

IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

CP (IB) No.181/CB/2020

In the matter of:

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

- And -

In the matter of:

Smarkworks Coworking Spaces Pvt. Ltd (Formerly known as Smart Work Business Centre Pvt Ltd). having its registered office at Unit No. 305-310, Plot No 9,10, & 11, Vardhman Trade Centre, Nehru Place, South Delhi- 110019.

...Petitioner/Operational Creditor

-Versus-

Turbot HQ India Pvt. Ltd. a Company within the meaning of the Companies Act 2013 having its registered office at Plot No. – 1010/D, Aparana Nagar, Gopabandhu Marg, PO/PS – Nuabazar, Cuttack- 753004. Orissa.

...Respondent/Corporate Debtor

Appearances (through video conferencing)

For the Petitioner(s) : Mr. Aditya Kanodia, Adv.
Mr. Indradeep Basu, Adv.

For the Respondent(s) : Mr. Sidhant Dwibedi, Adv.

Order reserved on: 21.03.2022

Order pronounced on: 08.04.2022

Coram:

Shri P. Mohan Raj : Member (Judicial)
Shri Satya Ranjan Prasad : Member (Technical)

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ORDER

Per P. Mohan Raj, Member, (Judicial)

The brief contents of the Petition are as follows: -

1. The petitioner/Operational Creditor engaged in the business of coworking and shared office space in different centers of India. The Operational Creditor entered into an agreement dated 17th August, 2018 with the Corporate Debtor in respect of service centre situated at Kolkata. As per the agreement, petitioner agreed to provide serviced office space consisting of 44 work stations at an agreed monthly fee of Rs. 3,52,000/- plus taxes. In the agreement lock-in period of 36 months clause is added. The agreement came into effect from 1ST October, 2018. During the continuance of the agreement period on 4th June 2019 the Corporate Debtor intimated to the petitioner that they intend to terminate the agreement from the first week of September, 2019. The petitioner brought to the notice of the Corporate Debtor about the lock-in-period terms of the agreement. The Corporate Debtor left the coworking centre from 01.09.2019 and ending the agreement dated 17th August, 2018. The Corporate Debtor paid payment only up to July, 2019. The Operational Creditor sent statutory notice to corporate debtor under Section 8 of the Insolvency and Bankruptcy Code, 2016. Claiming an amount of Rs. 1,28,95,402/- (One Crore Twenty-Eight Lakhs Ninety-Five Thousand Hundred two). The notice was responded by the

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Corporate Debtor by his reply dated 28th August 2020 with falls and frivolous allegation and denying payment. Hence this petition.

2. The brief contents of the Reply are as follows: -

- (i) In the agreement entered between the Operational Creditor and Corporate Debtor even, though there it is mentioned that an agreement is a “pay-as-you-use service agreement but, in facts the agreement is lease agreement as provided under Section-105 of the Transfer of Property Act,1882. It contains all the ingredients of lease agreement. The lease agreement for more than eleven months is compulsorily registerable under Section-17(1)(d) of the Registration Act, 1908. Here, the agreement is not registered as per the Registration Act, hence, the same cannot be taken into consideration in view of bar provided Under Section-49 (c) of the Registration Act 1908.
- (ii) The claim of the Petitioner for realization of the rent is not comes under definition of operational debt as provided under section 5(21) of the Insolvency and Bankruptcy Code 2016. Further lease of immovable property cannot be considered as a supply of goods or rendering of any service to attract Section 9 of the Insolvency and Bankruptcy Code, 2016. The lease agreement was executed in an unstamped Papers. It is evident from the copy of document sent to the Respondent along Section 8 statutory notice. This was pointed out in the reply dated 05.11.2020 sent by corporate debtor. After the receipt of reply the Operational Creditor attached ante dated stamp paper and filed into court as **annexure E**. The absence of signature of corporate debtor in the stamp paper established that stamp

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paper was subsequently appended with Agreement. The Petitioner purposely done it to get out of the defect of unstamped pointed-out by the respondent.

- (iii) The claims of the petitioner to recover arrears of rent is not maintainable because of the West Bengal premises Tenancy Act, 1997. The petitioner claims of rent for the locking period amounts to damages so the Petitioner is not entitled for the same unless it is adjudicated in the court of law. Apart from that the Petitioner has not fulfil his commitments, there was deficiencies in service such as failure of fire safety apparatus, parking facilities and other service deficiencies were not attended by the petitioner. Further, after the respondent vacated the premises, the petitioner leased the said premises to another firm thus petitioner has not suffered any damages.
- (iv) In this scenario, the respondent has not committed any default even otherwise there is no operational debt to attract the provisions of Insolvency and Bankruptcy Code, 2016. Hence, this petition is liable to be dismissed.

3. The points for determination are: -

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

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POINT No: - 1

4. The petitioner claims amount pertaining to the locking in period. The agreement dated 17.08.2018, was executed for three years period it came into effect from 01.10.2018 but, the Respondent vacated the premises on 01.9.2019. The petitioner here in claims amount for the remaining months from 01.09.2019 to 30.09.2021 The petitioner claims amount on the basis of breach of contract. It covers under Section 74 of the Indian Contract Act 1872. When the liquidated damages, or the amount fixed in the contract for breach of contract or for non-performance the said amount is ceiling, not the actual amount to be paid. Here, also the petitioner claims the amount on the basis of monthly fee fixed in the agreement. The Liquidated Damages will crystalize only after the adjudication by the competent Civil Court. This cannot be determined in the Insolvency Proceedings; undecided claim cannot be used to bring an application for insolvency. As per Section 5(21) of Insolvency and Bankruptcy Code, 2016. Operational debts mean debts due towards the supply of goods or service rendered. But here the petitioner claims amount because of breach of contract. Even though in the agreement fee of Rs. 3,52,000/- per month is fixed towards services; here admittedly the Respondent not availed the services of petitioner after 1.09.2019, so the amount claimed in the petition is not the amount payable towards services availed, but it is claimed by the Petitioner for breach of agreement. In such situation the amount claimed by the Petitioner not comes under the 'Operational Debt' under Insolvency and

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Bankruptcy Code, 2016. On the Respondent side relies upon Delhi High Court, DB Judgment Tower Vision India Pvt. Ltd and others-vs- Procall Private Ltd. And others. MANU/DE/4958/2012 there in Para 27 it is stated as follows: -

This is a case where the premises were given by the petitioner to the respondent on license basis vide lease and license agreement dated 18.2.2008. Lock -in period of 33 months was prescribed and the entire amount is claimed on account of premature termination of agreement by the respondent. The petitioner is claiming total amount of the lock-in period. It is nowhere stated as to how it has suffered any loss on this account and whether the liquidated damages stipulated in the agreement are genuine pre-estimate damages. Once we have accepted the judgement in Manju Bagai (supra) and we are also in agreement with the view taken by the Bombay High Court in E-City Media Private Limited (supra), the consequence of that would be to dismiss this petition as well.

5. On the respondent side stated that after the respondent vacated the premises, the petitioner let out the premises to another firm, hence petitioner has not suffered any monetary loss in this regard. Of course, this contention is denied

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by the petitioner. When petitioner claims rent for the locking in period, it is to the Civil Court to decide. Whether, the petitioner really sustains any loss or engaged another firm during the said lock in period. All this questions to be decided and determined the actual loss suffered by the petitioner. These factors cannot be decided here. In these types of cases the breach of agreement, gives right to the other party right to sue but not confer any right to receive the amount straight away. On the petitioner said relies Supreme Court Judgment Pioneer Urban Land and Infrastructure Ltd. And anr. vs Union of India. This is the case pertaining to the payment made by the Allottees of real estate projects/Home buyers, There the allottees who had paid substantial portion of the total sale consideration amount to developers there the said Paid amount is considered as financial debt. There allottees claimed refund of paid amount in that context it is held that debt is liability, whether or not such right is reduced to Judgment. But here the Respondent denies his liability to pay any amount, because he had not availed any facility from the Petitioner, and Petitioner has not suffered any loss. The Fact is distinguishable and not applicable to our case. On the Petitioner side also relies upon the Delhi High Court, citation M/s. Satya Narain Sharma Huf vs – M/s Ashwani Sarees Pvt. Ltd. C.S. No. 1439/2008 dated 06.04.2009, The case is pertaining to registered lease, here on the Petitioner side not admitted that the agreement entered between the parties is lease deed in such a situation the said citation not improved the case of the Petitioner, the another Judgment relied by the petitioner is Sanjeev Kumar -vs- Aithent Technologies Private Limited and another 2020 SCC online NCLAT 734. This is also the case pertaining to lease deed and payment of rent, there

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majority of members held that it is not a simple case where rent is due which part of rent, there also other dues of electricity, diesel, sewer and water charges and separate invoices were issued, in that context the order of Adjudicating authority has confirmed. Here the petitioner denies the lessor and lessee relationship between the parties and denies the due amount is rent, then it is not known how this citation support his case. Thus, the citations relied on the petitioner side not helpful his case. In the circumstances it is concluded that the claim made in the petition is not an operational debt comes under the ambit of Insolvency and Bankruptcy Code, 2016. Thus, this point is answered.

POINT NO: -2

6. The petitioner stated that the agreement entered between the parties is only service provided agreement it is not a lease agreement. On the respondent side stated that even though the agreement is named as service providing agreement, but the contents of the agreement shows that it is a rent agreement, because all the ingredients set out in Section 105 of the transfer of properties. Act 1882, are available. The nature of an agreement cannot be decided on the nomenclature given in the deed, but it should be decided on the contents of document. The lease deed creates certain rights to the lessee in the immovable property. Here as per the recitals of agreement no right is conveyed. On the petitioner side it is not disputed that the services provided to the respondent in the service rooms and permitted the respondent to stay in the room and carry out his works. This amounts to license as provided in Section 52 Easement Act 1882. There is no pale of controversy that the petitioner granted permission to Respondent to use

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the service rooms for a specified period. The permission granted by the petitioner to Respondent to stay and work is immovable property. The period fixed is three years. The question arises is whether such a document is compulsorily registrable. Section 17(1)(b) of Registration Act 1908 says any instrument, create, declare either in present or in future certain rights over the immovable property values more than Rs. 100/- is compulsorily registered. In our case the impugned agreement dated 17.08.2018 created certain right to the respondent, to stay in the service rooms, for consideration of more than Rs.100/- thus the agreements satisfy all the requirements of section 17(1) (b) of Registration Act 1908 in consequence the agreement is compulsorily registrable instrument. In this case the agreement is not registered hence, the same cannot be taken into consideration in view of the bar provided under Section 49 (c) of the Indian Registration Act 1908. Thus, this point is answered.

POINT NO: -3

7. On the respondent side alleged that the agreement dated 17.08.2018, was engrossed on an unstamped paper. On the petitioner side denies this contentions and stated that the document was engrossed on sufficient stamped paper. The admitted fact is when the petitioner sent statutory notice dated 18.08.2020, sent copy of the agreement without stamp paper. Now the agreement is filed along with main petition (Page 46) with Rs. 100/- non-judicial stamp paper. The explanation offered on the petitioner side is it had happened inadvertently. On the respondent side stated that the petitioner tried to set right defect, after the defect was pointed out by respondent in his reply

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notice dated 05.09.2020. The agreement is written on thirteen sheets (Page 48-60), all these sheets bears signatures and office seals of both the Parties to agreement, 1st sheet of agreement starts with title office service Agreement. The stamp paper now filed in the petition (Page 46,47) bears the signature and office seal of the petitioner alone. The missing of signature and office seal of the respondent in stamp paper create doubt and support the version of the respondent. Normally the beginning lines of the agreement used to write in the stamp paper and rest of the matters will be written on the attached full scape paper. Here no portion of the agreement is written on the stamp paper it stands alone without connecting the agreement written or typed on the stamp paper. There the names of both companies are typed as like cause title of the case typed in Judicial stamp paper while filing of the proceeding before the courts. Thus, it proves that stamp paper (page 46) was ante dated and placed before the copy of agreement and filed along with the petition. In this circumstance it is concluded that Agreement dated 17.08.2018 was engrossed on unstamped paper. When the agreement is engrossed on unstamped paper, the said instrument is not admissible in evidence for any purpose, unless stamp duty and penalty is paid as provided under Section 35 (a) of Indian Stamp Act. 1869. The unstamped instrument should be impounded under Section 33 of Indian Stamp Act, but here on the petitioner side filed only Photo Copy of the unstamped agreement, the same cannot be impounded in view of Apex Court Citation Hariom Agarwal -vs- Prakash Chand Malviya India kanoon. Org/doc/1515290/ In fine it is answered that the impugned agreement was engrossed on unstamped paper.

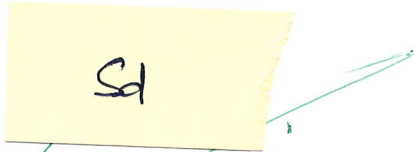
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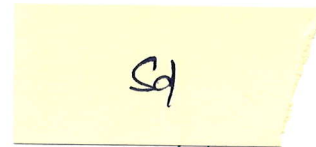
In these circumstances the unstamped and unregistered agreement cannot be considered, it has no legal value, If the impugned agreement dated 17.08.2018 is set apart from the legal proceeding, the claim of the Petitioner stand without base; in consequence the Petitioner plea is negated.

In the result Petition is **Dismissed**.

8. The registry is directed to send e-mail copies of the order forthwith to all the parties and their counsels for information and for taking necessary steps.
9. Certified Copy of this order may be issued on payment fee, if applied for, upon compliance of all requisite formalities.



Satya Ranjan Prasad
Member (Technical)



P. Mohan Raj
Member (Judicial)

Signed on this 8th day of April, 2022.

Supriya P.S.