

# M/S Smartworks Coworking Spaces ... vs M/S Turbot Hq India Pvt Ltd on 23 May, 2023

**Author: Ashok Bhushan**

**Bench: Ashok Bhushan**

NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 772 of 2022

(Arising out of Order dated 08th April, 2022 passed by National Company Law Tribunal, Cuttack Bench in CP(IB) No. 181/CB/2020)

IN THE MATTER OF:

M/S SMARTWORKS COWORKING SPACES

PRIVATE LIMITED,

Through its Authorized Signatory

Sh. Prashant Hakim,

Having its registered Office at Unit No. 305-310,

Plot No. 9, 10 & 11, Vardhman Trade Centre,

Nehru Place, South Delhi - 110019.

Email ID: Prashant.hakim@sworks.co.in

Tel. 9625753906

...Appellant

Versus

M/S TURBOT HQ INDIA PRIVATE LIMITED

Through its Director,

Having its registered office at Plot No.-1010/D,

Aparna Nargr, Gopabandhu Marg,

P0/PS-Nuabazar, Cuttack - 753004

...Respondents

Appellant:

Mr. Sanjeev Sen, Sr. Advocate, Mr. Atanu Mukherjee, Mr. Ankit Kohli, Mr. Arjun Aggarwal, Ms. Anjali Singh, Mr. Mridul Y.Suri, Advocates.

Respondent:

Mr. Avijit Patnaik, Ms. Soma Patnik, Mr. Shreyan Das, Ms. Suvra Mahapatra, Advocates.

JUDGEMENT

ASHOK BHUSHAN, J:

1. This Appeal by an Operational Creditor has been filed challenging the Order dated 08th April, 2022 by which order Section 9 Application of I&B Code, 2016 filed by the Appellant has been rejected holding that dues claimed by the Appellant are not

operational debt, Agreement dated 17th August, 2018 is not a registered agreement and is also not duly stamped document.

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

(i) The Appellant is engaged in the business of coworking and/or providing flexi office space i.e. a working arrangement where different corporate bodies come together to work for a single business center run and maintained by the Appellant. The Appellant developed the premises with all required amenities, facilities conducive to run/operate a fully functional office with day to day service/support service as per requirement of each and every client. Appellant makes provision of goods and provision of services as per clients' requirements. The Appellant entered into an Agreement with the Respondent-Corporate Debtor. Agreement was called "Services Providers Agreement". The Agreement do not create any right or title or interest in the property immovable or movable. Under the Agreement, the Corporate Debtor was to make monthly office fee of Rs. 3,52,000/.

Period of Agreement was from 01st October, 2018 to 30th September, 2021. Agreement provided for lock-in period of 36 months.

(ii) The Corporate Debtor in pursuance of the Agreement started using the premises. On 04th June, 2019, the Corporate Debtor wrote email to the Operational Creditor informing that Corporate Debtor intends to end the contract by 01st September, 2019. Operational Creditor immediately informed that Agreement is under lock-in till September, Company Appeal (AT) (Insolvency) No. 772 of 2022 2021. The Corporate Debtor was informed that Corporate Debtor has to pay the unpaid balance amount. The corporate debtor stopped using the premises with effect from 01st September, 2019 by terminating the Agreement.

(iii) The Appellant issued notice to the Corporate Debtor demanding payment in respect of unpaid operational debt amount to Rs. 1,05,32,126/-. On 18th August, 2020, Demand Notice under section 8 of I&B Code, 2016 was issued to the Corporate Debtor claiming an Operational Debt of Rs. 01,28,95,402/-. The Demand Notice was replied by the Corporate Debtor denying the claim.

(iv) Operational Creditor thereafter filed Application under Section 9 of I&B Code, 2016 on 09/10/2020. Reply was filed by the Corporate Debtor to Section 9 Application alleging that office service agreement is a lease agreement and further rent is not an Operational Debt for the purposes of admitting Section 9 Application. Appellant filed a Rejoinder-affidavit.

(v) Adjudicating Authority heard the arguments and by Impugned Order dated 08th April, 2022 rejected Section 9 Application. The Adjudicating Authority framed following three points for determination:

"(i) Whether, the amount claimed by the petitioner for the locking period amounts to operational debt?

(ii) Whether, the agreement dated 17th August, 2018 is compulsorily registerable Instrument under the Registration Act 1908?

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(iii) Whether, the agreement dated 17.08.2018 was originally engrossed on an unstamped paper?"

(vi) The Adjudicating Authority held that amount claimed by Operational Creditor for the lock in period is not an Operational Debt.

The Agreement dated 17th August, 2018 was originally engrossed on an unstamped paper and was required to be registered.

(vii) Appellant aggrieved by the said order, has come up in this Appeal.

3. We have heard Mr. Sanjeev Sen, Sr. Advocate appearing for the Appellant and Mr. Avijit Patnaik, Advocate for the Respondent.

4. Mr. Sanjeev Sen, Sr. Advocate submits that the Agreement dated 17th August, 2018 provided for lock in period of 36 months. It is submitted that Appellant cater to hundreds of clients spread across various cities at its various business centers/coworking office. The Appellant makes provision of goods and provision of services as per client's requirements. The agreement entered with Corporate Debtor had a lock-in period of 36 months. During the lock-in period, the Corporate Debtor had no authority to terminate the agreement and termination of agreement is breach of contract which entitles the Appellant to right to remedy. The right of Appellant is a claim within the meaning of Section 3(6) of the Code. The claim in respect of provision of goods and services is debt. The view of the Adjudicating Authority that license fee is not operational debt is erroneous. Learned Counsel for the Appellant relied on judgment of larger bench of this Tribunal in Jaipur Trade Expocentre Private Limited v. Metro Jet Airways Training Private Limited, C.A. (AT) Insolvency No. 423 of 2021 where it was held that debt Company Appeal (AT) (Insolvency) No. 772 of 2022 pertaining to unpaid license fee is covered within the meaning of operational debt. Appellant's claim or right of appellant arises out of breach of contract which is debt within the meaning of I&B Code, 2016. It is submitted that Agreement dated 17th August, 2018 did not require any registration since no right was created in any immovable property in favour of the Corporate Debtor. West Bengal Stamp Duty on document does not provide for license as chargeable with duty. It is submitted that the proceedings under IBC are summary proceedings and there being debt and default, the Adjudicating Authority was required to admit Section 9 Application.

5. Learned Counsel appearing for the Corporate Debtor submits that for breach of agreement, Appellant was required to claim damages in Competent Civil Court. The rent as per the agreement cannot be described as an operational debt. The agreement dated 17th August, 2018 being not engrossed on stamped paper is not admissible in the court of law. As per Clause 1.12 of the Agreement, the dispute between the parties has to be referred to the arbitration. Appellant could not provide services as per agreement and failed to the terms of the agreement, necessary uses and

customs. The claimed amount of Appellant is not an operational debt and Adjudicating Authority has rightly rejected Section 9 Application. Learned Counsel for the Respondent has placed reliance on Judgement of three- member bench of this Tribunal in 2020 SCC OnLine NCLAT 84, M. Ravindranath Reddy v. G. Kishan & Ors. where it was held that debt on account of purported enhanced rent of leasehold property does not fall within the definition of operational debt.

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

7. Before we consider the respective submissions of the parties, it is relevant to notice certain clauses of the Agreement to understand the nature of agreement between the parties. The copy of the agreement has been filed as Annexure A/2 to the Appeal. The lock in period of agreement is provided from 01st October, 2018 to 30th September, 2021. Following note is appended in the Agreement:

"Note:

1. Client would initially be paying INR 272,000 plus taxes for first 6 months i.e. till March, 2019 onwards they would be paying for the entire fit-out i.e. INR 352,000 plus taxes.

2. Escalation would be applicable @ 5% every year.

3. Lock-in period is 36 months."

8. The above note indicates that lock-in period of agreement was 36 months. Clause 1.1. deals with 'nature of this agreement' which is to the following effect:

"1.1 Nature of this agreement: This agreement (hereinafter this Agreement) is a service providers agreement for pay as you go model. This agreement Creates No Right Title or Interest Either in The Property (Immovable or Movable) Nor Any Other Form of Right to Asset Any Claim Save And Except Availing Of Services Being Rendered By Smartwork. This Agreement is in person to the Client and is non-heritable and cannot be transferred or assigned to anyone else. This Agreement is composed of the cover page describing the Service(s), the service charges and the tenure with the escalation (if any), the present 'Terms and Conditions', the house rules and service price guide as Company Appeal (AT) (Insolvency) No. 772 of 2022 published and made applicable from time to time by Smartwork."

9. Clause 1.4 deals with cancellation which provides as follows:

"The agreement can be terminated with 30 (Thirty) day(s) notice in advance in writing by the client without assigning any reason after the lock in period (if any). However, the Provider has no right to terminate the agreement during the validity of the agreement except in the circumstances of material breach of any of the terms of this agreement or the client is in default as more specifically mentioned hereinafter."

10. The above clause provides that client that is the Corporate Debtor can terminate agreement with 30 days notice after the lock in period whereas there are restriction on the services provided in the agreement. The present is a case where in pursuance of the agreement, Corporate Debtor took the possession of the premises. When we look into the agreement, there is a number of services, site plan containing the various facilities which has to be provided by the service provider to the corporate debtor like meeting room, writing wall, work stations, etc. The Corporate Debtor in pursuance of the agreement entered into premises on 01st October, 2018. On 04th June, 2019, Corporate Debtor issued an email to the Operational Creditor which is to the following effect:

" .....

Hi SmartWork team It has been a mix of experience with you at Kolkata and our setup at Bangaluru & Chennai (starting from July 15). Unfortunately our company management has decided to move to its owned place at Kolkata, to accomplish its own process, policies, more space per person and higher Company Appeal (AT) (Insolvency) No. 772 of 2022 parking lots for Cars & Bikes. In this scenario, we would like to end our contract with by Sept 1st Week. Our office at BLR and newly planned to start at Chennai will still remain with closer association with SmartWorks. And we hope to see growth later part of year or next year. We are a very small startup and still trying & struggling to create some hold in India. Which is triggering some unexpected changes from management. Our kind request you to consider our appeal and with good will spirit and future collaboration, allow us to exit. I am sure, as SmartWork will continue its journey across India with many more clients and we are still in your good will book. If we consider other cities, our preference will always remain SmartWork. Again with kind request, consider us to make adjustments our advance with you. We are very hopeful to get a positive response from you. ...."

11. By an Email dated 05th June, 2019, the above email was replied by the Operational Creditor, which is to the following effect:

"On Wed, Jun 5, 2019 ....

Dear Mr Mohanty, Thank you for your email.

Please note that the current agreement is under lock in till Sept 2021. Hence, mid term cancellation would not be possible. I understand that you have taken up your own space, but the agreement need to be honoured and payment for the balance term to be made as well. I have attached the agreement for your reference. Ward Regards,

Surojit Ray Regional Director (East) ....."

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12. The Operational Creditor thereafter issued notices to the Corporate Debtor demanding payment in respect of unpaid operational debt and ultimately a Demand Notice under Section 8 was issued on 18th August, 2020.

13. As noted above, the Adjudicating Authority framed three points for determination. The first point which was framed for consideration is as to whether the debt claimed by the Appellant was an Operational Debt.

14. In IBC, Section 3 of the Code is definition clauses. Section 3(6) defines "claim" in following words:

"3(6). "Claim" means-

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"

15. Section 3(6)(b) of the code clearly provides a right to remedy for breach of contract is a claim. The debt is defined under Section 3(11) which is to the following effect:

"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."

16. As per agreement dated 17th August, 2018, Operational Creditor was entitled to receive payment of entire lock-in period during which Corporate Debtor was prohibited to terminate the agreement. The cancellation of agreement as contemplated in clause 1.4 noted above indicates that client Company Appeal (AT) (Insolvency) No. 772 of 2022 can terminate the agreement with 30 days notice after the lock-in period. The lock-in period in the present case mentioned in the agreement is 36 months thus right to terminate the agreement by the Corporate Debtor can be exercised only after lock-in period. We have noticed the email dated 04th June, 2019 sent by the Corporate Debtor where it was corporate debtor who expressed their intention to terminate the Agreement with effect from 1st week of September, 2019. When the Corporate Debtor terminated the agreement contrary to the agreement clause 1.4, the claim for breach of contract clearly arose in favour of the Appellant. We have noticed the definition of claim under Section 3(6) (b) according to which the claim of the Appellant against the Corporate Debtor arises due to breach of contract which is a claim within the meaning of IBC. In section 9 Application, the Operational Creditor has in part-IV of the Application mentioned all details of transaction and details of operational debt giving details of correspondence

between the parties and the details of the operational debt which accrued on account of pre-mature termination of the agreement by the Corporate Debtor.

17. Learned Counsel for the Respondent has relied on three-member bench judgment in the matter of *M. Ravindranath Reddy v. G. Kishan & Ors.* In paragraph 48, following was laid down:

"48. 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 deserved to be allowed."

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18. The three-member bench judgement in *M. Ravindranath Reddy* came to be referred to Larger Bench of this Appellate Tribunal and Appellate Tribunal by a Larger Bench Judgement in *Jaipur Trade Expocentre Pvt. Ltd. (Supra)* has overruled the Judgement of this Tribunal in *M. Ravindranath Reddy*. In paragraph 39 of the judgement of the larger bench held that debts pertaining to unpaid license fees is fully covered within the meaning of 'operational debt'. Para 39 is as follows:

"39. The observation of this Tribunal in the above case in respect of definition of 'service' under Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 are not covered by Section 3(37) of the Code, with regard to which observation, no exception can be taken. However, in the facts of the present case, where Agreement itself contemplate payment of GST for the services under the Agreement, on which GST is payable, the definition of 'service' under Central Goods and Services Tax Act, 2017 cannot be said to be irrelevant. More so, even if an expression is not defined in the statute, the meaning of expression in general parlance has to be considered for finding out the meaning and purpose of expression. After making above observation in *Promila Taneja's* case (supra), this Tribunal did not dwell with the question as to what is the meaning of expression of 'service' used in Section 5(21) of the Code. Reference to Section 5(8)(d) regarding 'financial debt' by this Tribunal in the above case also was not relevant for finding out definition of expression 'service' under Section 5(21). We, thus, are of the view that both in *Mr. M. Ravindranath Reddy* and *Promila Taneja* this Tribunal did not dwell upon the correct meaning of expression 'service' used in Section 5(21) of the Code. In any view of the matter, in the above mentioned Company Appeal (AT) (Insolvency) No. 772 of 2022 two cases, the dues were in the nature of rent of immovable property whereas the present is a case of license granted for use of premises on Warm Shell Building with fittings and fixtures, electrical, flooring as per good corporate standards. Hence, the Licensee was licensed for a particular kind of service for use by the Licensee for running a business of Educational Institution. Hence, in the present case, debt pertaining to unpaid license fee was fully covered within the meaning of 'operation debt' under Section 5(21) and the Adjudicating Authority committed error in holding

that the debt claimed by the Operational Creditor is not an 'operational debt'. The judgment of this Tribunal in Promila Taneja's case reiterate the law as laid down in Mr. M. Ravindranath Reddy's case. We having held that judgment of Mr. M. Ravindranath Reddy's case does not lay down correct law, the judgment in Promila Taneja's case can also not be followed.

19. We thus are of the view that Adjudicating Authority committed error in holding that the debt claimed by the Operational Creditor was not Operational Debt. The debt claimed by the Appellant is clearly a claim within the meaning of IBC and on default being committed by the Corporate Debtor the debt became due and Appellant was fully entitled to initiate proceedings under Section 9 of the Code.

20. Now coming to the second point determined by the Adjudicating Authority that agreement dated 17th August, 2018 was compulsorily registrable agreement. We have already noticed the nature of Agreement where no interest, title or right on property immovable or movable or any other form of right to assert any claim save and except availing services being run by the Appellant. There being no right, title or interest in the Company Appeal (AT) (Insolvency) No. 772 of 2022 agreement created in favour of the Corporate Debtor, the Agreement was not compulsorily registrable under Section 17(b) of the Registration Act. Section 17(b) provides as follows:

"17. Documents of which registration is compulsory.-

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;"

21. When we look into the agreement as noted above, it is clear that agreement does not purport or operate to create, declare, assign, limit or extinguish any right, title or interest in immovable or movable property. The Agreement was clearly not required to be compulsorily registered under Section 17(b). The above determination by the Adjudicating Authority was also fallacious.

22. Now we come to the 3rd Point determined by the Adjudicating Authority that agreement was originally engrossed on an unstamped paper. Question framed clearly indicates that agreement as filed contained stamp paper but Agreement was written on plain papers. The case of the Respondent is that on the paper when agreement was written both the parties have signed but on the paper where stamp paper was mentioned there was no signature of the Corporate Debtor. The Reply has been filed to Section 9 Application by the Corporate Debtor. In paragraph 6 of the Reply, following has been stated:

"6. That, it is also pertinent to state here that, the Stamp Paper that has been affixed at Page-46, under Annexure -E; prior to the lease agreement; is an antedated Company Appeal (AT) (Insolvency) No. 772 of 2022 document and bears no signature or stamp of both of the parties. Moreover, the said stamp paper was not



available in the notice under Section-8, dtd.18.08.2020 under Annexure-J, at Page-66 of the present petition; and such the document was only inserted when the present deponent had raised the issue of non-payment of stamp duty vide its reply notice dtd. 05.11.2020, under Annexure

-K, at Page-93 of the present petition."

23. When we look into the Reply, stand taken by the Corporate Debtor is clear that Corporate Debtor clearly admits that in the Agreement in the stamp paper there are no signatures of both the parties whereas in the entire reply the Corporate Debtor does not deny execution of the agreement between the parties. The Agreement was termed by the Corporate Debtor as a lease agreement. In paragraph 4 of the Reply, following has been stated:

"4. That, the Operational Creditor, has though across the Agreement mentioned that the said agreement is a "pay-as-you-use service Agreement" / "Office Service Agreement"; but in essence the said agreement is a lease agreement containing therein all essential elements of a lease as per Section-105 of the Transfer of Property Act, 1882. The essential elements vis-à-vis the contractual clauses are tabled herewith for perusal of this Hon'ble Court:

Essential elements of a Relevant portion of the lease as per Section-105 agreement  
The said property must be The said property has been an immovable property. described at Page-48 and the exact design is provided at page-49 and hence from the description, it can be safely presumed Company Appeal (AT) (Insolvency) No. 772 of 2022 that the said document is an immovable property as per Section 3 of the Transfer of Property Act, 1882, read with Clause -3, Sub-Clause 26 of the General Clauses Act, 1897.

There is a transfer of right As per Clause -1.1, 2 and 3 to enjoy such property. of the lease agreement at Annexure-E; the present deponent had been given the right to enjoy the property.

The transfer of the right is At Page-48 of Annexure-E, made for a certain time. the length of agreement has been mentioned from 01.10.2018 to 30.09.2021.

The transfer	is in At	page-48,	the	total
consideration of	a price amount	payable	is	Rs.

paid or promised or of 3,52,000/- which squarely money, a share of crops, falls under the ambit of service or any other thing 'money', as provided in of value. Section -105.

The consideration is At page-48, read with payable periodically or in Clause -7 of the Lease specified occasions. Agreement; the payment of the consideration amount has been specified to be monthly.

The consideration is At Page-48, read with payable by the transferee Clause -7 of the Lease to the transferor. Agreement, the consideration is payable to Company Appeal (AT) (Insolvency) No. 772 of 2022 the corporate debtor.

Hence, from the above averments it can be safely concluded that, the above agreement is only a lease agreement. Hence, as the above agreement is a lease agreement; it must be compulsorily registered as per Section-17(1)(d) of the Registration Act, 1908. Moreover, as per Section -49 (c), if a document required to be compulsorily registered, is not registered then the said document cannot be received as evidence of any transaction affecting such property."

24. The Reply of the Corporate Debtor and the fact that Corporate Debtor in pursuance of the Agreement took the possession of the premises, also paid monthly office fee upto July 2019 clearly indicate that agreement dated 17th August, 2018 was given effect to. When the Corporate Debtor has accepted the agreement and acted upon by using the premises and have utilized services in the office space provided by the Appellant, even accepting the argument of Learned Counsel for the Respondent that it was not duly stamped, do not negate and do not oblige the Adjudicating Authority to ignore the agreement for finding out as to whether the claim made by the Appellant was an Operational Debt. In Section 9 Proceeding, the Adjudicating Authority has to find out as to whether the Operational Debt is due on the Corporate Debtor. In the present case, when Agreement was admittedly executed between the parties, signed by both the parties and acted upon, mere fact that it not being engrossed on stamped papers shall have no adverse consequence on the claim of the Operational Creditor. We thus are of the view that the Adjudicating Authority erred in determining the 3rd point against the operational creditor.

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25. In view of the following discussion, we hold that Appellant has proved that debt claimed by the Appellant in Section 9 Application was operational debt. Further the agreement dated 17th August, 2018 was not compulsorily registrable and agreement having not been executed on Rs. 100 Stamp Paper was inconsequential, the agreement having been acted upon and the Corporate Debtor having entered into possession of the premises in pursuance of the Agreement.

26. In result, we allow the Appeal, set aside the order dated 08th April, 2022 of the Adjudicating Authority. We further direct the Adjudicating Authority to pass order of admission of Section 9 Application within a period of one month from the date copy of order is produced. During the aforesaid period of one month, it shall be open for the parties to enter into a Settlement, if any.

The Appeal is allowed, accordingly.

[Justice Ashok Bhushan] Chairperson [Barun Mitra] Member (Technical) New Delhi 23rd May, 2023 Basant B. Company Appeal (AT) (Insolvency) No. 772 of 2022