

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT)(Insolvency) No.423 of 2021**

(Arising out of Order dated 04.03.2020 passed by National Company Law Tribunal,  
Jaipur Bench in C.P. No. (IB)-176/9/JPR/2019).

**IN THE MATTER OF:**

**JAIPUR TRADE EXPOCENTRE PRVIATE  
LIMITED,**

I-83, Lajpat Nagar – II,  
New Delhi – 110024  
India

**...Appellant**

**Versus**

**M/S METRO JET AIRWAYS TRAINING  
PRIVATE LIMITED,**

102-103, Gopalpura Bypass,  
Near Trivani Nagar Chouraha Jaipur,  
Jaipur, Rajasthan – 302018,  
India

**...Respondent**

**Appellant:** Ms. Sanjana Saddy, Mr. Sanyat Lodha and Ms. Harshita  
Singhal, Advocates

**Respondent:** Mr. Vikrant Arora, Advocate.

**J U D G E M E N T**

**Ashok Bhushan, J:**

1. This Appeal has been filed against the Judgement and Order dated 04.03.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Jaipur Bench) in Company Petition No. (IB)-176/9/JPR/2019 by which Order the Application filed by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as 'The Code') has been rejected holding that the Appellant is not an 'Operational Creditor'.

2. Brief facts of the case which are necessary to be noted for deciding this Appeal are:

- The Appellant entered into a 'Licence Agreement' with the Respondent on 15<sup>th</sup> April, 2017 for premises bearing no. SP-10, Sitapur Industrial Area, Phase 4 Jaipur. The Licensee took the premises for the purpose of running an Educational Establishment at the licence fee of Rs. 4 Lacs per month. Licensor agreed to hand over possession to the Licensee on or before 1<sup>st</sup> June, 2017. License was granted for an initial period of 5 years commencing from 1<sup>ST</sup> June, 2017 to 31<sup>st</sup> May, 2022. Appellant who is a Licensor received part payment made by the Corporate Debtor towards outstanding License Fee on 08<sup>th</sup> November, 2017 and 22<sup>nd</sup> November, 2017. Cheque dated 07<sup>th</sup> May, 2018 amounting Rs. 20 Lacs was handed over to the Appellant by the Corporate Debtor towards part payment which on presentation was dishonoured. Another Cheque dated 08.10.2018 amounting to Rs. 20 Lacs was handed over to the Appellant by the Corporate Debtor which too was dishonoured.
- When despite several reminders and emails, the Corporate Debtor did not clear outstanding payment towards License Fee, a Demand Notice under Section 8 of the Code dated 3<sup>rd</sup> May, 2019 was issued by the Appellant to the Corporate Debtor claiming an outstanding dues of Rs. 1,31,20,788/-. The Notice under Section 8 of the Code was delivered on 07<sup>th</sup> May, 2019 and was received by the Corporate Debtor but no Reply to Demand Notice was sent by the Corporate Debtor. The

Appellant filed an Application under Section 9 claiming an amount of Rs. 1,31,20,688/- including interest. Notice was issued by the Adjudicating Authority. The Corporate Debtor filed its Reply-Affidavit dated 11.09.2019. Rejoinder to the Reply was also filed by the Appellant. Corporate Debtor was allowed to file Additional Documents to which Reply-Affidavit was also filed by the Operational Creditor-Appellant. Adjudicating Authority vide Order dated 04.03.2020 rejected the Section 9 Application holding that the Appellant is not an Operational Creditor and there is no Operational Debt due. Aggrieved by the said Order dated 04.03.2020, this Appeal came to be filed.

**3.** Learned Counsel for the Appellant in support of his Appeal contends that Appellant is an Operational Creditor. The claim of the Appellant arises out of non-payment of license fee agreed to be paid by the Corporate Debtor against the License Agreement dated 15.04.2017 and as per the Agreement the premises were taken by the Corporate Debtor under License Agreement for use of the commercial purposes that is for running an Educational Institute. The Corporate Debtor defaulted in making payment of the License Fee and two Cheques issued were dishonoured. A Demand Notice dated 3<sup>rd</sup> May, 2019 was served on the Corporate Debtor on 07<sup>th</sup> May, 2019 to which no Reply was filed rather Corporate Debtor initiated Civil Proceedings before Sanganer Court, Jaipur, Rajasthan on 09.05.2019 after receipt of notice under Section 8 of the Code.

**4.** Learned Counsel for the Appellant further submits that the Judgement which has been relied on by the Adjudicating Authority in “Mrs.

Pramod Kumar Vs. Divine Infracon Pvt. Ltd.” by the NCLT, New Delhi Bench is not applicable in the facts of the present case and is clearly distinguished. The Adjudicating Authority committed error in holding that there is no Operational Debt.

**5.** Learned Counsel for the Respondent refuting the submissions of Learned Counsel for the Appellant submits that the Appellant is not an Operational Creditor. The License Fee which is the core issue in the present case is not in respect of any Goods and Services. Outstanding rent/license fee does not come within the meaning of Operational Creditor. The alleged due or rent from the Respondent-Corporate Debtor is purely a subject matter of Civil Suit before the Court under the jurisdiction of Civil Court. When the property was taken on the License there was not so many basic facilities and without basic facilities it was not possible for the Respondent to run their Educational Institute. The Respondent incurred expenses. Learned Counsel for the Respondent further submitted that the allotment in favour of the Appellant of the premises in question was also not in accordance with law and several notices have been issued by the Rajasthan State Industrial Development and Investment Corporation for cancellation of the allotment. Different entity has earlier applied for allotment and the premises were allotted to the Appellant for the purpose on 13<sup>th</sup> April, 2007. The cheques which were issued to the Appellant by the Respondent were for security purposes.

**6.** We have considered the submissions of Learned Counsel for the parties and perused the record.

7. The Adjudicating Authority in the Impugned Judgment after noticing that claim of the Appellant arises out of a License Agreement under which Respondent has right to use immovable property, held that the claim arising out of grant of licence to use immovable property does not fall in the category of goods and services. The reasons given by the Adjudicating Authority for rejecting the Application is contained in Paragraph 25 of the Judgment which is to the following effect:

*“25. In the present Application the claim of the Applicant has arisen out of a License Agreement whereby the Applicant had granted, to the Respondent, the right to use its immovable property to carry out business. It can be concluded that the claim arising out of grant of licence to use immovable property does not fall in the category of goods or services including employment and is also not a debt for 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, as defined under Section 5(21) of IBC, 2016. Thus, the amount claimed in the present petition is not an unpaid operational debt and therefore the Application cannot be allowed.”*

8. We may first notice the nature of Licence Agreement between the parties dated 15<sup>th</sup> April, 2017 which is the basis of Application filed by the Appellant under Section 9 of the Code. The Licence Agreement was entered into 15<sup>th</sup> April, 2017 between the parties “Jaipur Trade Expocentre Pvt. Ltd. and M/s. Metro Jet Airways Training Pvt. Ltd. the Corporate Debtor”. The Recitals in the Agreement as well as Clause 1, 4(a), 7(a) and 7(o) are as follows:

**“1. Grant of Demised Premises on License**

a. In consideration of the LICENSE FEE to be paid by the LICENSEE and the LICENSEE agreeing to observe and perform the covenants, terms and conditions herein contained, the LICENSOR hereby grants on LICENSE the Demised Premises to the LICENSEE and the LICENSEE has agreed to take the Demised Premises on LICENSE for the purpose of running an educational establishment as detailed hereinabove, on the terms and conditions appearing hereinafter.

In pursuance to the above LICENSE AGREEMENT, the LICENSOR hereby agree to hand over the vacant and peaceful license of the Demised Premises to the LICENSEE on or before 1<sup>st</sup> June, 2017.

b. It is specifically agreed between the parties that the LICENSEE will not in respect of the Demised Premises create encumbrance of any kind such as mortgage, collateral security etc. or any other interest in favour of third party or otherwise.

c. At the time of signing of this License Agreement, the LICENSEE undertakes and warrants that it does not have any claim against the LICENSOR with regard to any item of work, quality of work, materials, installation etc. any or all complaints that the LICENSEE had with respect to the Demised Premises have been sorted out by the LICENSEE with the LICENSOR before signing of this agreement.

d. On termination of the agreement the LICENSEE undertakes to restore the demised premises to its original condition.

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#### 4 **LICENSEE FEE**

(a) In consideration of the LICENSE granted herein for the Demised Premises, the LICENSEE shall pay to the LICENSOR an amount of Rs. 4,00,000/- Lumpsum per month (Rupees Four Lacs only) plus Government Taxes if any payable to the LICENSOR by means of Banker's cheque/cheque payable at par, in advance on or before 7<sup>th</sup> Day of each English Calendar Month.

*Any delay in payment of the LICENSE FEE beyond the 7<sup>th</sup> of each calendar month would attract interest @2% per month compound monthly for the period of delay. The amounts payable per month shall be as described in the schedule annexed as Annexure B.*

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**7. LICENSEE'S OBLIGATIONS AND COVENANTS**

*a. The LICENSEE shall use the Demised Premises for specific purpose as aforesaid only i.e. for educational purposes only as allowed by the RIICO/Authority.*

.....

*o. The LICENSEE shall not cease to carry on its commercial/business activity at the Demised Premises for which the Demised Premises has been licensed to the Licensee for more than 7 (seven) days in continuation. In the event of cessation of commercial activity/business by the LICENSEE for a period of 15 (fifteen) days, the LICENSOR shall have the right to cancel the agreement evict the Licensee by giving 15 days notice. The waiver of this right will be the sole discretion of LICENSOR on such terms and conditions as the LICENSOR may deem fit."*

**9.** The aforesaid agreement clearly proves that immovable property was taken on license by the Corporate Debtor with effect from 1<sup>st</sup> June, 2017 for payment of license fee of Rs. 4 Lacs per month. The premises were obtained by the Corporate Debtor for commercial purposes for running an Educational Institute. The Application was filed by the Appellant due to outstanding dues arising out of License Agreement dated 15<sup>th</sup> April, 2017. Apart from the part payment for license fee for few months, the Corporate Debtor defaulted in making the payment of license fee. Tow cheques which were issued 20 Lacs each by the Corporate Debtor on 07<sup>th</sup> May, 2018 and

08<sup>th</sup> October, 2018 were dishonoured. The Adjudicating Authority in its Order had stated that since the Appellant has allowed the Respondent to use its immovable property to carry out business, it does not fall in the category of goods and services including employment.

**10.** The definition of “Operational Debt” is contained in Section 5(21) of the Code. When the Corporate Debtor has taken on license the immovable premises of the Appellant for the use of premises for commercial purposes i.e. for running educational institutes the license of the premises by Appellant to Corporate Debtor is clearly included in the expression “provision of services”. The “Debt” has been defined under Section 3(11) of the Code which is to the following effect:

*“Section 3(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt”*

**11.** The claim of the Appellant under Section 9 of the Code arising out of liability which fell on the Corporate Debtor to make the payment of License Fee as agreement dated 15<sup>th</sup> April, 2017 when the License Fee having not been paid it was clearly “debt” which was in default.

**12.** Now we may notice the Judgement of Hon’ble Supreme Court in “Mobilox Innovations (P) Ltd. Vs. Kirusa Software (P) Ltd.” (2018) 1 SCC 353, where in Hon’ble Supreme Court has noticed the report of Bankruptcy Law Reforms Committee. Paragraph 5.2.1. of the Bankruptcy Law Reforms Committee has been quoted with approval. In para 5.2.1 the Committee stated:

*“5.2.1. Who can trigger IRP?”*



*Here, the Code differentiates between financial creditors and operational creditors. Financial Creditors are those whose relationship with the entity is a pure financial contract, such as a loan or a debt security. Operational Creditors are those whose liability from the entity comes from a transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by the car mechanic and who gets paid only after the spark plugs are sold is an operational creditor. Similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease. The Code also provides for cases where a creditor has both a solely financial transactions as well as an operational transactions with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt.”*

**13.** Bankruptcy Law Reforms Committee has given a clear example in Paragraph 5.2.1 in following were “similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease”. The expression “service” used in Code has not been defined in the Court.

**14.** Learned Counsel for the Appellant has relied on Judgment of this Tribunal in “Anup Dubey Vs. National Agricultural Cooperative Marketing Federation of India Ltd. & Ors.” reported in 2020 OnLine NCLAT 674 (Company Appeal (AT) (Insolvency) No. 229 of 2020) where the Tribunal held that subject to lease rental arising out of use of operational cold storage unit is Operational Debt. In this context, reference to Paragraph 20-22 of the Judgment is as follows:

“20. At this juncture, we find it relevant to refer to the definition of ‘Service’ as defined under Section 2 (42) of the Consumer Protection Act 2019;

“(42) “service” means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;”

21. The provisions of the Central Goods and Services Tax Act 2017. Schedule – II of the Act lists down the activities that are to be treated as supply of goods or services, and paragraph 2 of the Schedule stipulates as follows;

“(a) any lease, tenancy, easement, licence to occupy land is a supply of services;

(b) any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services.”

As the premises in the case on hand is leased out for ‘Commercial Purpose’, the cold storage owner/NAFED on collection is required to pay ‘service tax’ which is reflected in the tax invoices and ‘Ledger Accounts’ which is part of the record filed.

22. Therefore, keeping in view, the observations made by the Hon’ble Supreme Court in Para 5.2.1 of Mobilox (Supra), and having regard to the facts of the instant case this Tribunal is of the earnest opinion that the subject lease rentals arising out of use and occupation of a cold storage unit which is for Commercial Purpose is an ‘Operational Debt’ as envisaged under Section 5 (21) of the Code. Further, in so far as the facts and attendant circumstances of

*the instant case on hand is concerned, the dues claimed by the First Respondent in the subject matter and issue, squarely falls within the ambit of the definition of 'Operational Debt' as defined under Section 5 (21) of the Code."*

**15.** Learned Counsel for the Respondent has placed reliance on the Judgment of this Tribunal in Company Appeal (AT) Ins. No. 331 of 2019 in the matter of "Mr. M. Ravindranath Reddy Versus Mr G. Kishan & Ors." delivered on 17<sup>th</sup> January, 2020 this Tribunal wherein application for recovery of alleged enhanced lease rent, held not to fall within the meaning of 'Operational Debt' in terms of Section 5(21) of the Code.

**16.** There being two divergent opinions of this Tribunal, it is necessary that an authoritative pronouncement be made with regard to the issues which has been raised i.e. whether License Fee pertaining to immovable premises taken by Licensee from Licensor for running commercial activity i.e. Educational Institute fall within the definition of 'Operational Debt'. We have our doubts over the opinion by this Tribunal in "Mr. M. Ravindranath Reddy Vs. Mr. G. Kishan & Ors.". The Report of the Bankruptcy Law Reforms Committee as quoted with approval by Hon'ble Supreme Court of India in Mobilox Innovative (Supra) has not been placed before the Bench deciding "Mr. M. Ravindranath Reddy Vs. Mr. G. Kishan & Ors." case.

**17.** We thus are of the view that matter needs to be placed before the Hon'ble Chairperson on administrative side for constitution of a 'Larger Bench' to resolve the conflict as noted above.

**18.** Following two questions are framed for consideration before the 'Larger Bench':

i. Whether the Judgment of this Tribunal in Company Appeal (AT) (Ins.) No. 331 of 2019 in the matter of 'Mr. M. Ravindranath Reddy Vs. Mr. G. Kishan & Ors.' Lays down the correct law.

ii. Whether claim of the Licensor for payment of License Fee for use and occupation of Immovable Premises for commercial purposes is a claim of 'Operational Debt' within the meaning of Section 5(21) of the Code.

**19.** Let the matter be placed before the Hon'ble Chairperson on administrative side to constitute a Larger Bench for an authoritative Pronouncement.

**[Justice Ashok Bhushan]  
Chairperson**

**[Dr. Alok Srivastava]  
Member (Technical)**

**NEW DELHI  
07<sup>th</sup> March, 2022**  
Basant B.