

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

Company Appeal (AT) (Insolvency) No. 862 of 2021

[Arising out of order dated 31.05.2021 in C.P. (IB) No. 1106(PB)/2020 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi.)]

IN THE MATTER OF:

**National Agriculture Cooperative Marketing
Federation Limited (NAFED),**

NAFED House, Siddharth Enclave, Ashram Chowk,
Ring Road, New Delhi – 110014.

**..... Appellant.
(Financial Creditor)**

Versus

Synergy Petro Products Private Limited,
604, Hemkunt Tower, 98, Nehru Place,
New Delhi – 110019.

**..... Respondent.
(Corporate Debtor)**

Present:

**For Appellant: Mr. Rakesh Kumar and Mr. Ashish Ranjan,
Advocates.**

For Respondent:- Ms. Priya Soni, Advocate.

J U D G M E N T
(11th October, 2022)

Justice Anant Bijay Singh;

The present Appeal has been filed by the Appellant under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (***for short IBC***) being aggrieved and dissatisfied by the order dated 31.05.2021 passed by the Adjudicating Authority

(National Company Law Tribunal, Principal Bench, New Delhi.) in C.P. (IB) No. 1106(PB)/2020, whereby and whereunder the Appellant filed Application under Section 7 of the IBC for initiation of Corporate Insolvency Resolution Process (**for short CIRP**) against the Corporate Debtor / Respondent herein on the ground that Corporate Debtor defaulted in repaying the Arbitral Award dated 10.07.2019, amounting to Rs. 55,37,797/- (i.e. monthly license fee from April 2007 to October 2009) and due license fee from November 2009 to 15th July 2015, with interest of 6% per annum, aggregating to Rs. 3,14,36,864/- as on 11.10.2019. By which the Adjudicating Authority dismissed the Application filed by the Appellant.

2. The facts giving rise to this Appeal are as follows:

i) The Appellant Financial Creditor is a multi-state Co-operative Society formed and registered under the provisions of the Multi State Cooperative Societies Act, 2002. The Appellant/Financial Creditor is having its Registered Office at NAFED House, New Delhi-110014. The Instant appeal is being filed/instituted on behalf of the Appellant through its General Manager i.e. Sh. Tarun Handa, who is duly empowered/authorized to file this present appeal. The Respondent Company is a Company duly incorporated under the provisions of Companies Act, 1956 on 19.09.2001 having its registered office at Lajpat Nagar-4, New Delhi-110024.

ii) The case of the Appellant is that the facts relevant for adjudication of the present appeal are that the Appellant is the owner of a plot of a property situated at Plot No. B-481 situated at Industrial Area, Bhiwadi, Rajasthan admeasuring

8444 sq. mts of open area and 1311 sq. mts of constructed/covered area. The Respondent needed the said premise for its business purpose i.e. production of wide width PE Film, rigid PVC pipe, etc. Accordingly, a leave and license Agreement dated 17.08.2005 was executed between the Appellant and the Respondent and possession of the said premise was given to the Respondent for use and occupation by it on payment of license fee.

iii) Further case is that the leave and license agreement dated 17.08.2005 between the Appellant and Respondent was later substituted by another agreement dated 03.07.2006 (hereinafter referred to as 'subsequent agreement'). In terms of the subsequent agreement, the Respondent was liable to pay to the Appellant a monthly license fee Rs. 50,000/- for the covered area and Rs. 0.50/- per sq. ft. for the open area subject to increase of 25% every three years. The premise was given to Corporate Debtor for use and occupation by the Corporate Debtor for a period of 5 years and the monthly license fee was payable in advance on or before the 5th day of each English calendar month.

iv) Further case is that the Corporate Debtor paid the leave/license fee but later defaulted in paying the monthly license fee from April 2007 onwards. Even reminders and legal notice were sent to the Corporate Debtor but it evoked no response and the Corporate Debtor continued to occupy the said premise of the Appellant/Financial Creditor despite the termination of the agreement dated 03.07.2006 and demand by Appellant for vacation of premises.

v) In these circumstances arbitral dispute arose between the Appellant and Respondent which was referred for arbitration, which culminated in Arbitral

Award dated 10.07.2019 passed by the Sole Arbitrator. In terms of the said Arbitral Award, the Respondent is liable to pay to the Appellant a sum of Rs. 55,37,797/- (i.e. monthly license fee from April 2007 to October 2009) and due license fee from November 2009 to 15th July 2015 and interest @ 6% per annum from 01.04.2007 to 15.07.2015, as the Corporate Debtor continued to hold the possession of the said premise for the period mentioned above.

vi) Further case is that the Appellant requested the Registrar Cooperative Societies for getting back possession of the said premise and the Registrar Cooperative Societies further requested the Ld. District Collector, Alwar to pass orders directing the Corporate Debtor/Respondent to vacate the said premise and give back the possession to the Appellant. Consequently, the Appellant got back the possession of the said premise on 15.07.2015.

vii) Further case is that despite the award being passed on 10.07.2019 and the same becoming enforceable on expiry of a period of 90 days thereafter, the Corporate Debtor failed to make the payment in terms of the award and thus committed default in terms of Section 7 of the IBC. Thereafter, the Appellant filed the Application under Section 7 of the IBC before the Adjudicating Authority being CP (IB) No. 1106(PB)/2020 and after hearing the parties, the Adjudicating Authority dismissed the said Application filed by the Appellant under Section 7 of the IBC. Hence this Appeal.

Submissions on behalf of the Appellant

3. The Ld. Counsel for the Appellant during the course of argument and in his memo of Appeal along with written submissions submitted that the

Adjudicating Authority erroneously, wrongly and without hearing the Appellant vide the impugned order dismissed the application filed by the Appellant on the ground that the transaction which transpired between the parties does not partake the character of 'Financial Debt' and the Appellant does not qualify to be a Financial Creditor but an Operational Creditor in relation to the Corporate Debtor.

4. It is further submitted that this Appellate Tribunal in the case of ***“Mr M. Ravindranath Reddy Vs. Mr. G. Krishan & Ors. (3 Member Bench) [Company Appeal (AT) (Ins.) No. 331 of 2019]”*** has held that the definition under Section 5(21) of the IBC does not give scope to interpret rent dues as an 'operational debt'. By giving a strict interpretation to Section 5(21) of the Code, this Appellate Tribunal held that only when a claim by way of debt falls within one of the three categories mentioned in Section 5(21) will it be categorised as an 'operational debt'. It further held that for a debt to qualify as 'operational debt', the debt must have arisen with a nexus of direct input to the direct output produced. Based on the above reasoning, this Appellate Tribunal held that lease of immovable property cannot be considered as a supply of goods or rendering of any services and thus, cannot be considered as operational debt.

5. The Ld. Counsel for the Appellant further relied on a judgment passed by this Appellate Tribunal in the case of ***“Promila Taneja Vs. Surendri Design Pvt. Ltd. [Company Appeal (AT) (Ins.) No. 459 of 2020]”*** taking note of the conflicting judgments on the issue, and after analysing the available jurisprudence on the matter, upheld the view taken in ***Ravindranath Reddy***

case. This Appellate Tribunal made reference to Section 3(37) of the Code, which provides that if the undefined words and expressions used in the IBC can be found defined in the Acts mentioned in the Section, they can be directly imported. This Appellate Tribunal held that the definition of “Service” and “Activities” cannot be imported from the Consumer Protection Act, 2019 and the Central Goods and Services Tax Act, 2019 as both the Acts do not find a mention in Section 3(37) of the Code. Further, on the parameter of interpretation of statutes, this Appellate Tribunal analysed Section 5(8)(d) of the IBC, which while defining ‘financial debt’ says that it includes “the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standard or such other accounting standards as may be prescribed”. Accordingly, this Appellate Tribunal held that a perusal of the above definition makes it clear that the legislature was conscious of liabilities arising from lease and made specific provision to club it under a financial debt, but no such provision was made for operational debt.

6. It is further submitted that the Hon’ble Supreme Court in the case of **“Dena Bank (now Bank of Baroda) Vs. C. Shivakumar Reddy & Anr. (Civil Appeal No. 1650 of 2020)”** held in para 132 which is hereunder:

“132. We see no reason why the principles should not apply to an application under Section 7 of the IBC which enables a financial creditor to file an application initiating the Corporate Insolvency Resolution Process against a Corporate Debtor before the Adjudicating Authority, when a default has occurred. As observed earlier in this judgment, on a conjoint reading of the provisions of the IBC quoted above, it is clear that a final

judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money, if not satisfied, would fall within the ambit of a financial debt, enabling the creditor to initiate proceedings under Section 7 of the IBC.”

Based on these submissions the impugned order is fit to be set aside and the Appeal be allowed.

Submissions on behalf of the Respondent

7. The Ld. Counsel for the Respondent during the course of argument and in his reply along with written submissions submitted that the Appellant has filed its Section 7 Application before the Adjudicating Authority allegedly claiming itself to be financial creditor in the capacity of being a decree holder on the basis of arbitration award dated 10.07.2019.

8. It is further submitted that the Appellant failed to demonstrate that the nature of transaction between the parties fall within the ambit of financial debt as defined under the IBC.

9. It is further submitted that the Appellant is trying to read License in Section 5 (8) (d) of the IBC contrary to the intention of the Legislature. The Legislature in its wisdom included the case of lease and that too more precisely with case of Capital Lease or Financial Lease under Section 5 (8) (d) of the IBC while dealing with the definition of ‘financial debt’. The relevant terms of Section 5 (8) (d) of the IBC are reproduced herein below for a ready reference:

“Section 5 (8) “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes...

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed.”

10. It is further submitted that a bare perusal of arbitration award dated 10.07.2019 as passed by the Learned Sole Arbitrator vide para 21 clearly held as follows:

“..... The agreement clearly mentions leave and licence agreement and it was revoked by notice dated 24.08.2007 issued by claimant’s advocate. So this is a leave and licence Agreement. The objection w.r.t use of the word “Rent” is not tenable.”

11. It is further submitted that Leave and License Agreement dated 03.07.2006 was the core base transaction between the parties on the basis of which Arbitration Award dated 10.07.2019 was passed. This Leave and License Agreement does not qualify to be Lease/Financial Lease/capital Lease in view of the terms and restrictions of the Leave and License Agreement dated 03.07.2006.

12. It is further submitted that the facts and circumstances of the present case is squarely covered by the judgment as passed by this Appellate Tribunal in the case of **“Sushil Ansal Vs. Ashok Tripathi and Ors., Company Appeal (AT) (Ins.) No. 452 of 2020 (3 Member Bench)”** wherein this Appellate Tribunal in paragraphs 20 and 23 clearly held as follows:

“20. A ‘decree-holder’ is undoubtedly covered by the definition of ‘Creditor’ under Section 3(10) of the ‘I&B Code’ but would not fall within the class of creditors classified as ‘Financial Creditor’ unless the debt was disbursed against the consideration for

time value of money or falls within any of the clauses thereof as the definition of 'financial debt' is inclusive in character. A 'decree' is defined under Section 2(2) of the Code of Civil Procedure, 1908 ("CPC" for short) as the formal expression of an adjudication which conclusively determines the rights of the parties with regard to the matters in controversy in a lis. A 'decree-holder', defined under Section 2(3) of the same Code means any person in whose favour a decree has been passed or an order capable of execution has been made. Order XXI Rule 30 of the CPC lays down the mode of execution of a money decree. According to this provision, a money decree may be executed by the detention of judgment-debtor in civil prison, or by the attachment or sale of his property, or by both. Section 40 of the 'Real Estate (Regulation and Development) Act, 2016' lays down the mode of execution by providing that the RERA may order to recover the amount due under the Recovery Certificate by the concerned Authority as an arrear of land revenue. In the instant case, RERA has conducted the recovery proceedings at the instance of Respondent Nos.1 & 2 against the Corporate Debtor which culminated in issuance of Recovery Certificate and passing of order under Section 40 of the 'Real Estate (Regulation and Development) Act, 2016' directing the concerned Authority to recover amount of Rs.73,35,686.43/- from the Corporate Debtor as an arrear of land revenue. As already stated elsewhere in this Judgment, Respondent Nos.1 & 2 instead of pursuing the matter before the Competent Authority sought triggering of Corporate Insolvency Resolution Process against the Corporate Debtor resulting in passing of the impugned order of admission which has been assailed in the instant appeal. The answer to the question whether a decree-holder would fall within the definition of 'Financial Creditor' has to be an emphatic

‘No’ as the amount claimed under the decree is an adjudicated amount and not a debt disbursed against the consideration for the time value of money and does not fall within the ambit of any of the clauses enumerated under Section 5(8) of the ‘I&B Code’.

23. *We accordingly summarise our finding as under:*

(i) Respondent Nos. 1 and 2 can no more claim to be allottees of a Real Estate Project after issuance of Recovery Certificate dated 10th August, 2019 by ‘UP RERA’ directing recovery of Rs.73,35,686.43/- due thereunder as arrears of land revenue by the Competent Authority. On their own showing they are the decree-holders seeking execution of money due under the Recovery Certificate which is impermissible within the ambit of Section 7 of the ‘I&B Code’. Clearly their application for triggering of Corporate Insolvency Resolution Process is not maintainable as allottees.

(ii) Decree-holder, though included in the definition of ‘Creditor’, does not fall within the definition of ‘Financial Creditor’ and cannot seek initiation of Corporate Insolvency Resolution Process as ‘Financial Creditor’.”

Based on these submissions, the Adjudicating Authority has rightly passed the impugned order, therefore, there is no merit in the present Appeal, the Appeal is fit to be dismissed.

FINDINGS

13. After hearing the parties and going through the pleadings made on behalf of the parties as also the impugned order dated 31.05.2021, we are of the view that the Adjudicating Authority has rightly held that the basic nature of

transaction is not covered under 'financial debt' and rental lease agreement can be 'operational debt' but not 'financial debt'. The Transactions which transpired between the parties does not partake the character of a 'financial debt' and the Appellant does not qualify to be a Financial Creditor in relation to the Corporate Debtor.

- Taking all the facts aforementioned above, we agree with the reasons given by the Adjudicating Authority. The Impugned Order dated 31.05.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi.) in C.P. (IB) No. 1106(PB)/2020 is hereby affirmed. The instant Appeal is hereby dismissed.

14. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi.) forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Mr. Kanthi Narahari]
Member (Technical)**

**New Delhi
11th October, 2022
R. Nath.**