

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH - V
Company Petition (IB)No. 158/ND/2020

In the matter of:

Sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016

AND

In the matter of :

Ashimara Housing Private limited

Having its registered office at:
B3/47, Safdarjung Enclave,
New Delhi-110029

.....Operational Creditor/Applicant

VERSUS

Vibrus Homes Private Limited,

Having its registered office at:
8209, Ground Floor, Roshnara Road,
Opposite Jaipur Golden
Delhi-110007

Also at:

27, Bungalow Road,
Kamla Nagar,
Delhi-110007.

.....Corporate Debtor/Respondent

ORDER DELIVERED ON: 21/12/2021

CORAM :

Sh. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)
Sh. Avinash K. Srivastava, Hon'ble Member (Technical)

For the Applicant/ Operational Creditor: Adv. Vivek Kishore, Adv. Zorawar Singh, Adv. Anamika

For the Respondent/ Corporate Debtor: Adv. Saurabh Sachdeva



ORDER

AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER, JUDICIAL

The present petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 by the Applicant/ operational creditor, i.e. "**Ashimara Housing Private Limited**" for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor Company "**Vibrus Homes Private Limited**".

2. Brief Facts of the case are as follows:

- i. That the Ashimara Housing Private Limited (hereinafter referred to as "Operational Creditor" or "Ashimara") is engaged in the business of providing accommodation to students in the form of modern hostels.
- ii. That the Ashimara's Director, Mr. Karen Kaushish entered into discussions with one, Mr. Jatinder Pal Singh for running a long stay residential accommodation at property being Property No. 19/4, Shakti Nagar, New Delhi -110007.
- iii. That during the discussions, Mr. Jatinder Pal Singh represented himself as the Director and major stakeholder of two companies viz., the Corporate debtor and Juvello Homes Private limited. Mr. JP Singh also represented that the Shakti Nagar property is jointly owned by the Corporate Debtor and Juvello.
- iv. That based on their negotiations, the following terms were agreed vide email dated 29.04.2019 exchanged between Mr. Karan Kaushish and Mr. JP Singh:



- I. That the monthly license fee of 136 beds to be set up at the property would be INR 15,98,000/- ((e)INR 11,750/- per bed);
 - II. That the license fee would start with effect from 15.07.2019 i.e., the date when the Corporate Debtor would have the Shakti Nagar Property handed over to Ashimara in a functional condition;
 - III. That the Security Deposit would be 4 month's license fee that would be payable on 01.07.2019;
 - IV. That the sample room would be handed over by 07.07.2019;
 - V. That first draft of the agreement would be shared by 03.05.2019;
 - VI. That a token amount of INR 2,51,000/- to be paid;
 - VII. That Brokerage amount of INR 10,00,000/- to be paid to Mr. Prafful Garg. This would be split equally between Ashimara and both the companies of Mr. JP Singh i.e., the Corporate Debtor and Juvello;
 - VIII. That all White goods i.e., all Air Conditioners and Geysers, furniture and security apparatus like CCTV etc. would be provided by the owner of the Shakti Nagar Property i.e., Corporate Debtor and Juvello.
- v. That since the Corporate Debtor and Juvello jointly own the Shakti Nagar Property, it was agreed that 2 separate Operations & Management Agreements would be executed by both these companies with Ashimara for providing operations



and management services for 46 and 90 long-stay residents, respectively.

- vi. Further, Mr. JP Singh through the broker, Mr. Prafful Garg had shared the draft of Operations and Management Agreement for the Shakti Nagar Property with Ashimara vide email dated 14.05.2019.
- vii. That the Ashimara through its Director, Mr. Karan Kaushish executed 2 copies of the aforesaid Agreements on 2 stamp papers of INR 100/- each. Thereafter, the originals of both the Operations 85 Management Agreements were sent to Corporate Debtor's office for execution.
- viii. That simultaneously, the Corporate Debtor through Mr. JP Singh requested Ashimara to make payments of INR 32,43,000/- and INR 63,45,000/-, respectively as interest free deposit towards advance license fee for providing operations and management services for 46 and 90 long-stay residents, respectively at the Shakti Nagar Property.
- ix. That the Ashimara issued and handed over 2 cheques (of which one was a post-dated cheque) to Mr. JP Singh towards the advance, one in the name of the Corporate Debtor and other in the name of Juvello.
- x. That the particulars of these cheques are as follows:
 - a. Cheque no. 001431 dated 27.05.2019 in favor of Corporate Debtor for a sum of INR 32,43,000/-; and
 - b. Cheque no. 001428 dated 01.07.2019 in favour of Juvello for a sum of INR 63,45,000/-.



- xi. That the Corporate Debtor immediately deposited the cheque no. 001431 dated 27.05.2019 for a sum of INR 32,43,000/-. As per the account statement of Ashimara, the said cheque was cleared on 28.05.2019.
- xii. That the Applicant submitted that the acceptance of this payment by Corporate debtor confirms its acceptance of the terms of the Operations and Management Agreement dated 15.05.2019.
- xiii. That the despite accepting the aforesaid payment, the Corporate Debtor as well as Juvello delayed the execution of the originals of the Operations and Management Agreement sent by Ashimara.
- xiv. That since there was an unreasonable delay on part of the Corporate Debtor and Juvello in handover, Ashimara being suspicious of the transaction requested its Bank to stop payment of the cheque no. 001428 dated 01.07.2019 for a sum of INR 63,45,000/- issued in favour of Juvello.
- xv. That subsequently on 14 .07.2019, Ashimara informed the Corporate Debtor of its withdrawal from the project and requested the Corporate Debtor to return the payment of INR 32,43,000/- received by it towards advance license fee.
- xvi. Despite many follow-ups, Corporate Debtor defaulted in returning the amount of INR 32,43,000/- owed to Ashimara.
- xvii. That despite defaulting in paying Ashimara the outstanding amount, the CD has on 16.09.2019 presented the other



cheque no. 001428 dated 01.07.2019 for a sum of INR 63,45,000/- issued in favour of Juvello.

xviii. It is further submitted that due to standing instructions of stop payment, the payment was not made against this cheque.

xix. That on 29.11.2019, the Operational Creditor had issued a Demand Notice under S. 8 of the IBC to the Corporate Debtor. The same was also issued to the registered email address of the Corporate Debtor on 05.12.2019. The email was received by the Corporate Debtor and the email did not bounce back. The same was also issued by Speed Post and Courier to the registered address of the Corporate Debtor. However, the notice issued via speed post and Courier were returned with a noting that the corporate debtor does not exist at the said address of the Corporate Debtor.

3. The amount claimed to be default is of Rs. 32,43,000/- being the principal amount outstanding along with 18% p.a. interest from 01.08.2019 till the date on the principal amount is Rs. 1,94,580/-. The total amount due is Rs. 34,37,580/-.

4. The Corporate debtor on notice appeared and made following averments in its reply dated 12.10.2019:

- i. That the present petition is not maintainable as there exists a dispute prior to sending of a demand notice by the applicant to the respondent as respondent is a director in another company namely, M/s Juvello Homes Private Limited ('Juvello') and the present dispute arises out of the agreements executed between the applicant and the respondent and another with the M/s Juvello Homes Pvt. Ltd. That when M/s Juvello Homes



Pvt. Ltd. had issued a legal notice under Section 138 N.I. Act, the applicant sent the Demand notice to the respondent, which is afterthought and result of the action taken by M/s Juvello Homes Pvt. Ltd.

- ii. Further, whenever there is an existence of real dispute, IBC provisions cannot be invoked as has held in "*Mobilox Innovations Private Limited vs. Kirusa Software Private Limited*" (2018) 1 SCC 353 and same view was taken by Hon'ble Supreme Court in, "*Transmission Corporation of Andhra Pradesh Limited Vs. Equipment Conductors and Cables Limited*" in Civil Appeal No. 9597 Of 2018.
- iii. That the agreements which have been annexed with the present petition are not properly signed by both the parties and there is not even whisper of witnesses on those agreements.
- iv. That the claim of the applicant is not an operational debt and does not cover under the definition of the operational debt as defined under section 5 (21) of the IBC, 2016.
- v. That the petition by an operational creditor under IBC can only be filed, on the basis of invoice, which; in present case is not available, as there are neither such invoices nor agreement qua sale or purchase is involved.
- vi. That the agreement executed between the parties contains a valid arbitration clause.
- vii. That the cheque no. 001428 dated 01.07.2019 for a sum of INR 63,45,000/- given by the applicant to M/S Juvello Homes Pvt. Ltd. was dishonoured as it is the apprehension of the respondent that the applicant was not having sufficient funds



in its bank account and thus, they directed their banker to stop payment against the said cheque and back tracked from the agreement, so that they may illustrate that it was entirely the default on the part of the respondent and M/s Juvello Homes Pvt. Ltd.

- viii. That as per the agreement, the property bearing no.19/4, Shakti Nagar, Delhi- 110007, was handed over to the applicant, however, the applicant showed its inability to continue its business with the respondent and demanded a refund. However, as per the agreement the lock-in period was of three years, and the security amount was to be retained for that three years. That due to the matafide acts and conducts of the applicant, the respondent has suffered pecuniary loss as well as this also has affected the goodwill and reputation of the respondent, which cannot be determined in terms of money.
- ix. That in terms of the agreement, the applicant is liable to indemnify the respondent from the losses incurred by the respondent.
- x. That the email dated 29.04.2019 contains merely terms proposed for the agreement, which was yet to be finalised, executed and signed by the parties and the amount of Rs. 2,51,000/- was never paid by the applicant to the respondent.
- xi. That the applicant vide email dated 17.05.2019 sent the draft agreements only, which were never signed by the applicant and respondent.



- xii. That the company M/s Juvello Homes Pvt. Ltd. has already initiated appropriate proceedings under the Negotiable Instruments Act, 1881 against the applicant.
- xiii. That the reply to the Demand notice dated 26.12.2019 was sent through Speed post as well as through E-mail which was received by the applicant
- xiv. That Mr. Prafful Garg accepted a commission of Rs.2,37,000/- from the respondent, however, the applicant did not pay any amount regarding the commission being Mr. Prafful Garg employee of the Applicant and this is one of the issues involved that become part of dispute apart from the other. Mr. Prafful Garg also worked as a student broker who used to fill accommodations in the property of the applicant. Pertinently, the applicant took another building bearing no. 39, Bungalow Road, Kamla Nagar with a capacity of 180 students from some other company/individual and since they were dependant on Mr. Prafful and his Sister to fill the accommodations at Bungalow Road as well as Shakti Nagar, which they could not fill and only able to fill 100 seats, out of total 180, and rest of the beds remain vacant, seeing this, the applicant left the Shakti Nagar Property Midway and stopped payment of the cheque issued to M/s Juvello Homes Pvt. Ltd. resultant causing losses to the respondent as well as M/s Juvello Homes Pvt. Ltd. as the accommodation is still mostly vacant and the applicant is unable to stand on its promise as represented by the applicant.

5. The Applicant in its rejoinder dated 26.02.2020 submitted that:

- i. That Juvello Homes Private Limited is a third party and not the corporate debtor.



- ii. That the Applicant had never received the said 138 N.I. Act notice. The Corporate debtor has not annexed a single proof of delivery of notice under section 138 Negotiable Instrument Act. The Corporate debtor furnished false information regarding issuance of 138 notice and liable to be punished under section 77 of the IBC.
- iii. The Corporate Debtor himself admitted to the existence/execution of the Operation and Management Agreement in his own document issued on behalf of Juvello Homes private Limited i.e. the alleged 138 N.I. Act's notice. The Corporate Debtor has further relied upon the Operation and Management Agreement in paragraph E, F etc of the reply of the corporate debtor, wherein he has sought invocation of the Arbitration Clause mentioned therein.
- iv. The statutory period of 10 days as mentioned in Section 8(2) of the IBC had expired on 11.12.2019, considering the service attempted on the registered address of the Corporate Debtor. Even otherwise if the date of service is considered as 05.12.2019, being the date of email, the limitation to file reply/notice of dispute on behalf of the Corporate Debtor would have expired on 15.12.2019.
- v. Since the Operational Creditor did not receive any reply / notice of dispute to its demand notice dated 29.11.2019, within the statutory limitation period, therefore, an application for initiating Corporate Insolvency against the Corporate Debtor was filed on 27.12.2019. An advance copy of the said application was also despatched on 27.12.2019 and attempted to be delivered on 28.12.2019 however, the same could not be



delivered as even though the address was correct, the post returned with a noting that no such person existed on the said address.

- vi. That post the Filing Date of the application under Section 9 of the IBC, the Applicant had received a reply on behalf of the Corporate Debtor on 03.01.2020, to the Demand Notice of the Applicant dated 29.11.2019. Though, the said reply on behalf of the Corporate Debtor is pre dated as 26.12.2019 the same was only dispatched on 02.01.2020, as is evident from the postal receipts as well the tracking reports, which is after the advance copy of the Insolvency Application was served/attempted to be served on the Corporate Debtor, as is clear from perusal of Annexure M (Colly) of the application to initiate insolvency against the Corporate Debtor, filed on behalf of the Operational Creditor.
- vii. That the insolvency petition under section 9 IBC can also be initiated on the basis of Agreement.
- viii. That the cheque no. 001428 for an amount of Rs. 63,45,000/- was not dishonoured. There was a specific instruction for 'stop payment' of the same as there was a violation of the Operation and Management Agreement on behalf of the corporate Debtor and Juvello Homes Private Limited. On the relevant date, the Operational Creditor had sufficient balance in his bank account to clear the cheque in question. An email sent to the Corporate Debtor by the Operational Creditor on 31.07.2019, enumerates the list of defaults on behalf of the Operational Creditor leading to the termination of the Operation and Management Agreement and also instructions for stop



payment of the cheque in question on behalf of the Operational Creditor.

- ix. The operational creditor had signed the agreement and had sent the signed copies to the office of the corporate debtor for his signatures and is unaware whether the corporate debtor signed the same or not.

6. The Applicant in its written submissions dated 27.07.2021 submitted that:

- i. That the reply to demand notice has not received by the operational creditor in stipulated Limitation period.
- ii. That the Contention of the corporate debtor regarding pre-existing dispute is false.
- iii. That the execution of Operation and Management Agreement has been accepted and admitted by the Corporate debtor in their own documents.
- iv. That the claim amount which is the subject matter of the present petition is an Operational debt.
- v. That advance payment for goods and services is an operational debt. The Applicant has referred the Judgement of Hon'ble NCLAT in the matter of *Joseph Jayananda v. Navalnar (UK) Limited (2021 SCC Online NCLAT 116)*.
- vi. That License Agreement is construed as an Operational Debt. The Applicant has referred the Judgement of Hon'ble NCLAT in the matter of *Anup Sushil Dubey v. National Agriculture Co-operative Marketing Federation of India Ltd. and Another^o*.
- vii. That the operational Creditor has suffered loss due to delay in handling possession.
- viii. That it is an admitted fact that the agreement was signed by the Operational Creditor and was further sent for execution to the Corporate Debtor. In addition to this, it is pertinent to mention here that, the parties to the agreement are in

Consensus ad idem, which means there is mutual assent and comprehension between the Operational Creditor and the Corporate Debtor. The main concern in the instant case is to establish execution of the agreement which is evident from the email conversation as well as through list of reasoning as mentioned herein above (refer para 5-8 of this written submission). The parties have acted in furtherance to the agreement. Thus, mere non- registration of the agreement in the instant case does not leave the Corporate Debtor free from guilt in the instant case.

7. On 06.07.2021, this Hon'ble Tribunal directed the Operational Creditor to answer on the point "*whether the claim of the applicant comes within the definition of the Operational Debt*" and vide order dated 13.09.2021 directed the Operational creditor to file an affidavit in this regard.

8. The Operational creditor vide affidavit dated 20.09.2021 submitted that:

- i. There is a binding contract between the parties as the parties performed their part of the Agreement i.e. the Operational Creditor gave a Cheque of Rs.32,43,000/- which was encashed by Corporate Debtor in terms of the Agreement. Hence, there is an agreement by performance of the Agreement and acceptance of Cheque of Rs.32,43,000/- by the Corporate Debtor, such contract is in terms of Section 8 of the Indian Contract Act, 1872.
- ii. The amount of Rs.32,43,000/- was paid to the Corporate Debtor in terms of Clause 5 of the Operator & Management Agreement dated 15.05.2019, for running long stay accommodation business at the Corporate Debtor's premises with the intention to earn profit for both the Operational Creditor and the Corporate Debtor. The security amount is nothing more than a performance guarantee. As per Section 5(21) the Operational Debt is a Claim towards Goods or



Services. The Agreement clearly states that the Operational Creditor had to provide services viz Operational Management services, hence, the claim is an Operational Debt.

9. The Corporate debtor in its written submissions dated 14.07.2021 submitted that:

- i. There is pre-existing of dispute between the applicant and the respondent and there are triable issues which cannot be decided in summary procedure and the agreement based on which the present petition has been filed cannot be enforced being not signed by both the parties and in absence of any witnesses, which makes the entire agreement as null and void.
- ii. The amount subject matter of present petition is not operational debt and the applicant is not an operational creditor. The respondent has referred the Judgement of Hon'ble Supreme Court in the matter of "*Swis Ribons Ltd. v. UOP*" and Hon'ble NCLT in the matter of "*Jindal Steel & Power Ltd. v. DCM International Ltd.*"
- iii. The alleged agreement upon which the applicants are relying mandatorily needs to be registered with the sub-registrar concerned.
- iv. The respondent has replied to the statutory notice under IBC sent by the Applicant to the Respondent thereby raising and showing that there exist dispute between the parties.
- v. Form 5 filed by the Operational Creditor is not in acceptance with section 9 IBC read with Rule 6 of IBC (Application to Adjudicating Authority) Rules, 2016.
- vi. The respondent has referred the judgment of Hon'ble NCLAT in the matter of "*M/S Kuntal Construction Pvt. Ltd. v. M/s Bharat Hotels Ltd.*" [CA(AT) (Insolvency) No. 542 of 2020] decided on 04.09.2020.



- vii. The respondent has also referred the judgment of Hon'ble NCLT, Mumbai bench in the matter of "*M/s Citicare Super Speciality Hospital v. Vighnahartha Health Visionaries Pvt. Ltd.*" [CP No. 567/IB/2018] decided on 11.03.2019.

10. We have heard the Learned Counsel appearing for the Applicant as well as the Respondent and perused the averments made in the application, reply, rejoinder and the written submission filed by the respective parties.

11. The Learned Counsel appearing for the Petitioner raised all the facts mentioned in the Petition, Rejoinder as well as the written submission, similarly, the Learned Counsel appearing for the Respondent raised all the facts mentioned in the reply and the written submission, therefore, it is needless to repeat the contention of the parties.

12. On perusal of the averments made in the Petition, Reply, Rejoinder and Written Submissions filed on behalf of the parties, we notice that it is an admitted fact that Rs. 32,43,000/- was paid as an advance to the Corporate Debtor by the Operational Creditor. This deposit is towards the advance licence fee. It is also an admitted fact that by filing this application, the Petitioner has claimed that since the amount was not refunded, therefore, there is a default in payment of the amount, which comes under the definition of the Operational Debt.

13. Whereas the contention of the Corporate Debtor is that the amount deposited by the Petitioner do not come under the definition of Operational Debt, hence the present application is not maintainable. The other ground taken by the respondent is that there is a pre-existing dispute between the parties and the Respondent has raised the dispute in its reply to the demand notice sent on 26th December, 2019. It is further claimed by the Respondent that vide order dated 14.10.2019, the Respondent has served a legal notice under Section 138 of the N.I. Act and so, there is a pre-existing dispute. We further notice that apart from that, the Respondent has also claimed that there is no valid agreement, as it was neither signed nor registered under Section 17 of the Registration Act.



14. On the contrary, the claimed of the applicant is that the advance payment made towards the license fee is come under the definition of the Operational Debt and on this point the Applicant has placed reliance upon the decision of Hon'ble NCLAT in the matter of **"Anup Sushil Dubey v. National Agriculture Co-operative Marketing Federation of India Ltd. And Another"** (COMPANY APPEAL (AT) (Insolvency) No. 229 of 2020) **(2020 SSC Online NCLAT 674) decided on 07th October, 2020** referred to Supra and he has also placed reliance upon the decision of Hon'ble NCLAT in the matter of **"Joseph Jayananda v. Navalmar (UK) Limited (2021 SCC Online NCLAT 116)** on the point of advanced payment.

15. Therefore, in the light of aforesaid background, we consider the prayer of the applicant. Since the Corporate Debtor has raised the point of maintainability of the application on the ground that the deposit of advance money and the license fee do not come under the definition of Operational Debt, therefore, we will examine this aspect first.

16. At this juncture, we would like to refer to the decision of the Hon'ble NCLAT in the matter of **"Joseph Jayananda v. Navalmar (UK) Limited (2021 SCC Online NCLAT 116)** on the point of advance payment upon which the applicant has placed reliance. The relevant portion of the decision is reproduced below: -

"1. 4 In the instant case, the monies advanced by the R-1 to the Corporate Debtor were advance payment for work to be done in the future. Admittedly, the work was to be done in terms of the General Agency Agreement between the parties. The Corporate Debtor referred to these amounts as advanced payment in its audited accounts and the objection filed by it before the NCLT. It even claimed that the said amount was "adjusted towards various cost and expenses incurred by the Corporate Debtor Company in the course of business, without raising any doubt about the nature of the Debt. Hence the



amounts referred to as above cannot be treated as anything but Operational Debt under the Code. Further, in case of Pioneer (supra) Hon'ble Supreme Court has clearly held that in Operational Debt there is no consideration for the time value of money. The consideration of the Debt is the goods or services that are either sold or availed of from the Operational Creditor. Payments made in advance for goods and services are not made to fund the manufacture of such goods or the provision of such services. The advance payment being made for turnkey projects and capital goods, where customization and uniqueness of such goods are important by reason of which advance payments are made. The liability or obligation in respect of a claim which is due from any person is defined as Debt under Section 3 (11) of the Code. It provides that the Debt includes Financial Debt and Operational Debt. Further, the term 'Financial Creditor' and 'Financial Debt' is defined under Section 5 (7) & 5(8) of the Code. Section 5 (20) defines the term 'Operational Creditor' as a person to whom an Operational Debt is owed and includes any person who has been legally assigned or transferred. Section 5 (21) defines 'Operational Debt' as a claim in respect of the provision of goods or services including employment or a debt in respect of 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.

1.5 ... Since the Corporate Debtor was an agent and service provider of the Operational Creditor, the amounts due



under the transactions would fall within the ambit of Operational Debt as defined under Section 5 (21) of the Insolvency and Bankruptcy Code 2016.”

17. At this juncture, we would also like to refer the decision of Hon’ble NCLAT in the matter of **Anup Sushil Dubey Vs. National Agriculture Co-operative Marketing Federation of India Ltd. (COMPANY APPEAL (AT) (Insolvency) No. 229 of 2020) (2020 SSC Online NCLAT 674)**. The relevant portion of the decision is reproduced below; -

“15. In *Sarla Tantia V/s. Ramaanil Hotels & Resorts Pvt Ltd.*, this Tribunal while dealing with dues arising from the terms of the Leave and Licence Agreement held and observed it to be an ‘Operational Debt’. This Tribunal in *Citycare Super Specialty Hospital V/s. Vighnaharta Health Visionaries Pvt. Ltd.* has also observed that there is an admission of rent of certain periods to be due and payable which are reflected in the Books of Accounts, but subsequently, dismissed the ‘Appeal’ on the ground of ‘Pre-Existing Dispute’.

16. The law has not gone into defining goods or services – hence, one has to rely on general usage of the terms so used in the law, with due regard to the context in which the same has been used. Simultaneously, it is also relevant to understand the intention of -11- Company Appeal (AT) (Insolvency) No. 229 of 2020 the lawmakers. The Bankruptcy Law Reforms Committee (BLRC), in its report dated November 2015, indicates “the lessor, that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease”. Hence, the BLRC recommends the treatment of lessors/landlords as Operational Creditors. However, in the definition adopted by the Legislature only claims relating to ‘Goods and Services’ were included within the definition and purview of ‘Operational Debt’.

17. The Hon’ble Supreme Court in *Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited* (2018) 1 SCC 353 in Para 5.2.1 observed as hereunder;

“5.2.1 Who can trigger IRP? Here, the code differentiates between financial creditors and operational creditors. Financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or a debt security. Operational creditors are those whose



liability from the entity comes from a transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by the car mechanic and who gets paid only after the spark plugs are sold is an operational creditor. Similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease. The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt"

(Emphasis

Supplied)

18. The Learned Counsel contended that 'Lease Rentals' are not a 'Service' and do not fall within Regulation 32 (Insolvency Resolution Process for Corporate persons, Regulation 2016) read -12- Company Appeal (AT) (Insolvency) No. 229 of 2020 with Section 14 (2) which defines essential goods or services as follows;

- (1) Electricity
- (2) Water
- (3) Telecommunication Services
- (4) Information Technology Services

To the extent, these are not direct input to the output produced or supplied by the Corporate Debtor.

19. The contention of the Learned Counsel for the Appellant that Regulation 32 read with Section 14 (2) is applicable to the facts of this case and that cold storage facilities cannot be construed as 'essential service' and, therefore, does not fall within the meaning of 'Operational Debt' as defined under Section 5 (21), is untenable, having regard to the fact that Regulation 32 read with Section 14 (2) only mentions essential goods and services whose supply cannot be terminated during the course of CIRP. The Code does not anywhere specify that the goods so mentioned under Regulation 32 are the same as those which fall within the ambit of the definition of Section 5 (21). Annexure 1D of the Leave and Licence Agreement stipulates that the cold storage with the machinery and equipment has been designed for storage of all agricultural commodities. The Lessee being in need of a cold storage

participated in the tender floated by the Lessor and sought for grant for the use and occupation of the cold storage unit. It is apparent from the material on record and the terms and conditions of the Leave and Licence Agreement -13- Company Appeal (AT) (Insolvency) No. 229 of 2020 that the Appellants have leased out the premises for 'Commercial Purpose', which comes within the meaning of 'Service' for the purpose of sub-Section (21) of Section 5 of the I&B Code, 2016.

20. At this juncture, we find it relevant to refer to the definition of 'Service' as defined under Section 2 (42) of the Consumer Protection Act 2019;

"(42) "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"

21. The provisions of the Central Goods and Services Tax Act 2017. Schedule - II of the Act lists down the activities that are to be treated as supply of goods or services, and paragraph 2 of the Schedule stipulates as follows;

(a) any lease, tenancy, easement, licence to occupy land is a supply of services;

(b) any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services."

As the premises in the case on hand is leased out for 'Commercial Purpose', the cold storage owner/NAFED on collection is

required to pay 'service tax' which is reflected in the tax invoices and 'Ledger Accounts' which is part of the record filed.

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".

18. In the light of the decision referred to Supra, when we consider the submissions of the Corporate Debtor then we are of the considered view that the decision upon which the Corporate Debtor has placed reliance are not applicable in the case in hand, rather the decision upon which the applicant has placed reliance referred to Supra are applicable in the case in hand and in the basis of that we hold that the amount of Rs. 32,43,000/- deposited by the Petitioner towards the advance license fee for providing operational and management services comes under the definition of operational debt and the applicant is Operational Creditor.

19. Now coming to the merit of the application as we observe that it is admitted by the respondent that the said amount has been received by the respondent and it has not been paid as yet. The contention of the Respondent is that there is pre-existing dispute which the respondent has raised by issuance of the legal notice under Section 138 N.I. Act. In our considered view, the issuance of the N.I.A legal notice under N.I. Act, cannot be treated as dispute. Therefore, we find, no force in the contention raised on behalf of the Respondent that there is a pre-existing dispute. We further notice that the application filed by the applicant under Section 9 is complete, demand notice was duly delivered and the amount claimed in Part-IV has not been paid as yet.



20. In order to admit an application under Section 9, the Adjudicating Authority is required to consider the conditions referred to in **Section 9 (5) (i) & (ii)** and the relevant provision of Section 9 (5) is reproduced below:

Section 9: Application for initiation of corporate insolvency resolution process by operational creditor

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no 3[payment] of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending⁴ against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been 3[payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility;

or

(e) any disciplinary proceeding is pending⁴ against any proposed resolution professional;



Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

21. When we consider the prayer of the applicant in terms of Section 9 (5)(i), then it is seen that the application filed by the applicant is complete, there is no payment of unpaid operational debt or the invoices, notice for payment to the Corporate Debtor has been duly delivered by the Operational Creditor and no notice of dispute has been received by the Operational Creditor or there is no record of dispute. So far the 5th condition is concerned; the applicant has not proposed the name of the IRP rather he has prayed for appointment the Insolvency Professional. Therefore, we are of the considered view the applicant has fulfilled all the criteria as required under Section 9 (5) (i) of the IBC. Hence, we have no option but to admit the application.

22. Accordingly, we hereby ADMIT the petition. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;*
- (b) transferring, encumbering, alienating or disposing of by the corporate debt or any of its assets or any legal right or beneficial interest therein;*
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*



(d) *the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

Further:

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator. (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."


23. The Operational Creditor has not proposed the name of any IRP. Accordingly, we appoint **Mr. Vivek Kumar**, an Insolvency Professional, Registration No. **IBBI/IPA-002/IP-N00008/2016-17/10008** email id: **vee_singh@yahoo.com** duly empaneled with the IBBI as the IRP. He is directed to take such steps as are mandated under the Code, more specifically under Sections 15, 17, 18, 20 and 21 and shall file his report before the Adjudicating Authority.

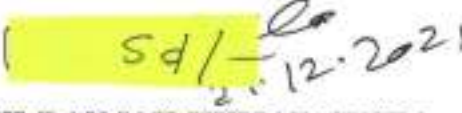
24. The Operational Creditor is directed to deposit a sum of Rs. Two lakhs to meet the immediate expenses of IRP. The same shall be fully accountable by the



IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.

25. Copies of the order be sent to both the parties as well as to the IRP.


AVINASH K. SRIVASTAVA
Member (Technical)


ABNI RANJAN KUMAR SINHA
Member(Judicial)