

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)
(Arguments through web-based video conferencing platform)**

**IA No. 83/2022
In
CP (IB) No.263/Chd/Hry/2018**

**Under Section 60(5) of IBC, 2016
read with Rule 11 of NCLT Rules,
2016**

In the matter of:

Volkswagen Finance Private Limited

....Financial Creditor

Vs.

Zenica Cars India Pvt. Ltd.

...Corporate Debtor

And in the matter of:-

IA No.83/2022

Orix Leasing and Financial Services India Ltd.
having its registered office at
Plot No. 94, Marol Co-operative,
Industrial Estate, Andheri Kurla Road,
Andheri East Mumbai-400059

....Applicant

Vs.

Mr. Rajendra Kumar Jain,
Resolution Professional
having its registered office at
SCO 818, NAC Manimajra,
Chandigarh-160101

...Respondent

Order delivered on: 17.01.2023

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

Present:

For the Applicant in
IA No. 83/2022

:Mr. Pukit Deora, Advocate

For the respondent

: Ms. Swati Saluja, Advocate

For the respondents : Mr. Neeraj Kumar, Advocate

Per: Subrata Kumar Dash, Member (Technical)

ORDER

The present application is filed by Orix Leasing and Financial Services India Limited, a company incorporated under the Companies Act, 1956 seeking the following directions against the Respondent-Resolution Professional.

- i. Direct the respondent to admit the claim of the applicant as a financial creditor of Zenica Cars India Private Limited/Corporate Debtor and to reconstitute the CoC.
 - ii. Direct that no Resolution Plan of Zenica Cars India Private Limited/Corporate Debtor be passed till the present application is heard, decided, and the claim of the applicant is admitted.
2. It is stated by the applicant that this Adjudicating Authority vide order dated 22.03.2021 admitted the company Petition i.e., CP(IB) No. 263/Chd/Hry/2018 filed on behalf of M/s. Volkswagen Finance Private Limited under Section 7 of IBC, 2016, against the corporate debtor for initiating the Corporate Insolvency Resolution Process (CIRP).
3. It is submitted that pursuant to the publication made by Resolution Professional, the applicant duly filed its claim in the capacity of the financial creditor of the corporate debtor in prescribed form C dated 10.05.2021, sent vide email dated 12.05.2021 along with the requisite documents. The claim of the applicant was rejected vide email dated 12.05.2021.
4. It is further submitted that the respondent-Resolution Professional reconstituted the CoC and admitted the applicant as a member of CoC with

0.34% voting share. The applicant attended the fourth meeting of CoC. Thereafter vide email dated 26.08.2021, the respondent rejected the claim of the applicant as a financial creditor and was directed to re-submit the claim in the capacity of an operational creditor. The claim of the applicant was again rejected vide email dated 20.10.2021 in the capacity of a financial creditor.

5. The applicant has relied on the provision of the Indian Accounting Standard (IND-AS 116) :

Para 62 A Lease is classified as a finance lease if it transfers substantially all the risks and rewards incidental to ownership of an underlying asset. A lease is classified as an operating lease if it does not transfer substantially all the risks and rewards incidental to ownership of an underlying asset.

Para 22-Lessee shall, recognise the Finance Lease asset as Right of Use Asset and create a corresponding Lease Liability. Lessee depreciates the asset, over the useful life or lease tenure whichever is earlier, based on its depreciation policy.

Para 67 - At the commencement date, a lessor shall recognise assets held under finance lease in its balance sheet and present them as a receivable at an amount equal to the net investment in the lease.

Para 75 - A Lessor shall recognise finance income over the lease term, based on a pattern reflecting a constant periodic rate of return on the lessor's net investment in the lease.

6. The applicant has further relied on the decision of the Hon'ble Supreme Court in the matter of **Swiss Ribbons Private Limited & Anr. vs. Union of India**, Writ Petition (Civil) No. 99 of 2018, wherein it is held that the Resolution Professional has no adjudicatory powers and as such, the Resolution Professional cannot reject the claims submitted by various creditors.

7. Notice of this application issued to the respondent vide order dated 16.02.2022. Pursuant to the notice, reply and written submissions have been

filed by Resolution Professional vide diary No. 00092/01 dated 06.06.2022 and 00092/2 dated 14.10.2022, wherein it is stated that the applicant has erroneously filed its claim in the capacity of the financial creditor, whereas the claim of the applicant is operational in nature.

8. The respondent-Resolution Professional has submitted that the applicant has leased out vehicles to the corporate debtor under the Master Lease Agreement dated 23.03.2018. It is further submitted that the provisions of the Master Lease Agreement are such that they create only an operational lease over vehicles owned by the Applicant (Orix Leasing and Financial Services India Ltd.) in favour of the Respondent (Corporate Debtor), with no ownership rights in favour of the Corporate Debtor. The relevant clauses are reproduced below:

Clause 1.1.10 defines 'Lease' as granting of right to use the Vehicle to the Lessee during the Lease Term excluding right to sell, alienate, transfer, charge, hypothecate or otherwise encumber the Vehicle.

Clause 1.1.20 defines 'Rental' or 'Lease Rental' as the consideration payable by the Lessee, during the Lease Term, by way of

- a) rent for the use of the Vehicle during Lease Term; and /or*
- b) Fleet Management Fee for availing of Fleet Management Services for a Vehicle, as the case may be.*

2. Article 2 provides the Terms of the Lease.

a) Clause 2.1 states that the Lessor may give the Vehicle on Lease to the Lessee on the terms and conditions contained in the Agreement and on other terms as specified in the Schedule.

b) Clause 2.2 states that upon the Lessor accepting a VRO, the Parties shall execute Schedule for the proposed Vehicle, which shall constitute Lease of that Vehicle to the Lessee.

C) Clause 2.5 provides for the ownership of the Vehicle and states that the Parties confirm that their intent is that the Vehicle shall at all times remain the property of the Lessor.

d) Clause 2.9 states that the Lessee shall pay to the Lessor regularly and punctually without any abatements or deductions, the Rental as defined in 1.1.20.

e) Clause 2.10 provides for the Payment of Lease Rental on Due Date on the invoice/debit raised by the Lessor.

9. The respondent-Resolution Professional has further submitted that the Vehicle Request Order (VRO) Form, dated 24.01.2018 clearly states that the Rental was for a fixed term of 15 months, whereas the life of a vehicle may well be in excess of 15 years. Further, to the Respondent's understanding, there was no option to purchase the said vehicles at the end of the lease tenure for a peppercorn price - which is usually the case where an asset is given on a finance lease.

10. Furthermore, the Applicant has claimed depreciation over the said vehicles in its books of account for Income Tax purposes under the applicable provisions.

11. The respondent further relied on the Indian Accounting Standard (IND AS-116) which provides that under a Finance lease, the risk and rewards are generally transferred to the lessee, and provides as under Articles 62 and 63:

"62 A lease is classified as a finance lease if it transfers substantially all the risks and rewards incidental to ownership of an underlying asset. A

lease is classified as an operating lease if it does not transfer substantially all the risks and rewards incidental to ownership of an underlying asset.

63 Whether a lease is a finance lease or an operating lease depends on the substance of the transaction rather than the form of the contract. Examples of situations that individually or in combination would normally lead to a lease being classified as a finance lease are:

(a) the lease transfers ownership of the underlying asset to the lessee by the end of the lease term;

(b) the lessee has the option to purchase the underlying asset at a price that is expected to be sufficiently lower than the fair value at the date the option becomes exercisable for it to be reasonably certain, at the inception date, that the option will be exercised;

(c) the lease term is for the major part of the economic life of the underlying asset even if title is not transferred;

(d) at the inception date, the present value of the lease payments amounts to at least substantially all of the fair value of the underlying asset; and

(e) the underlying asset is of such a specialised nature that only the lessee can use it without major modifications."

12. It is averred that the applicant in the present case had not transferred substantially all risks and rewards associated with ownership of the said vehicles to the Corporate Debtor. Rather, the Corporate Debtor was only contractually entitled to use the vehicle for a limited period of 1/10th of its

useful life, and the Applicant retains ownership of the said vehicles and also enjoys depreciation expense in its tax bill. Accordingly, the Respondent further submitted that the substantial risks and rewards that form the basis of the lease were not transferred to the Corporate Debtor, and the lease cannot be classified as a finance lease. The same was categorically explained to the Applicant vide emails by the respondent-Resolution Professional dated 26.08.2021 and 20.10.2021. The vehicles were leased to the Corporate Debtor on an operating basis alone.

13. The respondent-Resolution Professional has relied on ***New Okhla Industrial Development Authority v. Manish Gupta and Anr.***, 2022 SCC Online SC 631, where the Hon'ble Supreme Court has explained that Section 5(8)(d) of the Code includes only finance or capital lease, which is deemed, as such, under the Indian Accounting Standards. In ***Anup Sushil Dubey v. National Agriculture Co-operative Marketing Federation of India Ltd.***, 2020 SCC OnLine NCLAT 674 where the Hon'ble NCLAT explained that the service of providing lease for Commercial Purpose is an 'Operational Debt as envisaged under Section 5(21) of the Code.

14. We have heard the learned counsel for the applicant and respondent-Resolution Professional.

15. The issue for adjudication in the present case is whether sufficient risks and rewards incidental to ownership of underlined asset on lease have been transferred to the respondent so as to classify the said lease as a financial lease. Before deciding on this issue, the decision of the Hon'ble NCLAT in the case of Anup Sushil Dubey (Supra) which is in the context of the Lease and License Agreement needs to be discussed. One of the issues before the

Hon'ble NCLAT was whether the First Respondent/NAFED by providing a 'Lease' would be treated as an 'Operational Creditor'. The deciding question was whether the first Respondent provided services to the Corporate Debtor and whether the alleged dues fall within the meaning of Section 5 (21) of the Code. In the said case, the Hon'ble NCLAT has cited the definition of 'service' as defined under Section 2 (42) of the Consumer Protection Act, 2019 which reads as under :

2. In this Act, unless the context otherwise requires,—

“(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;”

16. Further, Hon'ble NCLAT has made a reference to the provisions of Central Goods and Services Tax, which reads as under :

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”

17. After analyzing the facts of the case, the Hon'ble NCLAT has held that it is apparent from the material on record and the terms and conditions of the

lease and license agreement that the appellant has leased out the premises for all 'commercial purposes' which comes within the meaning of 'service' for the purpose of sub-Section 21 of Section 5 of the IBC 2016.

18. A further reference is made to the decision of Hon'ble NCLAT in the matter of **New Okhla Industrial Development Authority Vs. Mr. Anand Sonbhadra** (RP)(2021) dated 16.04.2021, wherein it is observed that :

keeping in view the Indian Accounting Standards, what appears broadly is that when lease involves real estate (like land in present matter) with a fair value different from its carrying amount, the lease can be classified as a finance lease if the lease transfers ownership of the property to the lessee by the end of the lease term or there is bargain purchase option. The lease must transfer substantially all the risks and also rewards incidental to ownership of the asset.

19. In the said decision, it is mentioned that the Hon'ble Supreme Court dealt with the issue as to what is a lease finance in "**Asea Brown Boveri Ltd. Versus Industrial Finance Corporation of India and Others**" reported in (2004) 12 SCC 570 (SCC Online Web Edition) observed that the features of the financial lease, according to the learned author are as under:

"1. The asset is use-specific and is selected for the lessee specifically. Usually, the lessee is allowed to select it himself.

2. The risks and rewards incidental to ownership are passed on to the lessee. The lessor only remains the legal owner of the asset.

3. Therefore, the lessee bears the risk of obsolescence.

4. The lessor is interested in his rentals and not in the asset. He must get his principal back along with interest. Therefore, the lease is non-cancellable by either party.

5. The lease period usually coincides with the economic life of the asset and may be broken into primary and secondary period.

6. The lessor enters into the transaction only as a financier. He does not bear the costs of repairs, maintenance or operation.

7. The lessor is typically a financial institution and cannot render specialized service in connection with the asset.

8. The lease is usually full-pay-out, that is, the single lease repays the cost of the asset together with the interest.”

20. It may be noted that in the present case, the lease period is only for a short term of 15 months as against the life expectancy of a vehicle of around 15 years and the applicant-lessor has claimed depreciation over the said vehicles in the books of accounts for Income Tax purposes. It is also noted that there is no option for the purchase of these said vehicles at the end of the 10-year lease for a peppercorn price as is usually the case where the asset is given on a finance lease. Moreso, in the case at hand there is no proposal for the transfer of all the risks and rewards incidental to ownership.

21. Based on such facts, we are of the view that the ‘service’ supplied by the applicant-lessor for all ‘commercial purposes’ and the risks and rewards associated with the ownership of the said vehicles have not been transferred substantially to the corporate debtor.

22. In view of these discussions, the claim of the applicant to be considered as a financial creditor is held to be untenable and the appeal is dismissed and disposed of accordingly.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

Sd/-
(Harnam Singh Thakur)
Member (Judicial)

January 17, 2023
PB/ASH