

National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 501 of 2021

(Arising out of Order dated 05th July, 2021 passed by National Company Law Tribunal, New Delhi, Court No. IV, in C.P. No. IB.- 1112/ND/2018).

IN THE MATTER OF:

**Somesh Choudhary,
Suspended Director at M/s. Global Fragrances
Private Limited**

At: C-138, Hari Nagar, Near Clock Tower, New
Delhi.

Also at: Plot No. 1, IMT Manesar Sector – 7,
Gurugram, Haryana.

Email – info@globalfragrances.in

...Appellant

Versus

1. Knight Riders Sports Private Limited

Backstage Plot No. 612, 15th Road Junction of
Rama Krishan Mission Road, Santacruz West,
Mumbai – 400054.

Email of Legal Representative –
vishal.gehrana@karanjawala.in

...Respondent No. 1

**2. Ms. Arti Baluja, Interim Resolution
Professional**

H No. 100, Pocket H-34,
Sector – 3, Rohini, Delhi – 110085

Email – ca.artibaluja@gmail.com

...Respondent No. 2

For Appellant: Mr. Aditya Sharma, Advocates.

**For Respondent No. 1: Mr. Vishal Gehrana, Ms. Ruby Singh Ahuja,
Mr. Lakshay Khanna and Mr. Jaiveer Shergill,
Advocates for R-1.**

**For Respondent No. 2 Ms. Arti Baluja, Advocates for R-2/IRP.
/IRP:**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Impugned Order dated 05.07.2021, passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, Court No. IV), in C.P. (IB) No.- 1112/ND/2018, the Shareholder of the 'Corporate Debtor' preferred this Appeal under Section 61 of the Insolvency

and Bankruptcy Code, 2016 (hereinafter referred to as 'The Code'). By the Impugned Order, the Adjudicating Authority has admitted Application filed under Section 9 of the code observing as follows:

*“30. We would like to draw conclusion as per the judgment **Vikas Sales Corporation vs. Commissioner of Commercial Taxes AIR 1996 SC 2082**, hence we are of the view that incorporeal rights like trademarks, copyrights, patents and rights in personam capable of transfer or transmission are included in the ambit of "goods". Further having considered the facts and circumstances and the material available on record the Adjudicating Authority is of the view that that for a claim to fall within the definition of 'operational debt', the operational creditor must establish that it has a "right to payment" "in respect of the provision of "goods or services" and also that Corporate Debtor has committed a "default" towards its "liability or obligation in respect of such outstanding claim". We would also like to place our reliance on the judgment **Broadcast Audience Research Council V. Mi Marathi Media Limited [C.P. I 688/IBC/NCLT/MB/MAH/2018]** and we hereby observe that in the present case, the MGR was a fixed payment due and payable by the Corporate Debtor to the Operational Creditor under the Agreement and the non-payment by the Corporate Debtor, for using the "**Trademark**" which is the **Licensed "Product"** of the Operational Creditor, amounted to an "operational debt" under the IBC. It has been observed that time and again the Corporate Debtor has admitted its liability be it by way of making a part payment (first and second quarter payment) or by submitting before the "admittedly the claim of the Applicant arises out of failure to pay the Minimum Guaranteed Royalties and were not paid on the condition that the Operational Creditor under the obligation to promote the brand for the Corporate Debtor" therefore, it is a clear admission of default and this Adjudicating Authority does not have to indulge in the details or the terms of the Agreement. Further in order to deal with issue in hand with respect to "pre-existence of dispute" as the alleged by the Corporate Debtor that the Operational Creditor was under the obligation to promote the brand for the Corporate Debtor, We are of the view that the Corporate Debtor did not raise any dispute in terms of Section 8(2)(a) read with Section 5(6) of the IBC, either with regard to the (a) existence of the*

*amount of debt, (b) the quality of goods or service, or (c) the breach of a representation or warranty, either directly or indirectly. Therefore, the defense of pre-existence of dispute can be categorized as a moonshine dispute as explained in the judgment of "Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited 2017 1 SCC OnLine SC 353", of the Hon'ble Supreme Court. Therefore, the Application is **admitted** and the commencement of the CIRP is ordered."*

2. Submissions of the Learned Counsel appearing on behalf of the

Appellant:

- It is submitted that Section 9 Application was filed by the first Respondent regarding non-payment of Minimum Guaranteed Royalties as compensation in lieu of Licensing Agreement entered into with the 'Corporate Debtor', whereby the 'Corporate Debtor' was granted exclusive rights and allowance to use the trademark KKR the brand market, to manufacture and distribute and also advertise the licensed products namely Deodorants, Hair Gels, and Perfumes.
- The first Respondent/'Operational Creditor' raised the invoices for an aggregate sum of Rs.40,60,147/- towards is the Minimum Guaranteed Royalties payable by the 'Corporate Debtor' under the Licensing Agreement and in lieu of which the 'Corporate Debtor' made the payment of Rs.17,69,835/- upto 15.06.2015.
- The invoices were raised towards payment of Minimum Guaranteed Royalties which were to be paid irrespective of the sales made by the 'Corporate Debtor'. It is submitted that the 'Claim' arises out of non-payment of Minimum Guaranteed Royalties, which admittedly does not arise out of non-payment of any goods or services and therefore cannot be an 'Operational Debt'.

- It is submitted that the amount claimed is not an 'Operational Debt' as there is no transaction having a correlation of direct input into the output levels or supplied by the 'Corporate Debtor'. Learned Counsel placed reliance on the decision of this Tribunal in '*M. Ravindranath Reddy*' Vs. '*Mr. G. Krishan & Ors.*' in *Company Appeal (AT) (Ins.) No. 331/2019* in support of his case that any 'debt' arising without nexus to the direct input to the output produce or supplied by the 'Corporate Debtor', cannot be considered as an 'Operational Debt'.
- Learned Counsel also placed reliance on the Judgement of this Tribunal in '*Promila Taneja*' Vs. '*Surendra Design Pvt. Ltd.*', *Company Appeal (AT) (Ins.) No.459/2020*, wherein this Tribunal has held that definition of goods and services cannot be lifted from taxation statutes unless it is specifically provided for under the Code and once again reaffirmed the decision of '*M. Ravindranath Reddy*' (*Supra*).
- It is submitted that the first Respondent has failed to show that the Appellant has used the trademark of the first Respondent for the purpose of sale, marketing etc. that their claim is with respect to non-payment of Minimum Guaranteed Royalties which is not an 'Operational Debt'.

3. Submissions of the Learned Counsel appearing on behalf of

Respondent No. 1:

- It is submitted that a License Agreement dated 03.03.2014 was entered into between the 'Corporate Debtor' and the first Respondent, which is the registered trademark owner of the trademark; Kolkata Knight Riders ('KKR').

- In terms of the Agreement, Respondent No. 1 *inter alia* granted to the Corporate Debtor, an exclusive right and license, (i) to use the Trademark of Respondent No. 1 (i.e. Kolkata Knight Riders brand logo or such other trademark as Respondent No. 1 may designate, in its sole and absolute discretion, in writing) on or in association with the Licensed Products in India being (a) Deodorants; (b) EDT and (c) Hair gels, as well as on packaging, promotional and advertising material associated therewith. (ii) to use, manufacture, distribute and advertise the Licensed Products in India bearing the Trademark of Respondent No. 1, only through the Authorized Distribution Channels but subject to the absolute approval rights of Respondent No. 1.
- The Agreement came into force on the date of execution and was to be automatically terminated on 31.12.2018, unless mutually extended. Pertinently, under the Agreement, Respondent No. 1 authorized 'Wild East Brand Private Limited' (now known as 'Invision Brand Consulting') also a party to the Agreement, to act as Respondent No. 1's licensing representative and contact for all matters pertaining to the Agreement.
- It is submitted that under the Agreement, in consideration of Respondent No. 1 granting the license and right to use its Trademark on the Licensed Products manufactured and sold by the Corporate Debtor, the Corporate Debtor was obligated to pay certain consideration in form of 'compensation' to Respondent No. 1 as stated in Clause 4 of the Agreement. Clause 4.1 of the Agreement provides for the payment of Royalties to Respondent No. 1 by the Corporate

Debtor. Also, Clause 4.2 provides for a Guaranteed Minimum Royalties to be payable quarterly as per the schedule given in the Agreement. It was also provided that the Royalties due under Clause 4.1 shall take into account the Guaranteed Minimum Royalties paid for the corresponding period as stated in Clause 4.3.1 of the Agreement. The Agreement further provides that the Corporate Debtor shall pay all Royalties to Respondent No. 1 for each calendar quarter no later than 15 days following the last day of such calendar quarter, failing which the late charge interest at 1.5% per month or the maximum rate permitted by law, whichever is less, along with any costs/attorney fee, etc., was payable on such dues as stated in Clause 4.4 and Clause 13.12 of the Agreement.

- It is further submitted that in terms of Clause 4 of the Agreement, Respondent No. 1 raised and served several Invoices upon the 'Corporate Debtor'. However, the 'Corporate Debtor' deliberately/intentionally did not make the payment of the total amount due and payable under the Agreement to Respondent No. 1. It is submitted that Respondent No. 1 has sent several reminders in this regard but the 'Corporate Debtor' did not respond.
- Learned Counsel drew our attention to the emails dated 11.06.2015, 29.09.2015 and also the reminder emails dated 21.11.2015, 10.12.2015 and 21.12.2015 sent by the first Respondent to the 'Corporate Debtor' seeking payment of the amounts. While so, on 11.06.2015, the 'Corporate Debtor' gave a post-dated cheque for a sum of Rs.5 Lakhs issued by 'Xtreme Perfumes and Personal Care Private Limited, a Company in which the Appellant is also a director.

But the first Respondent returned the said cheque as the drawer of the cheque did not have privity of contract. Despite repeated admission the 'Corporate Debtor' was defaulted in making the payments.

- Learned Counsel drew our attention to the email dated 13.06.2015, wherein the 'Corporate Debtor' has stated that the delay in payment is on account of pending commitments and that Rs.5 Lakhs was being transferred by RTGS and the balance amount would also be paid in that month. Thereafter two cheques for an amount of Rs.10 Lakhs were handed over by the 'Corporate Debtor' to the first Respondent, but subsequently the cheques were dishonored on the ground that 'payment was stopped'.
- Learned Counsel stated that in the email dated 01.10.2015, the 'Corporate Debtor' has agreed to pay the Royalties as per their commitments. Despite repeated reminders, when the amounts were not paid, a legal Notice dated 30.03.2016 was issued and also a Criminal Complaint was lodged on 05.07.2017 against the 'Corporate Debtor' and the Appellant herein.
- A Demand Notice dated 28.03.2018 with a complete annexure was served upon the 'Corporate Debtor' under Section 8 of the Code. The payment was also sent to the Corporate Debtor's email ID registered in the Company's Master Data, that there was no reply. The Adjudicating Authority has rightly observed that there was no 'Pre-Existing Dispute' between the parties and allowed the Section 9 Application.

Assessment:

4. The brief point which arises in this Appeal is whether the amounts claimed by the first Respondent falls within the definition of 'Operational Debt' as defined under section 5(21) of the Code.

5. Section 5(21) of the Code which defines 'Operational Debt' reads as follows:

“5 (21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the 1 [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;”

(Emphasis Supplied)

6. It is the main case of the Appellant that the payment of 'Minimum Guaranteed Royalties' under the Agreement does not arise out of any 'goods or services' and therefore does not fall within the ambit of 'Operational Debt' as defined under Section 5(21) of the Code. Section 2(7) of the Sale of Goods Act, 1930 reads as follows:

“2(7) goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale.”

7. Section 3(27) of the Code is being reproduced as hereunder:

“3(27) “property” includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property;”

8. Section 2(jb) of the Recovery of Debts and Bankruptcy Act, 1993 defines 'property to include intangible assets like trademark, etc'.

9. The Learned Counsel for the Respondent submitted that the Hon'ble High Court of Madras in **'Duro Flex (P) Limited' Vs. 'Duroflex Sitzings System', (2014) SCC OnLine Mad 8968**, examined the issue of jurisdiction of the Court in case of infringement of the trademark and observed that the right and interest in a trademark is a 'Movable Property'. The Hon'ble Madras High Court has considered the Judgements passed in **'Shabbir Medical Hall' Vs. 'Mohammed Naseer' (2010) SCC OnLine Mad 2196**, as well as in **'Ramu Hosieries' Vs. 'Ramu Hosieries', (1998) SCC OnLine Mad 452**, and came to the conclusion that the trademark is a 'Movable Property'.

10. The Hon'ble Apex Court in **'Vikas Sales Corporation' Vs. 'Commissioner of Sales Tax', (199) 4 SCC 433**, examined the definition of 'goods' and observed that *'even incorporeal rights like trademarks, copyrights, are 'Movable Property' and are included in the ambit of definition of 'goods' under the provisions of Sale of Goods Act, 1930'*.

11. At this juncture, we find it relevant to understand the meaning of 'Guarantee Minimum Royalty'. A guaranteed minimum annual royalty or guaranteed minimum royalty, is a payment made periodically by a licensee to a licensor pursuant to a licence regardless of sales success for a licensed product over that year. Unlike a royalty which is usually calculated as a percentage of net sales revenue, a minimum royalty is generally an agreed lump-sum payment of reasonably expected revenue from the sale of a licensed product over the agreed time period.

12. A Larger Bench of this Tribunal in *'Jaipur Trades Export Centre Private Limited' Vs. 'M/s. Metro Jet Airways Training Private Limited'* in *Company Appeal (AT) (Ins.) No.423/2021*, observed that *'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'. Section 7 'Scope of Supply' read with Entry 5 of Schedule II of Central Goods and Services Tax Act, 2017 permits the use or enjoyment of any Intellectual Property Right as a 'supply of service'. The Hon'ble Madras High Court in the case of **'AGS Entertainment Private Limited' Vs. 'Union of India', 2013 SCC OnLine Mad 1823**, examined that *'the issue whether the temporary transfer/permission to use the copyright in a cinematographic film granted by its owner to another person, amounted to the provisions of service'*. The Hon'ble High Court held that the same constituted provision of service by the owner of the copyright to the other person. In this case, the 'Corporate Debtor' was permitted to use the trademark of 'KKR' in relation to its licensed products and hence we note that there was temporary transfer/permission to use, constituting 'provision of service' rendered by the first Respondent and therefore falls within the definition of service and any amounts 'due and payable' arising out of such service is an 'Operational Debt'. Further, it is also the case of the first Respondent that they had paid 'Service Tax' to the Government Authorities on the invoices raised against the 'Corporate Debtor'. As the invoices itself contemplate payment of GST for the use of the services rendered by the first Respondent, on which GST is payable, the definition of 'service' under the Central Goods and Services Tax Act, 2017 is applicable to the facts of this case.

13. The contention of the Learned Counsel for the Appellant that the term 'Service' has not been defined expressly under the Code and therefore the definition cannot be lifted from other statutes and that this issue is squarely covered by the Judgements of this Tribunal in '*M. Ravindranath Reddy*'

(Supra) and 'Promila Taneja' (Supra), is unsustainable, keeping in view the Judgement of a Five Member, Larger Bench of this Tribunal in 'Jaipur Trades Export Centre Private Limited' Vs. 'M/s. Metro Jet Airways Training Private Limited' in Company Appeal (AT) (Ins.) No.423/2021, wherein it was observed 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 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.

40. In view of the foregoing discussion, we answer the two questions referred to the larger Bench in the following manner:

(1) Judgment of this Tribunal in **Mr. M. Ravindranath Reddy (supra)** as well as judgment in **Promila Taneja's** case does not lay down the correct law.

(2) The claim of Licensor for payment of license fee for use of Demised Premises for business purposes is an 'operational debt' within the meaning of Section 5(21) of the Code."

(Emphasis Supplied)

14. Keeping in view the ratio of the aforementioned 'Jaipur Trades Export Centre Private Limited' (*Supra*) it is clear that the claim of licensor for payment of licence fee does fall within the definition of 'Operational Debt' within the meaning of Section 5(21) of the Code. We observe that the Judgements relied upon by the Learned Counsel for the Appellant namely 'M. Ravindranath Reddy' (*Supra*) and 'Promila Taneja' (*Supra*), were held to be bad in law.

15. In the instant case, the Respondent has permitted the **(a)** use manufacture, sell, distribute and advertise the licensed products **(b)** use of intellectual property rights i.e., the trademark 'Kolkata Knight Riders'/'(KKR)' brand logo and any other trademark which as the first Respondent may designate in its sole and absolute discretion or in association with the licensed products in India as well as on packaging, promotional and advertising material associated therewith. We are of the considered view that the 'Claim' of the Respondent is in respect of the

provision of the Goods and Services for which the 'Corporate Debtor' is contractually obligated to make the payments towards such 'Claim'. The clauses of the Agreement provided for Royalties to be paid as a variable amount to the first Respondent and the minimum guaranteed amount to be paid as a fixed payment as stipulated under Clause 4.2 of the Agreement. Keeping in view the terms and conditions of the Agreement, we are of the earnest view that the first Respondent has established a 'Right to Payment' in respect of the provisions of goods and services. We hold that granting an exclusive right and license to the 'Corporate Debtor', to use manufacture, sell, distribute and advertise the licensed products and to use the trademark in association with the licensed products as well as on packaging, promotional advertising material has a direct nexus with the business operations and sales and also with the actual product supplied by the 'Corporate Debtor.' Hence, we hold that the 'Claim' in respect of such provisions of 'goods and services', under the terms of the Agreement, fall within the ambit of the definition of 'Operational Debt' as defined under Section 5(21) of the Code.

16. Now we address ourselves as to whether there was any 'default' in the payment of the 'Operational Debt' and also whether there was any 'Pre-Existing Dispute'. The emails dated 01.10.2015 together with the cheques dated 15.09.2015 on 20.10.2015 issued for amounts of Rs.10 Lakhs each clearly construed the Admission of the 'Corporate Debtor' that the amount was indeed 'due and payable'. At this juncture, we find it relevant to reproduce the emails dated 01.10.2015 which read as follows:

“As far as the royalty is concerned really we have not earned anything by last nine months still we will pay the royalty as per our commitments.”

Let's our account check what exactly the royalty amount will be after deducting TDS but to keep this brand in continue we will deposit 10 lakhs through rtgs by Tuesday next week positively.

On clearance of 10 lakhs we will discuss the matter once again with you to pay the balance and to discuss about how to way forward strategically with this brand.

Remaining amount once our account confirmed about the actual amount we will pay max by end of this month.

But from next month onwards after making all strategy we will do the needful on time.”

(Emphasis Supplied)

17. Therefore, we are of the considered opinion that there is a clear Admission on behalf of the 'Corporate Debtor' that the amounts are required to be paid and would be paid in time.

18. Now we address to the contention of the Learned Counsel for the Appellant that there was a 'Pre-Existing Dispute' between the parties and that Section 8 Notice was never served upon them with the complete set of annexures. A brief perusal of the email dated 25.04.2018, clearly shows that the annexures have also been appended. The contention of the Learned Counsel for the Appellant that in the very same email dated 25.04.2018, it is stated that the record establishes that the 'Corporate Debtor' had willfully and actively avoided service of the Notice and therefore, this statement proves that the Notice was never received by them is untenable, keeping in view that the Demand Notice was sent to the Email ID of the 'Corporate Debtor' which is the registered Email ID shown in the Master Data as stipulated by the Ministry of Corporate Affairs. Regarding the argument of the Learned Counsel for the Appellant that there was a 'Pre-Existing

Dispute' between the parties, we find it relevant to peruse the emails exchanged between the parties where nowhere did the 'Corporate Debtor' raise any dispute in terms of Section 8(2)(a) read with section 5(6) of the Code, either with regard to existence of the amount of debt or with regard to the quality of goods or services or regarding the breach of the representation or warranty either directly or indirectly. The submissions of the Learned Counsel for the Appellant that the ratio of this Tribunal in 'Jindal Steel and Power Ltd.' Vs. 'DCM International Ltd', (IB) No. ND/2017 is applicable to the facts of this case, is untenable as the issue in 'Jindal Steel & Power Ltd.' (*Supra*) was with regard to default in non-refund of Security Deposit amount given by the 'Operational Creditor' (lessee) to the 'Corporate Debtor' (lessor) and has no relevance to the facts and circumstances of the attendant case on hand.

19. For all the aforementioned reasons we do not find any illegality or infirmity in the well-reasoned Impugned Order of the Learned Adjudicating Authority and therefore, this Appeal fails and is accordingly dismissed. No order as to costs.

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

**[Ms. Shreesha Merla]
Member (Technical)**

NEW DELHI
18th August, 2022
Himanshu