting Agreement was initially envisaged to be operative for a period of 5 years. However, subsequently, it was extended for another 2 years, expiring on 30.09.2017 vide Clause 2 of the Supplemental Agreement -1 dated 30.04.2010.
- It is also admitted fact that as per the terms of the Supplemental Agreement, extension also entailed a revision of the monthly Business Conducting Fee from the pre-existing 10% of the Gross Revenue (as per Schedule B to the BCA dated 29.04.2010 r/w Clause 12 thereof) to 11% thereof.

- It is also admitted fact in 2016, the Appellant Company had indicated that it did not wish to extend or renew the BCA beyond the expiration dated 30.09.2017.
- It is also admitted fact that prior to expiry of BCA the Respondent Nos. 2 and 3 along with Anslem Pereira, filed R.A.D. Suit No. 348 of 2017 before the Court of Small Causes Bandra, claiming tenancy right in the business premises.
- It is also admitted fact that on 05.09.2017, the Appellant raised Invoice No. CTC/17-18/06 on the Respondent No. 1 for an amount of Rs. 9,44,000/- (including GST) being the Business Conducting Fee for the month of August, 2017.
- It is also admitted fact that on 30.09.2017, the BCA expired by efflux of time, and since the Appellant was not interested in continuing with the business arrangement any longer, the Respondent Company vacated the possession of the business premises. The Monthly Conducting Fee and the utility bills (electricity, water etc.) for the month of August and September remained unpaid. Further, Municipal Assessment Taxes from June, 2010 to September, 2017 had also not been paid.
- It is also admitted fact that on 08.11.2017 and 24.11.2017, the Appellant again wrote letters to the Respondent No. 1 Company calling upon it to clear the outstanding amount to the tune of Rs. 35,52,022/. However, no response from the Respondent No. 1.
- It is also admitted fact that on 15.12.2017, in Commercial Suit No. 187 of 2018 filed by the three individuals of the Pereira family, namely Mr. Craig Pereira, Mrs. Leonys Pereira and Mr. Anslem Pereira under

Section 6 of the Specific Relief Act, 1963 seeking possession of the Business Premises, the Hon'ble Bombay High Court granted Status Quo.

- It is also fact that the Appellant (Operational Creditor) claimed an amount of Rs. 14,62,205/- towards Municipal Taxes covering the following period against the total claim of Rs. 35,52,022/- which is hereunder:

Property Tax Payable by Crale Foodlink Pvt. Ltd. From 2010 to 2017

Period	**Old Rate**	**Revised**	**50% of increased taxes**
01.06.2010 to 30.09.2010	5178	122297	58,560
01.10.2010 to 31.03.2011	10357	245095	1,17,369
01.04.2011 to 31.03.2012	20714	415170	1,97,228
01.04.2012 to 31.03.2013	20714	361282	1,70,284
01.04.2013 to 31.03.2014	20714	361282	1,70,284
01.04.2014 to 31.03.2015	20714	361282	1,70,284
01.04.2015 to 31.03.2016	20714	483272	2,31,279
01.04.2016 to 31.03.2017	20714	483270	2,31,278
01.04.2017 to 30.09.2017	10357	241635	1,15,639
		Total	14,62,205

- It is also admitted fact that the Respondent No. 1 is supporting the case of the Appellant. It is also fact that the Appellant had not made party as Respondent Nos. 2 and 3 before this Tribunal when the Appeal was filed. Vide order dated 12.01.2021 passed by this Tribunal the Appellant made party as Respondent Nos. 2 and 3 and they opposed the submissions of the Appellant.
- Thus, viewed from all angle, we are of the view that there is pre-existing dispute between the parties and two cases also pending one is before the Hon'ble Bombay High Court and other is before the Court of Small Causes Bandra.
- The Ld. Adjudicating Authority rightly come to the conclusion that total amount of 14,62,205/- (Municipal Taxes) which is claimed by the Appellant from period 2010 to 2017 and the Petition under Section 9 of the IBC was filed on 12.03.2018, so all claims prior to 12.03.2015 are time barred. We agree with this finding passed by the Ld. Adjudicating Authority.

ORDER

23. We agree with the reasons mentioned in the impugned order dated 21.09.2020 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), Mumbai Bench while dismissing the Company Petition under Section 9 of the IBC filed by the Appellant in C.P. (IB)-388/2018 and is hereby affirmed. There is no merit in the instant Appeal, the Appeal is hereby dismissed. No order as to costs.

24. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Ld. Adjudicating Authority (National Company Law Tribunal), Mumbai Bench forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi

30th September, 2021

R. Nath.