

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH (Court-II)**

**(IB)-290/ND/2021**

**IN THE MATTER OF:**

**Futurescapes Infra**

**404-Krisil Tower,**

**Opp. Crystal Plaza, Gotri Road**

**Vadodara-390021, Gujarat**

**...Operational Creditor**

**VERSUS**

**Dtwelve Spaces Pvt. Ltd.**

**210/C-1/1, 2<sup>nd</sup> Floor**

**Amber Tower Commercial Complex**

**Azadpur, New Delhi-110033**

**... Corporate Debtor**

**Section: 9 of IBC, 2016**

**Order Delivered on: 05.08.2021**

**CORAM:**

**SH. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)**

**SH. L. N. GUPTA, HON'BLE MEMBER (T)**

**PRESENT:**

For the Petitioner : Mr. Malak Bhatt, Ms. Neeha Nagpal, Mr. Rajat Bector,  
Advocates

## **ORDER**

### **PER SHRI L. N. GUPTA, MEMBER (T)**

This petition is filed under Section 8 and 9 of Insolvency and Bankruptcy Code, 2016 (for brevity '**IBC, 2016**') read with Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s Futurescapes Infra (for brevity '**Operational Creditor**') through its authorized representative Mr. Yogesh Velani with a prayer to initiate the Corporate Insolvency process against M/s Dtwelve Spaces Pvt. Ltd. (for brevity '**Corporate Debtor**').

2. The Corporate Debtor namely, M/s Dtwelve Spaces Pvt. Ltd is a Private Company incorporated under Companies Act, 2013 with CIN No. U45309DL2017PTC313505, having its registered office at 210/ C-1/1 2<sup>ND</sup> Floor, Amber Tower, Commercial Complex, Azadpur, New Delhi-110033, which falls within the jurisdiction of this Tribunal.

3. The Authorized Share Capital of the Corporate Debtor is Rs. 10,00,000/- and Paid-up Share Capital of the Company is Rs.2,8,66,741/- as per the Master Data of the Corporate Debtor.

4. That during the initial hearing held on 01.07.2021, while going through the Application of the Operational Creditor, this Bench has observed that in the Part-IV of its Application, the Operational Creditor has claimed the following as 'Operational Debt' :

- a) **Outstanding dues pertaining to advance rent and security deposit payable** : It is stated by the Operational Creditor that the Corporate Debtor has defaulted in payment of Rs.23,28,000/- on account of the Security Deposit and Rs.1,70,00,000/- on account of Advance Rent. It is added by him that the entire Security Deposit and the Advance Rent was due to be paid by the Corporate Debtor by complete handover date i.e., 25.07.2019 of the leased property.
- b) **Outstanding dues in respect of the Rent Receivable** of Rs.57,60,000/- for the months of April 2020 to June 2021.
- c) **Outstanding dues in respect of GST Returns** : of Rs. 30,73,719.

Thus, the total amount of operational debt claimed by the Operational Creditor is to the tune of Rs.2,81,61,719/-.

5. That since a part of the Operational Debt in the present claim is arising out of the Lease Rentals, a specific query was made by this Bench from the Applicant as to how the 'lease rent' is covered under the ambit of the 'Operation Debt' as defined under Section 5(21) of IBC 2016.

6. That before looking into other aspects of the Petition, it was felt necessary to examine the said issue and accordingly, the arguments were heard on this limited point and order was reserved on the issue to determine ***“Whether the ‘lease rents’ can be claimed as Operational Debt?”***

7. That during the course of hearing, it was submitted by the Ld. Counsel appearing for the Operational Creditor that lease rentals can be claimed as 'Operational Debt' under IBC. He has also filed his written submissions and contended the following :

a) That Hon'ble NCLAT in the matter of **Anup Sushil Dubey Vs. National Agriculture Cooperative Marketing Federation of India Ltd. (NAFED), Company Appeal (AT) (Insolvency) No. 229 of 2020** held that lease rentals arising out of use and occupation of immovable property for commercial purpose is an Operational Debt.

The relevant extract of the said Judgement is reproduced below :

*22. Therefore, keeping in view, the observations made by the Hon'ble Supreme Court in Para 5.2.1 of Mobilox (Supra), and having regard to the facts of the instant case **this Tribunal is of the earnest opinion that the subject lease rentals arising out of use and occupation of a cold storage unit which is for Commercial Purpose is an 'Operational Debt' as envisaged under Section 5 (21) of the Code.** Further, in so far as the facts and attendant circumstances of the instant case on hand is concerned, the dues claimed by the First Respondent in the subject matter and issue, squarely falls within the ambit of the definition of 'Operational Debt' as defined under Section 5 (21) of the Code."*

b) Further, the Operational Creditor has placed reliance on the Judgement in the matter of **Sarla Tantia Vs Ramaanil Hotels & Resorts Pvt. Ltd., Company Appeal (AT) (Ins) No. 513 of 2018**, wherein the Hon'ble NCLAT while dealing with dues arising from the

terms of the leave and license agreement held and observed it to be an 'operational debt'.

c) Additionally, the Ld. Counsel for the Operational Creditor has placed on record the Judgement of the Calcutta Bench of NCLT passed in the matter of **Sarla Tantia vs. Nadia Health Care Ltd., CP(IB) 108/KB/2018 and CA (IB)/KB/2018**, wherein it is held that:

*“Letting out premises on rent is nothing but providing the services... Hence, **receiving any consideration by way of rent, lease from time to time or license fee for letting out the premises falls under the purview of providing services and the consideration that is receivable becomes 'Operational Debt'**. 'Arrears of rent' are in the nature of 'operational debt' within the meaning of definition of operational debt defined under Section 5(21) of the I&B Code”.*

d) Furthermore, the Ld. Counsel for the Operational Creditor has also placed emphasis on *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd., (2018) 1 SCC 353*, wherein it was held that :

*“The Report of Bankruptcy Law Reform Committee, Volume I, Rational and Designed dated November 2015 at 5.2.21 under the heading “Who can trigger the IRP” also provides that **“the lessor that the entity rents out space from is an operational creditor to whom the entity owns monthly rent on or three years lease.”**”*

8. At this juncture, we would like to refer to the Judgement of the Hon'ble NCLAT in the matter of **Mr. M. Ravindranath Reddy Vs. Mr G. Kishan & Ors. Company Appeal (AT) (Insolvency) No. 331 of 2019** dated 17.01.2020, wherein the following was held :

*“...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 deserves to be allowed.”*

9. Further, the Hon'ble NCLAT has discussed the decision of Anup Sushil Dubey v. National Agriculture Cooperative Marketing Federation of India Ltd. (NAFED) and of Mr. M. Ravindranath Reddy Vs Mr G. Kishan & Ors in its latest Judgement on the said issue passed in the matter of **Promila Taneja Vs Surendri Design Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 459 of 2020** dated 10.11.2020, wherein the following is held:

*“9. In paragraphs 20 and 21 of the Judgment, there is reference to definition of “service” under the Consumer Protection Act, 2019 and “a list of activities” which are treated as supply of goods or services under the Central Goods and Services Tax Act, 2017. Referring to the same, in Paragraph 22 of the Judgment, Hon’ble Bench concluded that keeping in view the observations made by*

*the Hon'ble Supreme Court in Para 5.2.1 of Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited (2018) 1 SCC 353 (Supra) and having regard to the facts of the case, Ld. Bench was of the view that lease rentals arising out of use and occupation of Cold Storage which was for commercial purposes was Operational Debt under Section 5 (21) of the Code.*

10. *For such reasons, the Hon'ble Bench of this Tribunal has taken a different view in Anup Shushil Dubey Vs. National Agriculture Co-operative Marketing Federation of India Limited & Ors.*

11. *We are finding difficulty to change the view we had taken in the matter of Mr. M. Ravindranath Reddy Versus Mr G. Kishan & Ors. for the following reasons.*

*In the matter of Anup Shushil Dubey Vs. National Agriculture Co-operative Marketing Federation of India Limited & Ors, it does not appear that the Learned Counsel for parties duly assisted the Hon'ble Bench. In paragraph 17 of the Judgment which we have reproduced above, the Hon'ble Bench recorded that Hon'ble Supreme Court in Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited in paragraph 5.2.1 have observed as per the portion quoted and reproduced by the Hon'ble Bench. When with the assistance of Learned Counsel for parties, we have gone through the original Judgment in the matter of Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited*

*as reported in (2018) 1 SCC 353, in Paragraph 22 of the Judgment, the Hon'ble Supreme Court was reproducing portions from the final report dated November, 15 of Insolvency Law Reforms Committee and Paragraph 5.2.1 which was part of the report of the Committee was reproduced. Such paragraph 5.2.1 of report of Insolvency Law Reforms Committee has been recorded in Paragraph 17 of the Judgment as if it is observation of the Hon'ble Supreme Court in the matter of Anup Shushil Dubey Vs. National Agriculture Co-operative Marketing Federation of India Limited & Ors. This is apparently not correct.*

*After referring to the Report, Hon'ble Supreme Court referred to the Insolvency & Bankruptcy Bill (See Para 25 of Mobilox Judgment) and its contents as well as Notes on clauses; the Joint Committee report of April, 2016 (Para 28) and examined the provisions of IBC and observed in para 32 that "In the passage of the Bills which ultimately became the Code various important changes have taken place". Hon'ble Supreme Court went on to hold that at the time of admitting Application under Section 9 of IBC all that Adjudicating Authority is to see is whether there is plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. Learned Counsel for Appellant, before us does not show anything that in Mobilox Judgment, Hon'ble Supreme Court has held Rent to be Operational Debt It appears to us that the Learned Counsel*

*for parties did not properly assist the Hon'ble Bench in the matter of Anup Shushil Dubey Vs. National Agriculture Co-operative Marketing Federation of India Limited & Ors.*

12. *Another aspect is that, Section 3 (37) of IBC reads as under:*

*“(37) words and expressions used but not defined in this Code but defined in the Indian Contract Act, 1872 (9 of 1872), the Indian Partnership Act, 1932 (9 of 1932), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993), the Limited Liability Partnership Act, 2008 (6 of 2009) and the Companies Act, 2013 (18 of 2013), shall have the meanings respectively assigned to them in those acts.”*

13. *It is clear that words and expressions used in IBC which have not been defined but which have been defined in the Acts mentioned above can be directly imported. However, the Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 do not appear to have been covered under the Section 3 (37) and thus definition of “Service” and “Activities” to be treated as supply of service cannot simply be lifted and applied in IBC. Learned Counsel for parties in Anup Shushil Dubey Vs. National Agriculture Co-operative Marketing*

*Federation of India Limited & Ors do not appear to have brought this to Notice of Bench. For such reasons, with all due respect, we find that we are unable to have a second look at the opinion we arrived at in the Judgment in the matter of “Mr. M. Ravindranath Reddy Versus Mr G. Kishan & Ors.”*

14. *Yet again, if the definition of “Financial Debt” is perused Section 5 (8) (d) includes the following as financial debt:*

*“(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 Standard or such other accounting standards as may be prescribed;”*

15. **It is clear that the legislature was conscious regarding liabilities arising from lease but although for particular types of lease, as mentioned in above subclause (d), legislature made specific provision to even make it Financial Debt, while dealing with Operational Debt, no such provision has been made.** *Thus, even on the parameters of interpretation of statutes, **we are not in a position to hold that the rents due could be treated as Operational Debt.** For reasons recorded in the matter of Mr. M. Ravindranath Reddy Versus Mr G. Kishan & Ors., we do not find fault with Impugned Order.”*

10. Hence, we find that the Hon'ble NCLAT has already dealt with this issue in detail and has held that the Lease rents are not 'operational debt' within the meaning of Section 5(21) of IBC 2016. Therefore, in the light of the judgements in the matters of Mr. M. Ravindranath Reddy Vs. Mr. G. Kishan & Ors. Company Appeal (AT) (Insolvency) No. 331 of 2019 and Promila Taneja Vs Surendri Design Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 459 of 2020, we hold that the dues of the petitioner herein on account of the lease rent, advance lease rent and security deposit relating thereto does not come under the purview of the 'Operational Debt' as defined under Section 5(21) of the IBC, 2016. Hence, this petition is not liable to be accepted.

**11. In sequel to the above, this petition is DISMISSED.**

**Sd/-  
(L. N. Gupta)  
Member (T)**

**Sd/-  
(Abni Ranjan Kumar Sinha)  
Member (J)**