

Sanjeev Kumar vs Aithent Technologies Pvt. Ltd & Anr on 5 November, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 474 of 2020

(Arising out of order dated 13th March, 2020 in CP(IB) No. 288/KB/2019
passed by National Company Law Tribunal, Kolkata Bench, Kolkata)

IN THE MATTER OF:

Mr. Sanjeev Kumar,
Ex Director
Web Date Systems Private Limited,
R/o Sindhu Niley Apartment,
Flat No. 204, Boring Road,
Nageshwar Colony,
Patna-800001

...Appellant
(Corporate Debtor)

Versus

1.Aithent Technologies Private Limited
(A Company within the meaning of the
Companies Act)
Having its registered office at
A-16/9, Vasant Vihar,
New Delhi - 110057

...Respondent No. 1/
(Original Operational Creditor)

2.Shri Rajesh Lihala,
Insolvency Resolution Professional
(IBBI/IPA-001/IP-P00525/2017-
2018/10950) FOR Web Date Systems
Private Limited, (A Company within the
meaning of the Companies Act)
Having its registered office at 2nd Floor,
Shalimar Cold Storage, Gate No. -01, New
Bye-Pass Road, Anisabad, Patna - 800002,
Bihar.

...Respondent No. 2

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Present: -

For Appellant: Mr. Sumesh Dhawan, Mr. Gulshan Sachdeva, Ms.
Vatsala Kak, Ms. Geetika Sharma and Ms. Apoorva
Choudhary, Advocates.

For Respondents: Mr. Rishabh Bansal, Advocate for Respondent No.1
Mr. Rajesh Lihala, IRP (Respondent No.-2)

JUDGMENT

Justice Anant Bijay Singh, The instant Appeal has been filed by 'Corporate Debtor' being aggrieved and dissatisfied by the order dated 13th March 2020 passed by the Ld. Adjudicating Authority, National Company Law Tribunal, Kolkata Bench, Kolkata, whereby and whereunder the Ld. Adjudicating Authority admitted the application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 filed by Respondent No. 1 (Operational Creditor).

2. Brief facts of the case is as under: -

i) The Appellant is the Ex Director of the Web Date Systems Pvt. Ltd.

(hereinafter referred as the 'Corporate Debtor') is a Private Limited Company incorporated under Companies Act, 1956 on 15.05.2012 vide CIN U72300BR2012PTC018668.

ii) The Appellant is an Ex Director of the Corporate Debtor.

iii) The Appellant - 'Corporate Debtor' has taken on lease the basement and the ground floor of the Premises situated at Plot No. 8 and 9, Electronic City, Sector 18, Gurgaon - 122 015, Haryana (hereinafter referred to as the said Premises) vide a Lease Deed dated June 15, 2015 executed between the Company Appeal (AT) (Insolvency) No. 474 of 2020 'Corporate Debtor' and the alleged Operational Creditor. The said Premises was let out as per the following schedule:

Phase I - Ground Floor Area admeasuring 9000 sq. ft. from July, 2015 at the rate of monthly rent of Rs. 3,15,000/- plus Service Tax. An amount of Rs.

6,30,000/- towards security deposit was paid vide Cheque No. 002393 dated June 10, 2015 drawn on HDFC Bank by the Corporate Debtor to the alleged Operational Creditor in respect of the said Ground Floor of the Premises.

Phase II - Basement Floor Area admeasuring 9980 sq. ft. before January 1, 2016 at the rate of monthly rent of Rs. 2,49,500/- plus Service Tax. An amount of Rs. 4,99,000/- towards security deposit was paid vide cheque No. 002394 dated October 1, 2015 drawn on HDFC Bank by the Corporate Debtor to the alleged Operational creditor in respect of the said Basement Floor of the Premises.

It is material to note that the effective date of possession and lease rent for both the floors were different. However, with the consent and for the convenience of both the parties, a single agreement was executed in respect of both the floors.

iv) By way of Electronic Mail dated march 23, 2018 the Corporate Debtor has showed its willingness to vacate the basement of the said Premises.

However, by a counter Electronic Mail dated April 6, 2018 the alleged Operational Creditor stated that the Corporate Debtor cannot vacate the basement alone as there is no clause for part vacation of the said Premises. It Company Appeal (AT) (Insolvency) No. 474 of 2020 was further stated in the said Electronic Mail dated April 6, 2018 that in case the Corporate Debtor wish surrender the basement floor of the said Premises, a new Lease Deed has to be executed for the ground floor and that it can be done after payment of Rs. 40,27,179/-. There were numerous mails were exchanged and various meeting took place between Operational Creditor and Corporate Debtor said mail to resolve the issue for a period from March 2018 to September 2018.

v) It is further alleged that Operational Creditor has terminated the Lease Deed dated June 15, 2015 by its letter dated June 7, 2018. Due to such illegal action of the alleged Operational Creditor in terminating the Lease Deed, the Corporate Debtor was forced to surrender the ground floor of the said premises. Due to such surrender of the ground floor of the said premises, the Corporate Debtor could not meet its business commitments to various customers and suffered huge loss on account of such illegal and arbitrary action on the part of the alleged Operation Creditor.

vi) That even after vacating the premises the Operational Creditor alleged that there was some damaged done to the property and furniture by the Corporate Debtor.

vii) It is alleged that Operational Creditor has illegally forfeited the security deposit of Rs. 11,29,000/- (rupees Eleven Lacs twenty Nine Thousand) made over by the Corporate Debtor and the same was also not set off against the amount alleged to be due or payable by the Corporate Debtor to the alleged Operational Creditor.

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3. The Respondent No. 1 - Operational Creditor sent Demand Notice under Section 8 of the IBC on 27th September, 2018 to the Appellant - Corporate Debtor, demanding the payment in respect of the unpaid operational Debt due from M/s Web Date Systems Private Limited under the Insolvency and Bankruptcy Code, 2016.

4. The Appellant - Corporate Debtor sent reply to aforesaid Demand Notice on 08.10.2018 at page 59 of the Appeal Paper Book is as under:-

" i) It is stated that "WDS" has taken on lease the Basement and Ground Floor of the premises situated at Plot No. 8 & 9, Electronic City, Sector-18, Gurgaon-122015, Haryana, India vide Lease Deed dated 15.06.2015 executed between our company and your company. That a security deposit that the leased out floor were leased out as per schedule as per follow Phase-I- Ground Floor Area measuring 9000 sq. ft. from July 2015 @ monthly rent of Rs. 3,15,000/- plus service tax. An amount of Rs. 6,30,000/- (vide cheque no. 002393 dated 10-06-2015 drawn on HDFC Bank) towards

security deposit was also paid to Lessor in respect of Ground Floor.

Phase-II- Basement floor Area measuring 9980 sq. ft. before Jan 1st 2016 @ monthly rent of Rs. 2,49,500/- plus service tax. An amount of Rs. 4,99,000/- (vide cheque no. 002394 dated 01-10-2015 drawn on HDFC Bank) towards security deposit was also paid to Lessor in respect of Basement Floor.

It is pertinent to mention here that though the effective date of possession & lease rent for both the floors were different however with the consent & convenience of both the parties a single agreement was executed in for both the floors.

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ii) That vide mail dated 23.03.2018 we have written to "AITHENT" and shown our willingness to vacate the Basement (which was taken on lease as per phase-I). However to our surprise an email dated 06.04.2018 was written by "AITHENT" representative that our company can not vacate the basement alone as there is no clause for part vacation of the property and hence we are unable to accept our request.

It was further stated in said mail that in case "WDS" wish to surrender the basement floor we need to execute a new lease for ground floor alone and it can be done after full payment of Rs. 40,27,179/-

iii) It is pertinent to mention here that the intent of single agreement was contrary to the interpretation made by "AITHENT" in the said mail dated 6.04.2018. Since then a dispute has arisen between "AITHENT" and "WDS". That "AITHENT" has not set off the security deposit paid by "WDS" in respect of Basement.

iv) That to our further shock and surprise "AITHENT" vide letter dated 7-06-2015 terminated the said lease deed dated 15/06/2015. That due to your company's such illegal action of terminating lease deed "WDS" was forced to surrender the Ground Floor of said premises. Due to this "WDS" could not meet its commitments made to its various customer and suffered huge loss due to your company's illegal and arbitrary act. "WDS" reserve the right to claim damages from "AITHENT" on account of loss of business to "WDS" due to illegal termination of lease dated 15.06.2015 and forced "WDS" to vacate the Ground Floor of the premises.

v) That it is also pertinent mention here that "AITHENT" has illegally forfeit the security deposited by "WDS" and same was never set off against the amount payable by our company." Company Appeal (AT) (Insolvency) No. 474 of 2020

5. Thereafter, the Respondent No. 1 - Operational Creditor filed Application under Section 9 of the IBC before the NCLT, Kolkata Bench, Kolkata, wherein it is mentioned in Part-IV for Particulars of Operational Debt is Rs. 5,473,536/- which is due on 19.02.2018. The Appellant (herein) appeared and contest the matter and denied the claim.

6. The learned counsel for the Appellant during the course of argument and also in the Rejoinder to the reply relied on the Judgment of this Tribunal dated 17th January, 2020 passed in Company Appeal (AT) (Insolvency) No. 331 of 2019 (Mr. M. Ravindranath Reddy V/s Mr. G. Kishan & Ors.) wherein this Tribunal have formulated two questions for consideration and given reply is as under:-

" The following question arises for our consideration:

1. Whether a landlord by providing lease, will be treated as providing services to the corporate debtor, and hence, an operational creditor within the meaning of Section 5(20) read with Section 5(21) of the 'Insolvency and Bankruptcy Code, 2016?

2. Whether the petition filed U/S 9 of the Insolvency and Bankruptcy Code 2016 is not maintainable on account of 'pre-

existing dispute'?

Heard the learned counsel for the parties and perused the record. Admittedly, the petitioner has filed this petition under Section 9 of the I&B Code, 2016 in respect of purported non- payment of enhanced rent totalling of Rs. 49,51,605/- (subsequently reduced to Rs. 35,94,090/- by the Respondent). The Lease deeds was valid from 12-05-1998 up till 2006, was executed and registered between the parties. The Appellant corporate debtor Company Appeal (AT) (Insolvency) No. 474 of 2020 contends that the original tenancy was yearly, with the enhancement of rent @10 % per year, over and above the last paid rent.

The Corporate Debtor has been regular in paying the rent in terms of lease deed with a 10% increase per annum. The original lease expired in 2006, and after that, for the period, i.e. 2011 to 2017 (disputed period) there was no agreement for enhancement of rent. The rent claimed by the Respondents from the Corporate Debtor Company from July 2011 to June 2017 was Rs. 85,66,290/- and the Respondent paid a sum of Rs. 55,51,920/- and therefore the Corporate Debtor was in arrears of rent amounting to Rs. 30,15,270/-.

The Respondent/Operational Creditor further contends that a notice under Section 106 of the Transfer of Property Act 1882 was issued against the corporate debtor on 15-06-2017, to terminate the lease, and was asked to vacate the premises. The respondent also stated that he had claimed arrears of lease rent as well as mesne profits.

After that Operational Creditor issued Demand Notice under Section 8 of the I&B Code, 2016 raising a demand of Rs. 49,51,605/- i.e. 39,98,926/- towards rent (from July 2011 to December 2017) and interest at 18% per annum is Rs. 9,52,679/- in January 2018, and after that filed the petition under Section 9 of the I&B Code, 2016, was filed, which has been admitted by the impugned order.

The Insolvency and Bankruptcy Code ("Code") recognises two types of debt to enable the creditors to make an application for initiating insolvency proceedings against the corporate debtor- financial

debt and operational debt. If there is a debt, other than a financial debt or an operational debt, the creditor will not qualify to apply under Sections 7 or 9, as the case may be. Hence, the Company Appeal (AT) (Insolvency) No. 474 of 2020 determination of nature of claim/debt is an important step while considering the admission of an application under the Code.

While the law is still evolving, there are certain categories of dues, about which, the debate as to their classification into financial or operational debt continues. One such debt claims on account of unpaid rent payable by an entity to a landlord are in question in the present case.

The Appellant also placed reliance on the provisions of the Central Goods and Services Tax Act, 2017. Schedule- II of the Act list 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."

This Tribunal, in the case of Jindal Steel & Power Ltd. v. DCM International Ltd. Company Appeal (AT)(Insolvency) No 288/2017, held as follows:

"Admittedly, the Appellant is a tenant of Respondent- . Even if it is accepted that a Memorandum of Understanding has been entered between the parties in regard to the premises in question, the Appellant being a tenant, having not made any claim in respect of the provisions of the goods or services and the debt in respect of the repayment of dues does not arise under any law for the time being in force payable to the Central Government or State Government, we Company Appeal (AT) (Insolvency) No. 474 of 2020 hold that the Appellant tenant do not come within the meaning of 'Operational Creditor' as defined under sub- section (20) read with sub-Section (21) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to 'I&B Code') for triggering Insolvency and Bankruptcy Process under Section 9 of the 'I&B Code'"

Relying on the judgment above of NCLAT, C.P. No.567/IB/2018 Citicare Super Speciality Hospital v. Vighnaharta Health Visionaries Pvt. Ltd. Dated 11th March 2019, NCLT, Mumbai Bench dismissed the petition, which was about arrears of license fee. NCLT, New Delhi, in Parmod Yadav &Anr v. Divine Infracon (P) Ltd., 2017 SCC OnLine NCLT 11263 observed that the word "operational" or for that matter "operation" has not been defined anywhere in the Code. The General Clauses Act, 1897, also do not define the term. Hence, the term has to be given a meaning as ordinarily understood. The dictionary meaning of 'operational' is given as 'of or relating to operation' (Merriam Webster). Similarly, the meaning of 'operation' is given as 'ready for use or able to be used'.

Further, from the usage of the term "goods or services" as given under Section 14(2) of the Code, provides that "essential goods or services", of the corporate debtor shall not be terminated or suspended or interrupted during the moratorium. What constitute essential goods and services are provided under Regulation 32 (Insolvency Resolution Process for corporate persons) Regulation 2016 wherein it is provided that;

The essential goods and services referred to in Sec 14(2) shall mean:

1 Electricity Company Appeal (AT) (Insolvency) No. 474 of 2020 2 Water 3
Telecommunication Services 4 Information Technology Services To the extent, these
are not a direct input to the output produced or supplied by the corporate debtor.

Thus, any debt arising without nexus to the direct input to the output produced or supplied by the corporate debtor, cannot, in the context of Code, be considered as an operational debt, even though it is a claim amounting to debt.

However, without going into the aspect whether an immovable property in itself constitutes stock-in-trade of the corporate debtor and has a direct nexus to its input-output, being an integral part of its operations, the Bench held that lease of immovable property cannot be considered as a supply of goods or rendering of services, and thus, cannot fall within the definition of operational debt. In this regard, reliance was also placed on Col. Vinod Awasthy v. AMR Infrastructure Ltd.

Further, relying on Jindal Steel (supra) and Citicare (supra), NCLT Hyderabad also, in the case of CP/IB/61/9/HDB/2019 Manjeera Retail Holdings Pvt. Ltd. v. Blue Tree Hospitality Pvt. Ltd., held that the petitioner claiming default in payment of rent of the premises leased out cannot be treated as an operational creditor, and the amount involved cannot be treated as an operational debt. Section 5(20) of the Code, defines an "operational creditor" to mean "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred." Company Appeal (AT) (Insolvency) No. 474 of 2020 In turn, Section 5(21) defines an "operational debt" to mean "a claim in respect of the provision of goods or services including employment or a debt in respect of the 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." Therefore, an operational debt is essentially a claim in respect of the following:

- (a) provision of goods;
- (b) provision of services, including employment; or
- (c) a debt arising under any statute and payable to Government/local authority.

If the claim by way of debt does not fall under any of the three categories as mentioned above, the claim cannot be categorised as an operational debt, even though there may be a liability or obligation due from the corporate debtor to the creditor, and hence, such a creditor disentitled from maintaining an application for initiation of corporate insolvency resolution process (CIRP) of the corporate debtor.

There seems to be some rationale in restricting only to operational creditors for initiation of CIRP, other than financial creditors. Default committed to operational creditors about payment of their debt connotes that the corporate debtor is not even in a position to service the regular payments and operational expenses, as required in the day-to-day functioning of the corporate debtor, which provides a clear indication to its insolvency, warranting the resolution process being put in place.

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 Company Appeal (AT) (Insolvency) No. 474 of 2020 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 the to interpret rent dues as operational debt.

The Code provides that for an amount to be classified as an Operational Debt under I&B Code, 2016 the alleged claim should fall in the definition of: -

3(6) "Claim" means -

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

Company Appeal (AT) (Insolvency) No. 474 of 2020 3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;

5(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred; 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 [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;

The Legislature did not include here the reference to rent dues of property. Thus, it is clear that a claim in respect of the provision of goods or services is covered under the operational debt. This petition has been filed for recovery of enhanced rent as per lease agreement; this is not about the goods or services or in respect to goods or services.

This Appellate Tribunal has also held on 28-11-2017 in Company Appeal (AT) (Insolvency) No. 288 of 2017 is given below: -

'Admittedly, the Appellant is a tenant of Respondent- 'Corporate Debtor'. Even if it is accepted that a Memorandum of Understanding has been entered between the parties regarding the premises in question, the Appellant being a tenant, having not made any claim in respect of the provisions of the goods or services and the debt in respect of the repayment of dues does not arise under any law for the time being in force payable to the Company Appeal (AT) (Insolvency) No. 474 of 2020 Central Government or State Government, we hold that the Appellant tenant do not come within the meaning of 'Operational Creditor' as defined under sub-section (20) read with sub-Section (21) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to 'I&B Code') for triggering Insolvency and Bankruptcy Process under Section 9 of the 'I&B Code'.

We also do not find the term is defined under the General Clauses Act, 1897 and hence the term has to be given the meaning as ordinarily understood. The dictionary meaning of 'Operational' is given as 'of or relating to the operation or an operation'.

For an amount to be classified for an operational debt under I&B Code, 2016, it is provided:

Firstly, the amount falls within the definition of "claim" as defined under Section 3(6) of the Code;

Secondly, such a claim should fall within the confines of the definition of a 'debt' as defined under Section 3(11), meaning it should be by way of a liability or obligation due from any person;

Thirdly, such a "debt" should fall strictly within the scope of an "Operational Debt" as defined under Section 5(21) of the Code, i.e. the claim should arise in respect of

(i) provision of goods or services including employment or

(ii) A debt in respect of the repayment of dues arising under any law for the time being in force and payable either to the Central Government, any State Government or any local authority.

The word "in relation to Government" or local authority and the dues owed to it, has been given a wide platform. It is important to see whether persons other than the Government or local authority can claim the benefit, that any debt owed should be Company Appeal (AT) (Insolvency) No. 474 of 2020 construed as an 'operational debt' other than those classified as 'financial debt'.

Thus, only if the claim by way of debt falls within one of the three categories as listed above, can be categorised as an operational debt. In case if the amount claimed does not fall under any of the categories mentioned as above, the claim cannot be categorised as an operational debt, and even though there might be a liability or obligation due from one person, namely Corporate Debtor to another, namely Creditor other than the Government or local authority, such a creditor cannot categorise itself as an "Operational Creditor" as defined under Section 5(21) of the I&B Code, 2016. 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 of Operational Debt.

In case of lease of immovable property, Default can be determined, on the basis of evidence. While exercising summary jurisdiction, the Adjudicating Authority exercising its power under Insolvency and Bankruptcy Code 2016, cannot give finding regarding default in payment of lease rent, because it requires further investigation.

In the present case itself the Corporate Debtor' in its reply to the Demand Notice dated 9th February 2018, stated in paragraph 6 that: -

"With regard to the allegations in paragraph no. 5 of the notice under reply, it is true that your clients got a legal notice dated 15.06.2017 issued under Section 106 of the Transfer of Property Act, 1882 calling upon my client to vacate the premises within six months ending with 31st December 2017. It is also true that your clients had demanded rental amount at Rs. 1,63,926/- (Rupees one lakh sixty three Company Appeal (AT) (Insolvency) No. 474 of 2020 thousand nine hundred and twenty-six only) per month besides demanding alleged arrears of rents amounting to Rs. 30,15,370/- (Rupees thirty lakhs fifteen thousand three hundred and seventy only) failing which your clients demanded payment of interest at 18% per annum. It is also true that in the said notice your clients had demanded mesne-profits at Rs. 3,00,000/- (Rupees three lakhs only) per month. My client states that immediately on receipt of the said notice, the Director of my client's company, Shri M Nihal Reddy contacted you and expressed surprise as to why such a demand for enhanced rent is being made when there was an understanding with your clients that your clients would not enhance the rent for a period of six years and when your clients have accepted the rental payments being made every month without demur or protest. My client further states that when its Director assured about payment of enhanced rents by 10% beginning from July 2018, your clients agreed for the same and continued to receive rents as originally agreed, i.e. Rs. 84,116/- (Rupees eighty-four thousand one hundred and sixteen only) per month. Under the circumstances, my client states that the present notice issued under the Insolvency and Bankruptcy Code, 2016 and the

Rules framed thereunder is quite misconceived besides being against the letter and spirit of the understanding reached between your clients and my client."

On perusal of the above reply of the 'Corporate Debtor,' it is clear that before issuance of Demand Notice dated 8th January 2018 the Appellant had issued legal notice dated 15th June 2017 under Section 106 of the Transfer of Property Act, 1882, calling upon to vacate the premises within six months ending with 31st December 2017. It is also stated in the reply that the Director of the Company Shri M Nihal Reddy has questioned on demand for Company Appeal (AT) (Insolvency) No. 474 of 2020 enhancing rent, based on an understanding, that rent would not be enhanced for six years.

On perusal of the above reply, it is evident that the 'Operational creditor' himself has admitted that before issuance of demand notice U/S 8 of the Code, notice to vacate the leasehold premises under Section 106 of the Transfer of Property Act, and termination of the lease was issued. The lessee / corporate debtor has also stated that there was an understanding regarding moratorium for not increasing rent for six years. But such type of questions whether rent enhancement was as per mutual understanding or not, can only be decided on the basis of evidence and by the competent court having jurisdiction. But the Adjudicating Authority admitted the petition U/S 9 of the Code, without considering the fact, that there was a pre-existing dispute regarding enhancement of rent, much before the issuance of demand notice.

Thus, it is clear that the landlord, who filed an application for recovery of alleged enhanced lease rent, can not be treated as an operational creditor within the meaning of Section 5(20) read with Section 5(21) of the 'Insolvency and Bankruptcy Code, 2016.'

7. Learned Counsel for the Appellant further submitted that the Ld. Adjudicating Authority has not considered the facts and admitted the Application filed under Section 9 of the IBC, thus, in view of the Judgment (supra), the impugned order is fit to be set aside.

8. The learned counsel for the Respondent No. 1 during the course of argument and in his written submissions, stated that a perusal of the Company Appeal (AT) (Insolvency) No. 474 of 2020 Agreement dated 15.06.2015 (at page 33 to 46 of the Reply) between the parties reveals that the relationship between the parties was not a mere relationship of landlord-tenant. The Respondent No. 1 - Operational Creditor provided services to the Appellant, which had direct nexus to the business of Information Technology, being carried out by the Appellant.

9. The learned counsel for the Respondent No. 1 referred to clause E (at page 37 of the Reply) of the Lease Deed whereby the Respondent No. 1 was to provide a DG Set of 550 KVA capacity, which would ensure uninterrupted power supply for the business of the Appellant.

10. Similarly, clause 11(a) (at page 40 of the Reply) of the Lease Deed provides for maintenance of common equipment which reads as under: -

"11. a) Maintenance of common equipment: All common equipment installed like DG sets, HT transformer, main electrical panel, UPSes, water pumps etc. for all the four floors of the building would be maintained by the Lessor. The cost for the same shall be equally shared (50%) by both Lessor and Lessee for entire Lease period. The Lessor will provide copy of all such bills/invoice to the Lessee. Day to day maintenance of the demised premises and the fixtures and fittings installed therein and the normal maintenance, usual repairs, including painting and distempering and polishing of the interior of demised premises will be carried by the Lessee throughout the lease period at it's own cost."

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11. Similarly under clause 11(b) (at page 40 of the Reply) of the Lease Deed, it was the responsibility of the Respondent No. 1 to provide and install a UPS for uninterrupted power supply.

12. Learned counsel for the Respondent No. 1 further referred to page 45 and 46 of the Reply which shows that the Respondent No. 1 also supplied essential technical equipment to the Appellant for its IT business.

13. Further, Respondent No. 1 submitted that at page 45 of the Reply as per Agreement provides equipments Serial No. 9 (Network/Data Port), 10 (Voice Ports) and 14 (Electrical Room/Panel).

14. Learned counsel for the Respondent No. 1 further submitted that the Respondent No. 1 regularly provided all these services and also raised invoices. The invoices are at page 119 to 177 of the Reply as under: -

i) Page 119 of Reply - Invoice for services of a Multi skilled Technician and water tanker.

ii) Page 131 of Reply- Invoice for services of a Multi Skilled Technician and Water Tanker.

iii) Page 136 of Reply- Invoice for PAYTM device repair expenses

iv) Page. 137 of Reply - Invoice for Service of a Multi Skilled Technician and Water tanker

v) Page 143 of Reply- Invoice for Diesel utilised for the DG Set, to ensure uninterrupted power supply.

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vi) Page 149 of Reply- Invoice for Diesel utilised for the DG Set, to ensure uninterrupted power supply

vii) Page. 157 of Reply- Invoice for Diesel utilised for the DG Set, to ensure uninterrupted power supply.

These invoices have been considered by the Ld. Adjudicating Authority while passing the Impugned Order, as is clear from para No. 3 of the Impugned Order.

15. It is further submitted that the relation between the parties was not a mere landlord-tenant relationship, is further established by the Master Service Agreement executed between the parties (Copy is at page 93 to 118 of the Reply).

16. It is further submitted by learned counsel for the Respondent No. 1 that the Ld. Adjudicating Authority has taken note of the fact that it was not a case simple outstanding amount only on account of lease rent, but amount of electricity charges, diesel, sewer and water charges were also due and has taken note of page no. 41 which contains detail of such charges.

17. Learned counsel for the Respondent No. 1 further referred at page 44 para 5 of the Impugned Order when the Ld. Tribunal have given a finding that admittedly in the instant case, there are dues of electricity, diesel, sewer and water charges which are undisputed by the Corporate Debtor. The quantum of such claim/debt is also more than Rs. 1 Lac and these activities fall within the definition of services under Section 5(21) of the IBC and admitted the Application under Section 9 of the IBC.

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18. It is further submitted that the ratio of the judgment of this Hon'ble Appellate Tribunal in the case of Mr. M. Ravindranath Reddy Vs. Mr. G. Kishan & Ors., in Company Appeal (AT) (Insolvency) No. 331 of 2019, does not apply to the facts of the present case because relationship between the parties was not a mere relationship of landlord-tenant.

FINDING

19. We have perused the records of the case, argument advanced on behalf of the parties and gone through the written submissions on behalf of Respondent No. 1. Taking the aforesaid facts and circumstances, we are of the considered view that the Ld. Adjudicating Authority has rightly distinguished the facts of the case from Judgment (supra) of this Appellate Tribunal.

In as much as this is not a simple case where the rent is due which is part of the rent.

The Respondent No. 1 has provided different type of services to the Appellant which has been referred hereinabove. There are dues of electricity, diesel, sewer and water charges which are undisputed by the Corporate Debtor which is more than Rs. 1 Lac. We are of the considered view that the Ld. Adjudicating Authority has rightly admitted the Application filed under Section 9 of IBC.

ORDER

20. Having regard to the foregoing discussion, we find no merit in this Appeal. The Appellant has failed to demonstrate that the impugned order Company Appeal (AT) (Insolvency) No. 474 of 2020 suffers from any legal infirmity. The Appeal being devoid of merit is dismissed. Interim orders, if any, stand vacated. No order as to costs.

Let the Registry communicate the Judgment to the Ld. Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata). Copy of the Judgment be provided to the party concerned as per Rule. Copy of the Judgment be up-loaded in the Website of this Appellate Tribunal.

[Justice Bansi Lal Bhat] Acting Chairperson [Justice Anant Bijay Singh] Member (Judicial) [V.P. Singh] Member (Technical) 5th November, 2020 NEW DELHI RN Company Appeal (AT) (Insolvency) No. 474 of 2020 Later on, In view of the majority judgment (2:1) the impugned order dated 13th March, 2020 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in CP(IB) No. 288/KB/2019 (Aithent Technologies Private Limited V/s Web Date Systems Private Limited) is hereby affirmed, consequently in view of reason mentioned hereinabove, there is no merit in the Appeal. The Appeal stands dismissed. No order as to costs.

[Justice Bansi Lal Bhat] Acting Chairperson [Justice Anant Bijay Singh] Member (Judicial) 5th November, 2020 NEW DELHI RN Company Appeal (AT) (Insolvency) No. 474 of 2020 NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI Company Appeal (AT) (Insolvency) No. 474 of 2020 [Arising out of Impugned Order dated 13th March 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition (IB) No. 288/NCLT/KB/2019] IN THE MATTER OF:

Mr Sanjeev Kumar Ex. Director Web Date Systems Private Limited R/o Sindhu Niley
Apartment Flat No.204, Boring Road Nageshwar Colony Patna - 800001 Appellant
Versus

1. Aithent Technologies Private Limited (A Company within the meaning of the Companies Act) having its registered office at: Respondent No.1 A-16/9, Vasant Vihar (Original Operational New Delhi - 110057 Creditor

2. Shri Rajesh Lihala Insolvency Resolution Professional (IBBI/IPA-001/IP-P00525/2017-2018/10950) For Web Date Systems Private Limited (A Company within the meaning of the Companies Act) having its registered office at:

2nd Second Floor, Shalimar Cold Storage Gate No.-01, New Bye-Pass Road Anisabad, Patna - 800 002 Respondent No.2 Present:

For Appellant : Mr Sumesh Dhawan, Mr Gulshan Sachdeva, Ms Vatsala Kak, Ms Geetika Sharma and Ms Apoorva Choudhary, Advocates For Respondent : Mr Rishabh Bansal, Advocate for R-1 Mr Rajesh Lihala, IRP (R-2) Company Appeal (AT) (Insolvency) No. 474 of 2020 1 of 39 J U D G M E N T [Per; V.P. Singh, Member (T)]

1. I have gone through the detailed judgment authored by brother Member Hon'ble Justice A.B. Singh, but I am unable to persuade myself to agree with the views expressed by him. With all humility and honour to my brother Member Hon'ble Justice Singh, I would like to give my finding separately.

2. Brief facts of the case are as under:

This Application has been filed under Section 9 of the I&B Code, 2016 by Applicant/Operational Creditor - 'Aithent Technologies Private Limited' (in short 'ATPL'), against the Corporate Debtor - 'Web Data Systems Private Limited' (in short 'WDS'), for default committed in payment of outstanding debt amounting to Rs.54,73,536/-.

3. The Operational Creditor contends that the commercial property was given on lease vide Agreement dated 15th June 2015 and alleges that the outstanding dues pertain to outstanding lease rent.

4. The Learned Adjudicating Authority observed that:

"Admittedly, in the present case, there are dues of electricity, diesel, sewer and water charges which are undisputed by the Corporate Debtor. The quantum of such claim/debt is also more than Rs.1 Lac, Diesel has been consumed for providing electricity. Electricity charges are to be reimbursed by the Corporate Debtor based upon its consumption. Similarly, water charges are also to be paid. These activities clearly fall in the definition of provisions of Services as defined in Section 5(21) of IBC, 2016 as the definition in 5(21) means a claim in respect of the provision of Services. Thus, at the cost of repetition, we Company Appeal (AT) (Insolvency) No. 474 of 2020 2 of 39 hold that by no stretch of imagination it can be said that such facilities provided by the Operational Creditor are not services. Accordingly, we reject the contention of the Corporate Debtor that since main services cannot be categorised as operational debt, these will also not construe as operational debt. In this regard, we are further of the view that no such restriction /condition exists in provisions of Section 5(21) of IBC, 2016, hence, for this reason also, we see no merit in this contention of the Corporate Debtor. As evident from the above discussion that the decision of Hon'ble NCLAT clearly distinguishable on facts, hence, ratio of same is not applicable."

(verbatim copy)

5. Learned Adjudicating Authority further noted that notice under Section 8 had been duly served and acknowledged and the Application, otherwise complete and defect-free, was thereby admitted.

6. The Operational Creditor has filed the said petition stating that it had let out the premises on lease vide Lease Deed Agreement dated 15th June 2015 for Plot No. 8 & 9, Electronic City, Sector-18,

Gurgaon, Haryana for Ground Floor and Basement for Office space in two phases. Phase-I: Ground Floor area measuring 9000 sq. ft. from 1st July 2015 for Rent @ Rs.3,15,000/- plus service tax per month. A security deposit of Rs.6,30,000/- was also paid by Corporate Debtor towards Ground Floor.

Phase II: Basement floor area measuring 9980 sq. ft. before 1st January 2016 for Rent @ Rs.2,49,500/- plus service tax per month. A security deposit of Rs.4,99,000/- was also paid by Corporate Debtor towards Basement. The lease deed was for 5 years, and the effective date was the date of occupancy for each floor. The lock-in period was 24 months. Company Appeal (AT) (Insolvency) No. 474 of 2020 3 of 39

7. The Appellant contends that there was a pre-existing dispute between the parties and that the alleged debt is not an operational debt. Therefore, a petition under Section 9 is not maintainable.

8. The counsel for the Appellant has placed reliance on the Judgment of this Appellate Tribunal passed in Company Appeal No.331 of 2019 M. Ravindranath Reddy Vs G. Kishan & Others.

9. In the above case this Appellate Tribunal has held that;

"The Insolvency and Bankruptcy Code ("Code") recognises two types of debt to enable the creditors to make an application for initiating insolvency proceedings against the corporate Debtor- financial debt and operational debt. If there is a debt, other than a financial debt or an operational debt, the creditor will not qualify to apply under Sections 7 or 9, as the case may be. Hence, the determination of nature of claim/debt is an important step while considering the admission of an application under the Code.

While the law is still evolving, there are certain categories of dues, about which, the debate as to their classification into financial or operational debt continues. One such debt claims on account of unpaid rent payable by an entity to a landlord are in question in the present case.

The Appellant also placed reliance on the provisions of the Central Goods and Services Tax Act, 2017. Schedule- II of the Act list 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;

Company Appeal (AT) (Insolvency) No. 474 of 2020 4 of 39

(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."

This Tribunal, in the case of Jindal Steel & Power Ltd. v. DCM International Ltd. Company Appeal (AT)(Insolvency) No 288/2017, held as follows:

"Admittedly, the Appellant is a tenant of Respondent. Even if it is accepted that a Memorandum of Understanding has been entered between the parties in regard to the premises in question, the Appellant being a tenant, having not made any claim in respect of the provisions of the goods or services and the debt in respect of the repayment of dues does not arise under any law for the time being in force payable to the Central Government or State Government, we hold that the Appellant tenant do not come within the meaning of 'Operational Creditor' as defined under sub-section (20) read with sub- Section (21) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to 'I&B Code') for triggering Insolvency and Bankruptcy Process under Section 9 of the 'I&B Code'"

Relying on the judgment above of NCLAT, C.P. No.567/IB/2018 Citicare Super Speciality Hospital v. Vighnaharta Health Visionaries Pvt. Ltd. Dated 11 th March 2019, NCLT, Mumbai Bench dismissed the petition, which was about arrears of license fee. Company Appeal (AT) (Insolvency) No. 474 of 2020 5 of 39 NCLT, New Delhi, in Parmod Yadav & Anr v.

Divine Infracon (P) Ltd., 2017 SCC OnLine NCLT 11263 observed that the word "operational" or for that matter "operation" has not been defined anywhere in the Code. The General Clauses Act, 1897, also do not define the term. Hence, the term has to be given a meaning as ordinarily understood. The dictionary meaning of "operational" is given as of or relating to "operation" (Merriam Webster). Similarly, the meaning of "operation" is given as "ready for use or able to be used".

Further, from the usage of the term "goods or services" as given under Section 14(2) of the Code, provides that "essential goods or services", of the corporate Debtor shall not be terminated or suspended or interrupted during the moratorium. What constitute essential goods and services are provided under Regulation 32 (Insolvency Resolution Process for corporate persons) Regulation 2016 wherein it is provided that;

The essential goods and services referred to in Sec 14(2) shall mean:

1 Electricity 2 Water 3 Telecommunication Services 4 Information Technology Services To the extent, these are not a direct input to the output produced or supplied by the corporate Debtor.

Thus, any debt arising without nexus to the direct input to the output produced or supplied by the corporate Debtor, cannot, in the context of Code, be considered as Company Appeal (AT) (Insolvency) No. 474 of 2020 6 of 39 an operational debt, even though it is a claim amounting to debt.

However, without going into the aspect whether an immovable property in itself constitutes stock-in-trade of the Corporate Debtor and has a direct nexus to its input- output, being an integral part

of its operations, the Bench held that lease of immovable property cannot be considered as a supply of goods or rendering of services, and thus, cannot fall within the definition of operational debt. In this regard, reliance was also placed on Col. Vinod Awasthy v. AMR Infrastructure Ltd.

Further, relying on Jindal Steel (supra) and Citicare (supra), NCLT Hyderabad also, in the case of CP/IB/61/9/HDB/2019 Manjeera Retail Holdings Pvt. Ltd. v. Blue Tree Hospitality Pvt. Ltd., held that the petitioner claiming default in payment of rent of the premises leased out cannot be treated as an operational creditor, and the amount involved cannot be treated as an operational debt.

Section 5(20) of the Code, defines an "operational creditor" to mean "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred."

In turn, Section 5(21) defines an "operational debt"

to mean "a claim in respect of the provision of goods or services including employment or a debt in respect of the 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."

Company Appeal (AT) (Insolvency) No. 474 of 2020 7 of 39 Therefore, an operational debt is essentially a claim in respect of the following:

- (a) provision of goods;
- (b) provision of services, including employment;
or
- (c) a debt arising under any statute and payable
to Government/local authority.

If the claim by way of debt does not fall under any of the three categories as mentioned above, the claim cannot be categorised as an operational debt, even though there may be a liability or obligation due from the corporate Debtor to the creditor, and hence, such a creditor disentitled from maintaining an application for initiation of corporate insolvency resolution process (CIRP) of the corporate Debtor.

There seems to be some rationale in restricting only to operational creditors for initiation of CIRP, other than financial creditors. Default committed to operational creditors about payment of their debt connotes that the corporate Debtor is not even in a position to service the regular payments and operational expenses, as required in the day-to-day functioning of the corporate Debtor, which provides a clear indication to its insolvency, warranting the resolution process being put in place.

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 Company Appeal (AT) (Insolvency) No. 474 of 2020 8 of 39 "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 the to interpret rent dues as operational debt.

The Code provides that for an amount to be classified as an Operational Debt under I&B Code, 2016 the alleged claim should fall in the definition of: -

3(6) "Claim" means -

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

Company Appeal (AT) (Insolvency) No. 474 of 2020 9 of 39 3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt; 3(12) "default" means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not [paid] by the Debtor or the corporate Debtor, as the case may be;

5(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

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 [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;

The Legislature did not include here the reference to rent dues of property. Thus, it is clear that a claim in respect of the provision of goods or services is covered under the operational debt. This petition has been filed for recovery of enhanced rent as per lease agreement; this is not about the goods or services or in respect to goods or services.

This Appellate Tribunal has also held on 28-11- 2017 in Company Appeal (AT) (Insolvency) No. 288 of 2017 is given below: -

Company Appeal (AT) (Insolvency) No. 474 of 2020 10 of 39 Admittedly, the Appellant is a tenant of Respondent- "Corporate Debtor". Even if it is accepted that a Memorandum of Understanding has been entered between the parties regarding the premises in question, the Appellant being a tenant, having not made any claim in respect of the provisions of the goods or services and the debt in respect of the repayment of dues does not arise under any law for the time being in force payable to the Central Government or State Government, we hold that the Appellant tenant do not come within the meaning of "Operational Creditor" as defined under sub-section (20) read with sub- Section (21) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to "I&B Code") for triggering Insolvency and Bankruptcy Process under Section 9 of the "I&B Code".

We are also do not find the term is defined under the General Clauses Act, 1897 and hence the term has to be given the meaning as ordinarily understood. The dictionary meaning of 'Operational' is given as 'of or relating to the operation or an operation'.

For an amount to be classified for an operational debt under I&B Code, 2016, it is provided:

Firstly, the amount falls within the definition of "claim" as defined under Section 3(6) of the Code;

Secondly, such a claim should claim within the confines of the definition of a 'debt' as defined Company Appeal (AT) (Insolvency) No. 474 of 2020 11 of 39 under Section 3(11), meaning it should be by way of a liability or obligation due from any person;

Thirdly, such a "debt" should fall strictly within the scope of an "Operational Debt" as defined under Section 5(21) of the Code, i.e. the claim should arise in respect of

(i) provision of goods or services including employment or

(ii) A debt in respect of the repayment of dues arising under any law for the time being in force and payable either to the Central Government, any State Government or any local authority.

The word "in relation to Government" or local authority and the dues owed to it, has been given a wide platform. It is important to see whether persons other than the Government or local authority can claim the benefit, that any debt owed should be construed as an 'operational debt' other than those classified as 'financial debt'.

Thus, only if the claim by way of debt falls within one of the three categories as listed above, can be categorised as an operational debt. In case if the amount claimed does not fall under any of the categories mentioned as above, the claim cannot be categorised as an operational debt, and even though there might be a liability or obligation due from one person, namely Corporate Debtor to another, namely Creditor other than the Government Company Appeal (AT) (Insolvency) No. 474 of 2020 12 of 39 or local authority, such a creditor cannot categorise itself as an "Operational Creditor"

as defined under Section 5(21) of the I&B Code, 2016. 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.

In case of lease of immovable property, Default can be determined, on the basis of evidence. While exercising summary jurisdiction, the Adjudicating Authority exercising its power under Insolvency and Bankruptcy Code 2016, cannot give finding regarding default in payment of lease rent, because it requires further investigation."

10. The above judgment has been noticed by the Adjudicating Authority. Still, the Adjudicating Authority has considered that it is not a simple case of outstanding amount only on account of lease rent. Still, the charges of electricity, diesel, sewer and water were also due. Even if the lease rent was not considered as operational debt, still the Application is maintainable because other charges were much more than the threshold limit of Rs. One lakh. It is further noted by the Adjudicating Authority that diesel has been consumed for providing electricity and electricity charges had to be reimbursed by the Corporate Debtor based upon its consumption. Similarly, water charges were also to be paid by the Corporate Debtor. This activity falls Company Appeal (AT) (Insolvency) No. 474 of 2020 13 of 39 in the definition of provision of services as defined under Section 5(21) of the Code.

11. However, I have gone through the Application submitted in Form 5 by the Operational Creditor, wherein details of the operational debt have been provided, which are noted as under:

Company Appeal (AT) (Insolvency) No. 474 of 2020 14 of 39 Company Appeal (AT) (Insolvency) No. 474 of 2020 15 of 39 Company Appeal (AT) (Insolvency) No. 474 of 2020 16 of 39 Company Appeal (AT) (Insolvency) No. 474 of 2020 17 of 39

12. On perusal of Form 5, it is crystal clear that the Operational Creditor has filed this petition for the realisation of only the outstanding lease rent and Company Appeal (AT) (Insolvency) No. 474 of 2020 18 of 39 it does not contain any mention of outstanding due on account of diesel, electricity and water charges. The applicant has also stated that in addition to the lease agreement, there was also a business relationship with the Corporate Debtor. The Operational Creditor was engaged by "One 97" to collect KYC information of customers of Paytm Payments Bank Limited by obtaining their proof of identity and address which work was assigned by an operational creditor to the corporate debtor for a fixed fee vide a separate agreement. It was further agreed between them that the fee shall be adjusted towards Rents to the extent required for the premises. After all

adjustments, the Corporate Debtor still owed Rs.54,73,536/- to the Operational Creditor.

13. The details of the Operational debt itself reveal the alleged disputes between the parties regarding the outstanding amount of alleged lease rent. The Operational Creditor has stated that as per lease deed, only possession was allowed to be taken in two phases, whereas there was no such condition for the vacation of the part of the leased premises. The Operational Creditor has questioned the validity of the action of the Appellant/lessee to terminate the lease deed for part of the leased premises, i.e. of Ground Floor only and has also claimed the rent of ground floor premises as operational dues.

14. The applicant has further stated that the lease deed was not properly terminated, as part termination was in breach of the Lease Agreement. The security deposit given by the Corporate Debtor for phase II was forfeited to realise the rent on the basis of the deemed continuation of lease deed. It is also contended that the Corporate Debtor vacated the ground floor without any intimation to the Operational Creditor, and moved out their computers Company Appeal (AT) (Insolvency) No. 474 of 2020 19 of 39 and other official equipments overnight. Thereafter, on inspection of the premises, damages to the property were noticed for which the Operational Creditor is claiming damage charges from the Corporate Debtor for the damage caused to articles such as AC, Chairs and Tables, false roofing, flooring, plumbing and carpet based on estimated repair charges.

15. It is pertinent to mention that the alleged damages to the property are not liquidated damages and such unliquidated damages, without the order of Court, cannot be claimed under the powers conferred to the Adjudicating Authority under the I&B Code.

16. In this case, the question, 'whether lease Rent falls under the category of 'operational debt' or not', loses its significance when the alleged lease rent itself is disputed. The undisputed claim is the sine qua non for initiating CIRP U/S 9 of the Code.

17. In this case, the dispute relates to the deemed continuation of lease deed. The Corporate Debtor claims that lease of the ground floor was terminated after notice, and part of the premises was vacated. Per contra, the Operational Creditor claims that vacation of part premises was not permissible and therefore, lease rent for whole premises is recoverable as an operational debt. Thus, even if the Lease Rent is considered as an operational debt U/S 5(21) of the Code, in case of pre-existing dispute, such operational debt is beyond the scope of Sec 9 of the Insolvency & Bankruptcy Code 2016.

18. In this case, the Operational Creditor has filed the petition after issuing demand notice under Section 8 of the Code. Photocopy of the demand notice given in Form 3 is as under:

Company Appeal (AT) (Insolvency) No. 474 of 2020 20 of 39 Company Appeal (AT) (Insolvency) No. 474 of 2020 21 of 39 Company Appeal (AT) (Insolvency) No. 474 of 2020 22 of 39 Company Appeal (AT) (Insolvency) No. 474 of 2020 23 of 39 Company Appeal (AT) (Insolvency) No. 474 of 2020 24 of 39

19. Based on the demand notice, it is clear that the alleged operational debt is related to the lease rent of Ground Floor and Basement Floor of the said premises. In response to the demand notice dated 27th September 2018, the Corporate Company Appeal (AT) (Insolvency) No. 474 of 2020 25 of 39 Debtor submitted its reply on 08th October 2018. . The contents of said mail dated 13th September 2018 is as under;

"4. That vide mail dated 23rd March 2018 we have written to "AITHENT" and shown our willingness to vacate the Basement (which was taken on lease as per phase-I). However, to our surprise an email dated 06th April 2018 was written by "AITHENT" representative that our company cannot vacate the Basement alone as there is no clause for part vacation of the property and hence we are unable to accept our request. It was further stated in said mail that in case "WDS" wish to surrender the basement floor we need to execute a new lease for ground floor alone and it can be done after full payment of Rs.40,27,179/-.

5. It is pertinent to mention here that the intent of single agreement was contrary to the interpretation made by "AITHENT" in the said mail dated 06th April 2018. Since then a dispute has arisen between "AITHENT" and "WDS". That "AITHENT" has not set off the security deposit paid by "WDS" in respect of Basement.

9. That after wards there were various communication exchanged between "WDS" and "AITHENT" and various meetings also took place to settle the dispute however it was not resolved till date. It is pertinent to mention here that a last meeting was held on 12th September 2018 to settle down the dispute and a mail dated 13th September 2018 was also sent by Mr. Sukhbir Singh wherein the minutes of meeting was shared with officials of our company"

20. Thus, it is clear that in reply to the demand notice, the Corporate Debtor had contended that there was a pre-existing dispute between the parties. The Company Appeal (AT) (Insolvency) No. 474 of 2020 26 of 39 Corporate Debtor emphasised our attention towards mail dated 13th September 2018. Copy of the email dated 13th September 2018 is as under:

Company Appeal (AT) (Insolvency) No. 474 of 2020 27 of 39

21. On perusal of the above email, it is clear that dispute between "AITHENT" and "WDS" existed till the date of issuance of demand notice, i.e. 27th September 2018. Since the provision of Section 9 can only be invoked for the realisation of the undisputed operational debt, the petition U/S 9 is thus, not maintainable.

22. The Appellant contends that the email correspondence made before the issuance of demand notice clearly shows that the demand contains the rent Company Appeal (AT) (Insolvency) No. 474 of 2020 28 of 39 for the Basement for January, February and March 2018 which "AITHENT" had already agreed to waive off for the said three months. It also contains the rent for May, June and July 2018, although the basement premises was already vacated. Thus, whether the rent for May,

June and July is payable or not, is a disputed question which cannot be decided in a petition filed U/S 9 of the Code.

23. The Appellant/Corporate Debtor has further placed reliance on the email correspondence dated 06th April 2018, photocopy of the email is as under:

Company Appeal (AT) (Insolvency) No. 474 of 2020 29 of 39

24. It appears in the above email that dispute was raised on account of part vacation of the property. The Operational Creditor's contention is that since the basement floor and ground floor were part of the same lease deed, therefore, part vacation of the property and subsequent termination of lease for the said portion is not permissible. Therefore, the request made by the Corporate Debtor through an email dated 23rd March 2018 was not accepted. The Operational Creditor further wrote that in case the Corporate Debtor surrenders basement floor, new lease deed could be executed after full payment of Rs.40,27,179/-.

25. Appellant has placed further reliance on the letter dated 13th August 2018. Copy of the letter is as under:

Company Appeal (AT) (Insolvency) No. 474 of 2020 30 of 39

26. The above correspondence clearly shows there was pre-existing dispute from the time before issuance of demand notice dated 27th September 2018. Company Appeal (AT) (Insolvency) No. 474 of 2020 31 of 39

27. In case of Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353: 2017 SCC OnLine SC 1154: (2018) 1 SCC (Civ) 311 at page 405 Hon'ble the Supreme Court of India has held:

"51. It is clear, therefore, that once the operational Creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the Application under Section 9(5)(2)(d) if notice of dispute has been received by the operational Creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational Creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a 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. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the Application.

56. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the Appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was Company Appeal (AT) (Insolvency) No. 474 of 2020 32 of 39 wholly incorrect in characterising the defence as vague, got up and motivated to evade liability."

28. In the case of Mobilox Innovations Private Limited (supra) Hon'ble Supreme Court has interpreted the phrase 'pre-existence of dispute' used in section 9 of the I&B Code. The relevant portion of the said judgment is reproduced below:

"33. The scheme Under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate Debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate Debtor must bring to the notice of the operational Creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing - i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.

34. Therefore, the adjudicating Authority, when examining an Application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh? (See Section 4 of the Act) Company Appeal (AT) (Insolvency) No. 474 of 2020 33 of 39

(ii) Whether the documentary evidence furnished with the Application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the Application would have to be rejected.

Apart from the above, the adjudicating Authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

(emphasis in bold supplied)

29. It is further pertinent to mention that the Hon'ble Supreme Court has propounded the guidelines to be followed in deciding Application under Section 9 of the Code. However, I fail to find any discussion about the existence of a pre-existing dispute in the order passed by the Adjudicating Authority. The judgment of the Adjudicating Authority has been passed solely on the basis that the NCLAT judgment passed in M. Ravindranath Reddy case is distinguishable on facts. Hence, the ratio of the same is not applicable in the instant case. The relevant part of the order of the Adjudicating Authority is given below for ready reference:

"3. The Ld. Counsel on behalf of the Operational Creditor appeared and submitted that default continued from 19th February 2018. The Corporate Debtor also accepted its debt by email dated Company Appeal (AT) (Insolvency) No. 474 of 2020 34 of 39 14th May 2018. Our attention was also drawn to the Ledger Account, copy of Invoices and terms & conditions of the Agreement/Lease Deed. It was specifically argued that it was not a case simply of outstanding amount only on account of lease rent but amount of electricity charges, diesel, sewer and water charges were also due. Our attention was specifically drawn, in this regard, to page no. 41 containing details of such charges. Based upon this statement, it was pleaded that even if the lease rent was not considered as operational debt, in view of the decision of the Hon'ble NCLAT, still this Application was maintainable as the amount on account of other charges was much more than the threshold limit of Rs. 1 Lac.

4. On the other hand, Ld. Counsel for the Corporate Debtor placed strong reliance on the decision of Hon'ble NCLAT In the case of M. Ravindranath Reddy vs. G. Kishan & Ors. in Company Appeal (AT) (insolvency) No.331 of 2019, Order dated 17th January 2020. It was also pleaded that other charges also arose on account of lease, hence, the ratio of this decision was applicable to such charges also. Reliance was also placed on the decision of NCLT, Mumbai Bench, in the matter of Citicare Super Speciality Hospital vs. Vighnaharta Health Visionaries Pvt. Ltd. (C.P. No. 567/B/2018), Order doted 11th March 2019.

5. We have considered the submissions made by both the sides and material on record. Admittedly, in the present case, there are dues of electricity, diesel, sewer and water charges which are undisputed by the Corporate Debtor. The quantum of such claim/debt is also more than Rs. 1 Lac. Diesel has been consumed for providing electricity. Electricity charges are to be reimbursed by the Corporate Debtor based upon its consumption. Similarly, water charges are also to be paid. These activities clearly fall in the definition of provisions of Services as defined in Section 5(21) of IBC, 2016 as the definition in Section 5(21) means Company Appeal (AT)

(Insolvency) No. 474 of 2020 35 of 39 a claim in respect of the provision of Services. Thus, at the cost of repetition, we hold that by no stretch of imagination it can be said that such facilities provided by the Operational Creditor are not services. Accordingly, we reject the contention of the Corporate Debtor that since main services cannot be categorised as operational debt, these will also not construe as operational debt. In this regard, we are further of the view that no such restriction/condition exists in provisions of Section 5(21) of IBC, 2016, hence, for this reason also, we see no merit in this contention of the Corporate Debtor. As evident from the above discussion that the decision of Hon'ble NCLAT clearly distinguishable on facts, hence, ratio of same is not applicable.

6. Notice U/S 8 of IBC, 2016 has duly been served and acknowledged. The Application is otherwise complete and defect- free. The name of the IRP is not proposed as it is not mandatory for an application filed under section 9 of IBC, 2016, hence, we shall appoint IRP from the panel of IRPs approved by IBBI."

(verbatim copy)

30. In this case, the Adjudicating Authority has nowhere discussed the pleadings of the Corporate Debtor regarding the pre-existing dispute even though in reply to the demand notice, the Corporate Debtor had specifically pleaded that CIRP cannot be invoked in case of pre-existing dispute between the parties.

31. Based on the law laid down by Hon'ble Supreme Court in Mobilox (supra) case, it was mandatory for the Adjudicating Authority to give a finding on the claim of pre-existing dispute raised by the Corporate Debtor. Company Appeal (AT) (Insolvency) No. 474 of 2020 36 of 39

32. In case of Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407: 2017 SCC OnLine SC 1025: (2018) 1 SCC (Civ) 356 at page 438 Hon'ble Supreme Court has held that:

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing--i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

33. Based on the law laid down by Hon'ble Supreme Court in case of Innoventive Industries Ltd. (supra) Case and Mobilox Innovations (P) Ltd. (supra) case, it was mandatory for the Adjudicating Authority to decide whether the plea taken by the Corporate Debtor regarding existence of pre-

existing dispute was based on any plausible contention which required further investigation and that the "dispute" was not a patently feeble legal argument or an assertion of fact unsupported by evidence. The Hon'ble Supreme Court has further held that the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the Adjudicating Authority has to reject the Application. Company Appeal (AT) (Insolvency) No. 474 of 2020 37 of 39

34. However, I find that the Adjudicating Authority has admitted the petition under Section 9 without giving any finding on the pre-existing dispute, even though the Corporate Debtor has raised the plea in its reply to the demand notice. On perusal of the record of the case, I am satisfied that there is sufficient evidence to show that there was pre-existing dispute between the parties.

35. The Adjudicating Authority has admitted the petition ignoring the fact that the alleged dues are relating to the outstanding Lease Rent. In contrast, there is sufficient evidence to show that pre-existing dispute existed regarding vacation of part of the leasehold premises, i.e. Basement Floor only, despite there being a Joint lease Agreement for Ground Floor and Basement. Such questions cannot be decided in summary jurisdiction exercised by the Adjudicating Authority under the Code U/S 9 of the Code.

36. It is also clear that the petition filed U/S 9 of the I & B Code 2016, for the realisation of the outstanding dues on account of Lease rent is not maintainable on account of the pre-existing dispute. Thus, the Appeal deserves to be Allowed and Impugned Order of Admission of petition under Section 9 of the Code deserves to be set aside.

37. In view of the aforesaid findings, I have no other option but to set aside the impugned order dated 13th March 2020. The Application preferred by 1st Respondent under Section 9 of the 'I&B Code' is dismissed. The appellant 'Corporate Debtor' (company) is released from all the rigours of 'Moratorium' and is allowed to function through its Board of Directors with immediate effect. The 'Interim Resolution Professional'/'Resolution Professional' will Company Appeal (AT) (Insolvency) No. 474 of 2020 38 of 39 provide and intimate the fees for the period he has functioned and costs of 'Corporate Insolvency Resolution Process' incurred by him to the Appellant/'Corporate Debtor' and amount, if any, already received. The 'Interim Resolution Professional' will hand over the assets and records to the Board of Directors of the Corporate Debtor.

38. However, it is to be clarified that the view taken by me is in the minority. Hence, it shall not come into effect, and the view taken by the Hon'ble co- Members of the Bench shall prevail.

[V. P. Singh] Member (Technical) NEW DELHI 05th NOVEMBER, 2020 pks Company Appeal (AT) (Insolvency) No. 474 of 2020 39 of 39