NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 261 of 2022

(Arising out of Order dated 06.01.2022 by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, Court-III in IB-112/ND/2020)

IN THE MATTER OF:

Chipsan Aviation Private Limited
Through its Director,
234, Vasant Enclave, Vasant Vihar
New Delhi-110057. .... Appellant

Vs

Punj Llyod Aviation Limited
Through its Director,
Punj Llyod House,
17-18, Nehru Place,
New Delhi-110019. .... Respondent

Present:

For Appellant: **Mr. Barun Kumar Sinha, Ms. Nidhi Vardhan, Advocates.**

For Respondent: **Mr. Karan Luthra and Ms. Aarushi Tiku, Advocates.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by an Operational Creditor has been filed against the order dated 06.01.2022 passed by National Company Law Tribunal, New Delhi, Court-III rejecting Section 9 Application filed by the Appellant.

2. Brief facts of the case, necessary for deciding this Appeal are:

(i) The Appellant was engaged in business with the Corporate Debtor for charter services of aeroplanes and helicopter, hired on long term basis from non-scheduled operators/ owners

from the Corporate Debtor. On the assurance received from the Corporate Debtor, the Appellant on 28.03.2016 advanced an amount of Rs.60 lakhs to the Respondent – Corporate Debtor for aviation related services, which services were not provided by the Corporate Debtor nor the advance paid by the Appellant was refunded. After payment of the advance amount, there has been several emails correspondence between the Appellant and the officials of the Corporate Debtor. The advance payment made by the Appellant to the Corporate Debtor was reflected in the Balance Sheets of the Corporate Debtor as on 31.03.2016 under the head current liabilities. The amount of Rs.60 lakhs was continuously shown as advance received from the customers during 2015-16, 2016-17 and 2017-18. The Appellant on 08.11.2017 wrote to the Corporate Debtor to return back the amount at the earliest.

(ii) On 26.03.2019, the Appellant filed a complaint against the Corporate Debtor with the Registrar of Companies Delhi and Haryana, where entire sequence of the facts was narrated and prayer was made to carry on investigation, so the amount of Rs.60 lakhs be refunded and action be taken against the Director, agents and officials of the Corporate Debtor.

(iii) On 19.09.2019, a Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") was issued, which was delivered on Corporate

Debtor on 21.09.2019. Section 9 Application was filed by the Appellant demanding an amount of Rs.97,40,055/-, out of which Rs.60 lakhs as principal amount and rest interest.

(iv) A reply was filed by the Corporate Debtor to Section 9 Application refuting the claims of the Appellant. It was pleaded that there was no privity of contract between the Appellant and the Corporate Debtor and there is no Operational Debt in existence under Section 5(21) of the Code. The contract of the Appellant dated 01.04.2016 was with M/s Buildarch Aviation. It was further pleaded that Application under Section 9 is barred by limitation as the advance payment was made on 28.03.2016 and the Application has been filed after expiry of the three years.

(v) The Adjudicating Authority by the impugned order has rejected the Section 9 Application holding that advance payment made by Operational Creditor to the Corporate Debtor does not fall within the four corners of the Operational Debt.

(vi) Aggrieved by the said order, this Appeal has been filed.

3. The learned Counsel for the Appellant challenging the impugned order contends that advance payment of Rs.60 lakhs on 28.03.2016 was made for the purposes of providing aviation services by the Corporate Debtor. The Draft Agreement was forwarded to the Corporate Debtor, which was never signed by the Corporate Debtor. The advance amount

was towards obtaining goods and services, hence it falls within the Operational Debt. The Adjudicating Authority committed error in holding that advance payment does not fall within the definition of Operational Debt. It is submitted that in the Balance Sheets of the Corporate Debtor, the amount of Rs.60 lakhs has been shown as "*advance received from customers*", which contains clear acknowledgement of the advance received for providing goods and services, hence, the view of the Adjudicating Authority that it is not an Operational Debt is erroneous.

4. The learned Counsel for the Appellant relying on the judgment of the Hon'ble Supreme Court in Consolidated ***Construction Consortium Limited vs. Hitro Energy Solutions Private Limited – (2022) SCC OnLine SC 142*** submits that Hon'ble Supreme Court has held that advance payment for goods and services is an Operational Debt, hence, the very foundation of the order of the Adjudicating Authority is knocked out and the Application under Section 9 was liable to be admitted.

5. The learned Counsel for the Respondent refuting the submission of learned Counsel for the Appellant contends that there is no evidence on record to indicate that there is any contract between the Appellant and the Corporate Debtor. In Section 9 Application, the Appellant has come up with a case that the amount of Rs.60 lakhs was advanced on the assurance/ advice of direct dealing with the Corporate Debtor, but in the Appeal, now the Appellant has improved its case by stating that the amount of Rs.60 lakhs was advanced under an oral contract with the Corporate Debtor. It is submitted that there being no privity of contract between the

Appellant and the Corporate Debtor, advance payment of Rs.60 lakhs cannot be held to be an Operational Debt. It is further submitted that Application filed by the Appellant under Section 9 was barred by limitation and the submission was raised before the Adjudicating Authority that Application was barred by limitation, but in the impugned order, there is no consideration with regard to question of limitation.

6. We have heard learned Counsel for the parties and have perused the records.

7. From the materials brought on record, it is clear that there is no contract between the Appellant and the Corporate Debtor for providing an aviation services. However, the payment of Rs.60 lakhs to the Corporate Debtor, which is reflected by Bank transaction is not denied. The amount of Rs.60 lakhs was paid through Bank transfer dated 28.03.2016 to the Corporate Debtor. The statement Annexure-2 to the Appeal, which is Statement of Account of HDFC Bank, clearly mentions that:

Date	Narration	Chq/Ref.No.	Value Dt.	Withdrawal Amt.	Deposit Amt.	Closing Balance
28/03/16	CHQ PAID-MICR CTS-NO-PUNJ LLOYD AVIATION	0000000000000600	28/03/16	6,000,000.00		12,441,098.17

8. The Balance Sheets of the Corporate Debtor were brought before the Adjudicating Authority, which are also on the record, mentions the amount of Rs.60 lakhs as advance received from the customers. The fact that advance of Rs.60 lakhs reflected in the Balance Sheets dated 2015-16 and onwards as advance received from customers has not been denied. The

case of the Corporate Debtor is that there being no privity of contract between the Appellant and the Corporate Debtor, the advance amount cannot be said to be advanced for providing any goods and services.

9. The definition of Operational Debt as contained in Section 5(21) is to the following effect:

> *"(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the 2[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;*

10. The above definition defines Operational Debt as a claim in respect of the *PROVISION OF GOODS AND SERVICES*. The expression 'goods and services' is preceded with the word 'in respect of'. The materials on record does indicate that advance of Rs.60 lakhs was given by the Operational Creditor to the Corporate Debtor for availing the aviation services and with regard to which, however, no contract could be entered into between the Appellant and the Corporate Debtor. In the complaint, which has been filed before the Registrar of Companies by the Operational Creditor, details of correspondence after payment by the Operational Creditor to the Corporate Debtor has been detailed. The copy of the complaint dated 26.03.2019 was part of Section 9 Application and the same has been filed as Annexure A-5 to the Appeal. In paragraph 9 of the complaint, correspondence between Appellant and the Corporate Debtor has been mentioned. On 13.04.2016, an email was forwarded on behalf of Corporate

Debtor to one Shri Sushil Kumar sushilkumar@punjlloyd.com contained following:

"13-04-2016	DAISY CHIPSAN <daisy@chipsan .com>	Sushil Kumar/F&A/ Group <sushilkumar@ punjlloyd.com>	Please forward me the Agreement copy. It may be noted that the Agreement desired by my client was agreement with the Respondent Company."

11. There has been repeated correspondence as encapsulated in the complaint, which indicate that there has been correspondence and various requests from the Operational Creditor to the Corporate Debtor with regard to goods and services. Thus, the correspondence as encapsulated shows that an amount of Rs.60 lakhs was advanced for providing goods and services to the Corporate Debtor. Neither goods and services could be provided, nor any Agreement could be entered between the Appellant and the Corporate Debtor as noted above.

12. The Hon'ble Supreme Court in ***Construction Consortium Limited*** (supra) had occasion to consider a case where Application under Section 9 was admitted by the Adjudicating Authority, which order was reversed by National Company Law Appellate Tribunal. Appeal filed by Operational Creditor was allowed by the Hon'ble Supreme Court and it was held that advance payment is covered within the definition of Operational Debt. Hon'ble Supreme Court came to consider the definition of Operational Debt as contained in IBC. While analyzing the provisions, the Hon'ble Supreme Court laid down following:

*"**49.** We have to now consider the "debt" in the present appeal. According to the appellant, it is the advance payment CMRL made on their behalf to the proprietary concern, which was encashed even though the project between CMRL and the appellant was terminated. On the other hand, the respondent has attempted to urge that there was no privity of contract between the appellant and the respondent, and that CMRL had not transferred the debt to the appellant. We reject both these submissions. It is amply clear from the facts that the debt arises from purchase orders between the appellant and the proprietary concern (which is the underlying contract), regardless of whether CMRL may have made the payment on behalf of the appellant. Thus, the ultimate dispute still remains between the appellant and the proprietary concern, and the debt arises from that.*

***50.** It is then that we come to the core of the dispute—while the appellant has argued that the debt is in the nature of an operational debt which makes them an operational creditor, the respondent has opposed this submission. The respondent's submission, which was accepted by NCLAT, seeks to narrowly define "operational debt" and "operational creditors" under the IBC to only include those who supply goods or services to a corporate debtor and exclude those who receive goods or services from the corporate debtor. For reasons which shall follow, we reject this argument:*

***50.1.** First, Section 5(21) defines "operational debt" as a "claim in respect of the provision of goods or services". The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which*

specifies that operational debt is in relation to operational requirements of an entity.

50.2. *Second, Section 8(1) IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a sine qua non, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulations 7(2)(b)(i) and (ii) of the 2016 CIRP Regulations which provide an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor.*

50.3. *Finally, the judgment of this Court in Pioneer Urban [Pioneer Urban Land & Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1] , in comparing allottees in real estate projects to operational creditors, has noted that the latter do not receive any time value for their money as consideration but only provide it in exchange for goods or services. Indeed, the decision notes that "[e]xamples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are*

wholly inapposite as examples vis-à-vis advance payments made by allottees". Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt.

52. *Similarly, in the present case, the phrase "in respect of" in Section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In the present case, the appellant clearly sought an operational service from the proprietary concern when it contracted with them for the supply of light fittings. Further, when the contract was terminated but the proprietary concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favour of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) IBC.*

53. *In doing so, we are cognizant of the observations of this Court in judgments such as Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , that IBC proceedings should not become recovery proceedings. However, in the present case, the dispute is not in relation to the quality of the services provided by the proprietary concern but is entirely about the repayment of the advance amount paid to them, upon the cancellation of the underlying project."*

13. The above judgment, thus, clearly laid down that expression 'in respect of' in Section 5(21) has to be interpreted in a broad and purposive manner. In the facts of the present case, the advance payment of Rs.60 lakhs was clearly an Operational Debt and the Adjudicating Authority committed error in rejecting Section 9 Application on the above ground.

14. The learned Counsel for the Respondent has submitted that there were other grounds objecting Section 9 Application including the ground of limitation, which submission although have been noticed by the Adjudicating Authority, but has not been dealt with. In view of above, we are of the view that impugned order dated 06.01.2022 rejecting Section 9 Application on the ground that advance payment paid is not an Operational Debt deserves to be set aside and is hereby set aside.

15. The Section 9 Application being IB-112/ND/2020 is revived before the Adjudicating Authority to be heard and decided afresh after hearing both the parties. Looking into the fact that Application pertains to the year 2020, we request the Adjudicating Authority to decide the Application at an early date, preferably within a period of six months from the date the copy of this order is produced before the Adjudicating Authority. It goes without saying that it shall always be open for the parties to enter into settlement in accordance with law. The Appeal is allowed to the above extent. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

10th November, 2022

Ashwani