NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 459 of 2020

IN THE MATTER OF:

Promila Taneja
W/o Shri Rajesh Taneja,
R/o House No. 245, Sector 4,
Urban Estate, Gurugram-122001 (Haryana) ...Appellant.

Versus

Surendri Design Pvt. Ltd.
Through its Director Shri Yogesh Chaudhary
Having its Registered Office at
House No. 103, All Girls PG, Near Purana Kuwan,
Village Sukhrali, Gurugram, Haryana-122001 (Haryana)
Also at Shop No. 101, the Galaxy, Silokhera,
NH-8, Sector – 15, Part-II
Tehsil & District Gurugram, Haryana ...Respondent.

Present:

For Appellant: **Mr. Hitesh Sachar and Ms. Srishti Badhwar, Advocates.**
For Respondent: **Mr. Akshat Goel, Advocate.**

Oral Judgment
(A.I.S. Cheema, J.)

10.11.2020 Heard Learned Counsel for the parties.

2. Learned Counsel for the Appellant is submitting that the Appellant is landlord who had filed the Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (In short IBC) in C.P. (IB) No. 394/Chd/Hry/2018 before the Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh). The Application filed under Section 9 of IBC came to be dismissed by the Adjudicating Authority relying on Judgment of this Tribunal in the matter

of "*Mr. M. Ravindranath Reddy Versus Mr G. Kishan & Ors.*" in *Company Appeal (AT) (Insolvency) No. 331 of 2019* dated 17th January, 2020 and held that dues in the nature of rent of immovable property do not fall under the head of Operational Debt as defined under Section 5 (21) of IBC. The Adjudicating Authority further held that there was pre-existing dispute. The Corporate Debtor claimed before the Adjudicating Authority that lease agreement was terminated in July, 2017 due to change of circumstances.

3. Learned Counsel for Appellant submits that the finding of the Adjudicating Authority that there was pre-existing dispute, is baseless. The Learned Counsel referred to the email relied on by the Corporate Debtor, copy of which is filed (Annexure A-1 with Diary No. 22971 filed by the Respondent). The Learned Counsel has taken us through the email to submit that the email only shows that the Corporate Debtor claimed that after taking the shop premises in Galaxy Mall on rent from the Appellant it had put in huge investment but suffered losses due to demonetization and as the entry to the mall was changed due to Judgment of Hon'ble Supreme Court. It is argued that the Corporate Debtor claimed that the Corporate Debtor was running Apparels Showroom from the shop premises which was at strategic spot but due to a liquor shop nearby and Judgment of Hon'ble Supreme Court that sale of Liquor should not be in proximity of National Highway there was change of entry of the mall which affected the business and so the Corporate Debtor informed the Appellant that it was facing losses and wanted to vacate although the agreement had lock in of 36 months from 01st February, 2016. The Corporate Debtor unilaterally stopped making payments of

rent. Thus, the Learned Counsel stated that it cannot be treated as pre-exiting dispute.

4. Regarding the other aspect whether rent is Operational Debt, the Learned Counsel for the Appellant submits that after the Judgment passed by this Tribunal in the matter of "*Mr. M. Ravindranath Reddy Versus Mr G. Kishan & Ors.*", another Bench of this Tribunal has in Judgment in the matter of *"Anup Shushil Dubey Vs. National Agriculture Co-operative Marketing Federation of India Limited & Ors." (Company Appeal (AT) (Insolvency) No. 229 of 2020 dated 07.10.2020* held that when the space provided is for commercial purposes, the arrangement has to be treated as services considering the definitions as seen in the Consumer Protection Act and the Central Goods and Services Tax Act, 2017 and the Bench of this Tribunal has also referred to portion of Judgment of Hon'ble Supreme Court in *Mobilox Innovations Pvt. Ltd Vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353.* The Learned Counsel has then submitted that on parity, the present appellant should also get relief considering the other view taken by Bench of this Tribunal subsequent to the Judgment in the matter of "*Mr. M. Ravindranath Reddy Versus Mr G. Kishan & Ors.*"

5. The Learned Counsel for the Respondent is opposing the submissions made by the Learned Counsel for the Appellant and is pointing out the trail email dated 12th September, 2017 which was sent after the email dated 18th August, 2017 (Annexure A1 Diary No. 22971) where the Appellant was informed that the lease deed has already been terminated due to change of circumstances. The Learned Counsel submits that the Section 8 Notice was sent on 06th August,

2018 and even if it was to be said that the rent was Operational Debt, it shows that there was pre-existing dispute.

6. Question raised again is whether arrears of rent could be said to be Operational Debt. This issue was dealt with by a three-member Bench of this Tribunal in *Company Appeal (AT) (Insolvency) No. 331 of 2019* (*Mr. M. Ravindranath Reddy Versus Mr G. Kishan & Ors.*). Both of us along with one more Hon'ble Member were party to that Judgment. In the said Judgment of *Mr. M. Ravindranath Reddy Versus Mr G. Kishan & Ors,* we had referred to the Insolvency Law Reforms Committee Report of November, 15 and observed as under:

> *"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 the lawmakers. The Bankruptcy Law Reforms Committee (BLRC), in its report dated November 2015, states that "Operational creditors are those whose liability from the entity comes from a transaction on operations". While discussing the different types of creditors, the Committee points out that "enterprises have financial creditors by way of loan and debt contracts as well as* ***operational creditors such as*** *employees,* ***rental obligations****, utilities payments and trade credit." Further, while differentiating between a financial creditor and an operational creditor, the Committee 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, the Legislature has not completely adopted the BLRC Report, and only the claim in respect of goods and services are kept in the definition of operational creditor and operational debt u/s Sec 5(20) and 5(21) of the Code. The definition does not give scope to interpret rent dues as operational debt."*

7. We had then referred to the relevant definitions from IBC and after discussing the provisions we had concluded as under:

> **"Therefore, we are of the considered opinion that lease of immovable property cannot be considered as a supply of goods or rendering of any services and thus, cannot fall within the definition or Operational Debt."**

8. As the Learned Counsel for the Appellant has submitted that another Bench of this Tribunal has taken a different view with the assistance of the Learned Counsel for parties we have gone through the said Judgment which is in the matter of *Anup Shushil Dubey Vs. National Agriculture Co-operative Marketing Federation of India Limited & Ors. (Company Appeal (AT) (Insolvency) No. 229 of 2020).* Going through the Judgment, it shows that the Ld. Bench of this Tribunal also referred to the various definitions which are material in Paragraph 12 of the Judgment and then the Tribunal referred to the observations made in Judgment in the matter of *Mr. M. Ravindranath Reddy Versus Mr G. Kishan & Ors.* and

discussed Judgment in the matter of *Sarla Tantia Vs. Ramaanil Hotels & Resorts Pvt. Ltd.* in the context of lease and license agreement. In paragraph 17 of the Judgment in the matter of *Anup Shushil Dubey Vs. National Agriculture Co-operative Marketing Federation of India Limited & Ors.* it is observed as under:

> *"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)"*

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 sub-clause (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.

16. Even if the Debt was said to be Operational Debt from the email dated 12th September, 2017 which was sent subsequent to the email dated 18th August, 2017 (at Annexure A-1 (Colly) Diary No. 22971) it is clear that the Corporate Debtor had referred to Financial Stress and terminated the lease which had lock in period. Whether or not the said termination of lease was legal would be an issue of trial between the parties.

17. Thus, we do not interfere with the findings of the Adjudicating Authority regarding Rent not to be Operational Debt, and that even if looked at in the alternative, there is a pre-existing dispute.

18. For the above reasons, we do not find any reason to interfere in the Appeal with the impugned Order. The Appeal is dismissed. No orders as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[V.P. Singh]
Member (Technical)

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