NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 423 of 2021

(Arising out of Order dated 04.03.2020 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench in Company Petition No. (IB)/176/9/JPR/2019)

IN THE MATTER OF:

Jaipur Trade Expocentre Private Limited
I-83, Lajpat Nagar – II,
New Delhi – 110024. .... Appellant

Vs

M/s Metro Jet Airways Training Private Limited
102-103, Gopalpura Bypass,
Near Trivani Nagar Chouraha Jaipur
Jaipur, Rajasthan – 302018. .... Respondent

Present:

For Appellant: **Ms. Sanjana Saddy, Mr. Sanyat Lodha & Ms. Harshita Singhal, Advocates.**

For Respondent: **Mr. Vikrant Arora & Mr. Manish Verma, Advocates.**

J U D G M E N T

ASHOK BHUSHAN, J.

This larger Bench has been constituted to consider the following two questions referred to it by Three Members' Bench vide order dated 09.03.2022:

> *"i. Whether the Judgment of this Tribunal in Company Appeal (AT) (Ins.) No.331 of 2019 in the matter of 'Mr. M. Ravindranath Reddy vs. Mr. G. Kishan & Ors.' lays down the correct law.*
>
> *ii. Whether claim of the Licensor for payment of License Fee for use and occupation of immovable premises for commercial purposes is a claim of*

'Operational Debt' within the meaning of Section 5(21) of the Code."

2. Before we proceed to consider the submission of the parties and the Questions framed, it is necessary to notice the facts of the case, which has given rise to this Appeal.

(i) The Appellant before us entered into an Agreement dated 15.04.2017 with the Respondent M/s Metro Jet Airways Training Private Limited, the Corporate Debtor. Under the License Agreement the Licensor granted license of Admin Building with total super area measuring 31000 Sq. Ft., which premises was on Warm Shell Building with fittings and fixtures, electrical, flooring as per good corporate standards and as per the requirement of the Licensee. The Licensee took the premises for the purposes of running an Educational Establishment with effect from 01.06.2017 for an initial period of five years. License fee was agreed to Rs.4,00,000/- lumpsum per month + government taxes.

(ii) Between 08.11.2017 to 22.11.2017, part payment was made by the Corporate Debtor towards the license fee. A cheque dated 07.05.2018 amounting to Rs.20,00,000/- was handed over by the Corporate Debtor to the Operational Creditor for part discharge of the outstanding license fee, which cheque was dishonoured and returned unpaid. Another cheque dated 08.10.2018 amounting to Rs.20,00,000/- was handed over to

the Operational Creditor by the Corporate Debtor, which on presentation also dishonoured and returned unpaid.

(iii) On 03.05.2019, the Appellant – Operational Creditor sent a Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") for total dues of Rs.1,31,20,788/-, consisting of license fee + taxes with interest. The Demand Notice was not replied by the Corporate Debtor.

(iv) On 09.05.2019 that is, after receipt of the Demand Notice, the Corporate Debtor initiated civil proceedings before Sanganer Court, Jaipur.

(v) The Adjudicating Authority issued Notice to the Corporate Debtor in Section 9 Application and reply dated 11.09.2019 was filed by the Corporate Debtor, disputing the debt. The Appellant filed its rejoinder to the reply of the Corporate Debtor. The Adjudicating Authority allowed the Corporate Debtor to file additional documents. The Adjudicating Authority vide its order dated 04.03.2020 dismissed the Section 9 Application holding that claim arising out of grant of license to use of immovable property does not fall in the category of goods or services, thus, the amount claimed in Section 9 Application is not an unpaid operational debt and therefore, Application cannot be allowed. Aggrieved by the

order of the Adjudicating Authority dated 04.03.2020, this Appeal has been filed by the Operational Creditor.

3. Two Member Bench vide its order dated 07.03.2022, referred the two questions as noted above for consideration of larger Bench. The three Member Bench heard the parties and vide its order dated 09.03.2022 directed that questions framed on 07.03.2022 be placed before the larger Bench, hence, this Appeal has been placed before this larger Bench of five Members.

4. We have heard Ms. Sanjana Saddy, learned Counsel for the Appellant and Shri Vikrant Arora, learned Counsel for the Respondent.

5. The learned Counsel for the Appellant submits that Agreement dated 15.04.2017 executed between the parties for providing services to the Corporate Debtor of the premises, which is a Warm Shell Building with fittings and fixtures, electrical, flooring as per good corporate standards and as per the requirements of the Licensee. The premises was licensed to the Corporate Debtor for running Educational Institution. The provision made by Agreement was a provision of 'service' within the meaning of Section 5, sub-section (21) of the Code. The debt was an 'operational debt' within the meaning of Section 5, sub-section (21) of the Code. The Adjudicating Authority committed error in holding that claim arising out of grant of license to use of immovable property does not fall in the category of goods or services. The Corporate Debtor defaulted in payment of license fee and dishonour of cheques is proof that the amounts are due from the Corporate Debtor to the Operational Creditor. Demand Notice was duly

served on the Corporate Debtor on 07.05.2019 but neither any reply was given to the Demand Notice nor any dispute was raised by the Corporate Debtor. The Corporate Debtor after receiving the Demand Notice with a malafide intention initiated civil proceedings before the Sanganer Court, Jaipur on 09.05.2019. The Appellant is a service provider to the Corporate Debtor by means of License Agreement, who was permitted to use the premises for the purpose of running an Educational Institution.

6. The learned Counsel for the Appellant placed reliance on judgment of this Tribunal in ***Anup Sushil Dubey v. National Agriculture Co-operative Marketing Federation of India ltd. and Anr. – (2020) SCC OnLine NCLAT 674***; and ***Sarla Tantia v. Ramaani Hotels & Resorts Pvt. Ltd. and Anr. – (2019) SCC OnLine NCLAT 725***.

7. The learned Counsel for the Respondent, refuting the submissions of learned Counsel for the Appellant submits that the License Agreement between the parties does not come within the meaning of 'operational debt'. The alleged dues of rent from the Respondent is purely a subject matter of the civil suit between the parties and the present Appeal is not maintainable. The Appeal deserves to be dismissed as there was pre-existing dispute between the parties. Outstanding rent/ License Fee does not come within the meaning of 'operational debt' as defined in Section 5(21) of the code. The Application under Section 9 for recovery of license fee is not maintainable. Prior to License Agreement between the parties, there was a Lease Agreement, which was executed on 06.01.2014 between RIICO and the Appellant. A Writ Petition has also been filed in Rajasthan

High Court for cancelling the lease of the premises granted in favour of Appellant by RIICO. The learned Counsel for the Respondent has placed reliance on judgment of this Tribunal in ***M. Ravindranath Reddy v. G. Kishan & Ors. – Company Appeal (AT) (Ins.) No.331 of 2019*** and ***Promila Taneja vs. Surendri Designe Pt. Ltd. - Company Appeal (AT) (Ins.) No.459 of 2020***.

8. We have considered the submissions of learned Counsel for the parties and perused the record.

9. The Government of India for the purpose of drafting of a single, comprehensive and internally consistent bankruptcy law, constituted a Bankruptcy Law Reforms Committee to deal with the task to create a uniform framework that would cover matters of insolvency and bankruptcy of all legal entities and individuals. The Bankruptcy Law Reforms Committee submitted its report dated 04.11.2015 to Finance Minister, Government of India. In paragraph 5.2.1, the Bankruptcy Reforms Committee dealt with subject "*who can trigger the IRP?"*, the following observations have been made by Bankruptcy Law Reforms Committee, 2015 under paragraph 5.2.1:

> ***"5.2.1 Who can trigger the 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."

10. Chapter 2 of the Code deals with The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Section 5, sub-sections (20) and (21) of the Code, which are relevant in the present case are as follows:

*"**3.(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;*

***(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"*

11. Section 3 of the Code also contains definition. Section 3, sub-section 33 deals with "transaction", which is to the following effect:

> *"**5.(33)** "transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor"*

12. Section 3(37) provides that words and expressions used but not defined in this Code but defined in other statutes, shall have the meanings respectively assigned to them in those Acts. Section 3(37) reads as:

> *"(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 Contact (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. The key question to be answered in the present Appeal is as to whether the license fee, which is claimed to be due from the Corporate Debtor, is an 'operational debt' within the meaning of Section 5(21) or not? Before we proceed with consideration of submissions of learned Counsel for the parties, it is useful to notice certain terms and conditions of License Agreement dated 15.04.2017 entered between the parties. The Agreement contains following Recitals in Clause 1:

> *"1. GRANT OF DEMISED PREMISES ON LICENSE*
>
> *a. In consideration of the LICENSE FEE to be paid by the LICENSEE and the LICENSEE agreeing to*

observe and perform the covenants, terms and conditions herein contained, the LICENSOR hereby grants on LICENSE the Demised Premises to the "LICENSEE" and the "LICENSEE" has agreed to take the Demised Premises on LICENSE for the purpose of running an educational establishment as detailed hereinbefore, on the terms and conditions appearing hereinafter.

In pursuance to the above LICENCE AGREEMENT, the LICENSOR hereby agrees to hand over the vacant and peaceful license of the Demised Premises to the LICENSEE on or before 1st June 2017.

b. *It is specifically agreed between the parties that the "LICENSEE" will not in respect of the Demised Premises create encumbrance of any kind such as mortgage, collateral security etc. or any other interest in favour of third party or otherwise.*

c. *At the time of signing of this License Agreement, the LICENSEE undertakes and warrants that it does not have any claim against the LICENSOR with regard to any item of work, quality of work, materials, installation etc. Any or all complaints that the LICENSEE had with respect to the Demised Premises have been sorted out by the LICENSEE with the LICENSOR before signing of this agreement.*

d. *On termination of this agreement the LICENSEE undertakes to restore the demised premises to its original condition"*

14. The tenure of the Agreement as per Clause 2 was for five years with effect from 01.06.2017 with renewal clause in Clause-3. Clause 4 of the Agreement, which deals with License Fee is as follows:

> *"4. LICENSEE FEE*
>
> *a. In consideration of the LICENSE granted herein for the Demised Premises, the LICENSEE shall pay to the LICENSOR an amount of Rs.4,00,000/- Lumpsum month (Rupees Four Lacs only) plus Government Taxes if any payable to the LICENSOR by means of Bankers cheque/ cheque payable at par, in advance on or before 7th Day of each English Calendar Month. Any delay in payment of the LICENSE FEE beyond the 7th of each calendar month would attract interest @ 2% per month compounded monthly for the period of delay. The amounts payable per month shall be as described in the schedule annexed as Annexure B.*
>
> *b. In addition to the above, the LICENSEE shall pay all government taxes including but not limited to Service Tax, VAT GST, Excise etc., over and above the License fee, which are or may become applicable in the future, in relation to the payments under this agreement.*
>
> *c. The LICENSEE would deduct TDS, if applicable, all the applicable rates on the LICENSE FEE and the LICENSEE would deposit the same with the concerned authorities in time and provide the LICENSOR with the Certificates as required under law.*

d. The monthly LICENSE FEE shall be enhanced automatically by 3% of the last paid fee after the expiry of every ONE (1) year term of this LICENSE AGREEMENT.

e. The LICENSE FEE shall become payable from 1st June 2017, as agreed between the parties hereto."

15. Certain key features of the License Agreement which are reflected from the Agreement dated 15.04.2017 are as follows:

(i) License was granted with regard to Admin Building, which has super area measuring 31000 Sq. Ft., which was referred to as Demised Premises in Annexure-A to the Agreement. The Recitals as quoted above also contains following: -

"Whereas the Demised Premise is a Warm Shell Building with fittings and fixtures, electrical, flooring , as per good corporate standards and as per the requirement of the LICENSEE".

(ii) Licensee has agreed to take the Demised Premises for the purpose of running an educational establishment on the terms and conditions appearing in the Agreement.

16. Now coming back to the definition of 'operational debt' as contained in Section 5 (21), the definition clause provides that 'operational debt' means a claim in respect of the provision of goods or services.

17. Apart from definition as contained under Section 5(21), the 'operational debt' has not been explained in any other provisions of the Code. The definition under Section 5(21) uses the expression 'operational'. The expression 'services' used in Section 5(21) has also not been defined in the Code. When an expression used in statute is not defined, the Court has to explain the meaning of undefined expression in accordance with the well-established rules of statutory interpretation. The Hon'ble Supreme Court has laid down the law on the above in ***(2015) 4 SCC 770 in Keshavlal Khemchand and Sons Private Limited and Ors. vs. Union of India and Ors.***, wherein in paragraph 53, following has been laid down:

> *"**53.** We are of the firm opinion that it is not necessary that the legislature should define every expression it employs in a statute. If such a process is insisted upon, legislative activity and consequentially governance comes to a standstill. It has been the practice of the legislative bodies following the British parliamentary practice to define certain words employed in any given statute for a proper appreciation of or the understanding of the scheme and purport of the Act. But if a statute does not contain the definition of a particular expression employed in it, it becomes the duty of the courts to expound the meaning of the undefined expressions in accordance with the well-established rules of statutory interpretation."*

18. When a statute does not contain a definition of a particular expression employed in it, it becomes the duty of the Court to expound the meaning of the undefined expression in accordance with law with the well-

established rules of statutory interpretation. We need to explain as to what is the meaning of expression 'services' in general parlance. In ***P Ramanatha Aiyar – Advanced Law Lexicon (6th Edition Volume 4)***, the word 'services' has been defined in following words:

> *""SERVICE" means service which is made available to potential users and includes the provisions of facilities in connection with banking, financing, insurance, chit fund, real estate, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the conveying of news or other information but does not include the rendering of any service free of charge or under a contract of personal service."*

19. We have noted Clause 4 of the Agreement dealing with License Fee. Clause 4 (b) provides:

> *"4(b) In addition to the above, the LICENSEE shall pay all government taxes including but not limited to Service Tax, VAT GST, Excise etc., over and above the License fee, which are or may become applicable in the future, in relation to the payments under this agreement."*

20. The above condition stipulates that Licensee shall pay all government taxes including but not limited to Service Tax, VAT, GST, Excise etc., over and above License Fee. The Agreement itself thus support payment of GST. The payment of GST is contemplated only for 'goods' and 'services' and the Clause 4 of the Agreement clearly indicates that when Licensee is to be taxed for GST, it being taxed for 'services'. The definition of 'services' given

under the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "**2017 Act**") in Section 2(102) is to the following effect:

> *"**2(102)** "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged"*

21. Section 2(52) of 2017 Act, defines "goods" in following manner:

> *"**2(52)** "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply"*

22. The Agreement dated 15.04.2017 is not with regard to any 'goods'. The Agreement dated 15.04.2017 has to read to mean that the Agreement between the parties was with regard to 'services' within the meaning of Section 5, sub-section (21) of the Code. Had the Agreement dated 15.04.2017 did not contemplate services, there was no occasion for making the Licensee liable to pay GST over and above the License Fee. The License Fee to be paid under the Agreement included Government Taxes like GST etc. The above Clause of Agreement, thus, throws considerable light on the nature of provision, which was provided by the Licensor by the Agreement.

23 We have noticed above that Section 3(33) of the Code deals with 'transaction'. Agreement dated 15.04.2017 is fully covered within the

meaning of word 'transaction' as defined in Section 3(33). We may also need to look into the meaning of expression 'operation'. The word 'operation' is derived from the word 'operate'. Various expressions relating to 'operation' and 'operate' have been defined. For example 'Operating Cost' and 'Operating Profit or Loss' have been defined in ***P Ramanatha Aiyar – Advanced Law Lexicon (6th Edition Volume 3)*** to the following effect:

> *"**Operating cost.** An expense incurred in the conduct of the principal activities of the enterprise. Also termed operating expense."*
>
> *"**Operating profit or loss.** Profit or loss arising* out of the principal business of a company, before extraordinary items (such as investments) are taken into accounting.
>
> *Profit or loss made by a company through its main activity, calculated by taken operating costs away from trading profit (or adding operating expenses to its trading loss). It excludes interest on loans, returns on other investments, or any other extraordinary items."*

24. The 'operating cost' as defined, is an expense incurred in the conduct of the principal activities of the enterprise. The 'operational debt' is also a debt which is incurred in the conduct of principal activities of the enterprise. In the present case, the Corporate Debtor has taken a licensed premises for running an Educational Institution. All cost incurred by the Corporate Debtor and cost which remained unpaid shall become a debt on the part of Operational Creditor. The payment of License Fee is an obligation on the Corporate Debtor under the Agreement dated 15.04.2017.

The word 'claim' has been defined in Section 3, sub-section (6) of the Code in following words:

> *"(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, matured, unmatured, disputed, undisputed, secured or unsecured"*

25. The claim of the Operational Creditor for payment of License Fee is fully covered as 'claim' of the definition under Section 3, sub-section (6) and similarly liability or obligation in respect of claim becomes a debt on the part of the Corporate Debtor within the meaning of Section 3 (11), which defines debt in following words:

> *"(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"*

26. Before we refer to the judgments relied by learned Counsel for the parties in respect of their respective submission, we may notice the judgment of Hon'ble Supreme Court in ***Mobilox Innovations (P) Ltd. vs. Kirusa Software (P) Ltd. – (2018) 1 SCC 353***, where the Hon'ble Supreme Court had occasion to consider Section 9 of the Code, which deals with

operational debt. The Hon'ble Supreme Court in the above judgment has noticed the Bankruptcy Law Reforms Committee Report given in November 2015. In paragraph 17, the Hon'ble Supreme Court observed that it was as a result of the deliberations of this Committee, that the present Insolvency and Bankruptcy Code of 2016 was finally born. In paragraph 17, following observation has been made:

> *"**17.** All this then led to the Bankruptcy Law Reforms Committee, set up by the Department of Economic Affairs, Ministry of Finance, under the Chairmanship of Shri T.K. Viswanathan. This Committee submitted an interim report in February 2015 and a final report in November of the same year. It was, as a result of the deliberations of this Committee, that the present Insolvency and Bankruptcy Code of 2016 was finally born."*

The Hon'ble Supreme Court, thus, referred the Interim Report as well as the Final Report dated November 2015. Final Committee Report dated November 2015 has been quoted in paragraph 21 and 22 in the following words:

> *"21. By the final report dated November 2015, the recommendation of the interim report was shelved. The Committee made a distinction between financial contracts and operational contracts. It stated:*
>
> > *"4.3.3. Information about the liabilities of a solvent entity*

Operational contracts typically involve an exchange of goods and services for cash. For an enterprise, the latter includes payables for purchase of raw materials, other inputs or services, taxation and statutory liabilities, and wages and benefits to employees.

* * *

The Code specifies that if the adjudicator is able to locate the record of the liability and of default with the registered IUs, a financial creditor needs no other proof to establish that a default has taken place.

* * *

The second set of liabilities are operational liabilities, which are more difficult to centrally capture given that the counterparties are a wide and heterogeneous set. In the state of insolvency, the record of all liabilities in the IUs become critical to creditors in assessing the complexity of the resolution required. Various private players, including potential strategic acquirers or distressed asset funds, would constantly monitor entities that are facing stress, and prepare to make proposals to the committee of creditors in the event that an insolvency is triggered. Easy access to this information is vital in ensuring that there is adequate interest by various kinds of financial firms in coming up to the committee of creditors with proposals. It is not easy to set up mandates for the holders of operational liabilities to file the records of their liabilities, unlike the case of

financial creditors. However, their incentives to file liabilities are even stronger when the entity approaches insolvency.

4.3.4. Information about operational creditors

Once the invoice or notice is served, the debtor should be given a certain period of time in which to respond either by disputing it in a court, or pay up the amount of the invoice or notice. The debtor will have the responsibility to file the information about the court case, or the repayment record in response to the invoice or notice within the specified amount of time. If the debtor does not file either response within the specified period, and the creditor files for insolvency resolution, the debtor may be charged a monetary penalty by the adjudicator. However, if the debtor disputes the claim in court, until the outcome of this case is decided, the creditor may not be able to trigger insolvency on the entity. This process will act as a deterrent for frivolous claims from creditors, as well as act as a barrier for some types of creditors to initiate insolvency resolution."

22. *The Committee then went on to consider as to who can trigger the insolvency process. In para 5.2.1 the Committee stated:*

"Box 5.2. — Trigger for IRP

1. IRP can be triggered by either the debtor or the creditors by submitting documentation specified in the Code to the adjudicating authority.

2. For the debtor to trigger IRP, she must be able to submit all the documentation that is defined in the

Code, and may be specified by the Regulator above this.

3. The Code differentiates two categories of creditors: financial creditors where the liability to the debtor arises from a solely financial transaction, and operational creditors where the liability to the debtor arises in the form of future payments in exchange for goods or services already delivered. In cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity, the creditor will be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt is more than half the full liability it has with the debtor.

4. The Code will require different documentation for a debtor, a financial creditor, and an operational creditor to trigger IRP. These are listed in Box 5.3 under what the adjudicator will accept as requirements to trigger IRP.

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.

5.2.2. How can IRP be triggered?

An application from a creditor must have a record of the liability and evidence of the entity having defaulted on payments. The Committee recommends different documentation requirements depending upon the type of creditor, either financial or operational. A financial creditor must submit a record of default by the entity as recorded in a registered information utility (referred to as the IU) as described in Section 4.3 (or on the basis of other evidence). The default can be to any financial creditor to the entity, and not restricted to the creditor who triggers IRP. The Code requires that the financial creditor propose a registered insolvency professional to manage IRP. Operational creditors must present an "undisputed bill" which may be filed at a registered information utility as requirement to trigger IRP. The Code does not require the operational creditor to propose a registered insolvency professional to manage IRP. If a professional is not proposed by the operational creditor, and IRP is successfully triggered, the

Code requires the adjudicator to approach the regulator for a registered insolvency professional for the case.

When the adjudicator receives the application, she confirms the validity of the documents before the case can be registered by confirming the documentation in the information utility, if applicable. In case the debtor triggers IRP, the list of documentation provided by the debtor is checked against the required list. The proposal for RP is forwarded to the regulator for validation. If both the documentation and the proposed RP checks out as required within the time specified in regulations, the adjudicator registers IRP.

In case the financial creditor triggers IRP, the adjudicator verifies the default from the information utility (if the default has been filed with an information utility, it shall be incontrovertible evidence of the existence of a default) or otherwise confirms the existence of default through the additional evidence adduced by the financial creditor, and puts forward the proposal for RP to the regulator for validation. In case the operational creditor triggers IRP, the adjudicator verifies the documentation. Simultaneously, the adjudicator requests the regulator for an RP. If either step cannot be verified, or the process verification exceeds the specified amount of time, then the adjudicator rejects the application, with a reasoned order for the rejection. The order rejecting the application cannot be appealed against. Instead, application

has to be made afresh. Once the documents are verified within a specified amount of time, the adjudicator will trigger IRP and register IRP by issuing an order. The order will contain a unique ID that will be issued for the case by which all reports and records that are generated during IRP will be stored, and accessed."

27. It is noteworthy that in paragraph 5.2.1 on the subject "*who can trigger IRP?"*, the recommendations of the report have been noticed. The learned Counsel for the Respondent submitted that there was no dispute regarding 'operational debt', hence, the observation of the Hon'ble Supreme Court in the above context cannot be read to mean that Hon'ble Supreme Court has approved the observation of the Bankruptcy Law Reforms Committee Report as stated in paragraph 5.2.1. The Hon'ble Supreme Court in the above case was considering a case where Application under Section 9 was filed claiming an 'operational debt', which was owed to the Respondent – Corporate Debtor. In the above context, as to what is the 'operational debt', the Bankruptcy Law Reforms Committee Report was referred to by the Hon'ble Supreme Court. It is true that there is no observation in the judgment specifically approving the views of the recommendation of the Bankruptcy Law Reforms Committee Report as contained in paragraph 5.2.1, but the reference of the said paragraph while quoting the relevant part of the Report, clearly means that the said recommendations of the Report were for the purpose of understanding the nature and content of the 'operational debt'. Further, there is no indication

in the observation made by Hon'ble Supreme Court in **Mobilox** that the Report of Bankruptcy Law Reforms Committee in paragraph 5.2.1 is incorrect or not to be followed. We, thus, conclude that the reference to paragraph 5.2.1 of the Bankruptcy Law Reforms Committee Report by the Hon'ble Supreme Court in **Mobilox** cannot be said to be irrelevant or meaningless. Thus, what Bankruptcy Law Reforms Committee Report in 2015 mentioned while explaining the 'operational debt' is relevant and can be fully relied for interpreting the expression 'operational debt' as reflected in Section 5, sub-section (21).

28. Now we come to the judgments of this Tribunal relied by learned Counsel for the Appellant in support of her submission.

29. Appellant has relied on judgments of this Tribunal in ***Anup Sushil Dubey v. National Agriculture Co-operative Marketing Federation of India ltd. and Anr.*** (supra), which was a case where Operational Creditor and the Corporate Debtor had entered into a Leave and License Agreement for the usage of cold storage. On account of default in making payment of outstanding debts, notice under Section 8 was issued and Section 9 Application was filed. One of the questions framed in the aforesaid case as to whether dues, if any, arising from the Leave and License Agreement is construed as an 'Operational Debt'?. In paragraphs 19 to 22, following have been observed:

> *"**19.** The contention of the Learned Counsel for the Appellant that Regulation 32 read with Section 14(2) is applicable to the facts of this case and that cold storage*

facilities cannot be construed as 'essential service' and, therefore, does not fall within the meaning of 'Operational Debt' as defined under Section 5(21), is untenable, having regard to the fact that Regulation 32 read with Section 14(2) only mentions essential goods and services whose supply cannot be terminated during the course of CIRP. The Code does not anywhere specify that the goods so mentioned under Regulation 32 are the same as those which fall within the ambit of the definition of Section 5(21). Annexure 1D of the Leave and Licence Agreement stipulates that the cold storage with the machinery and equipment has been designed for storage of all agricultural commodities. The Lessee being in need of a cold storage participated in the tender floated by the Lessor and sought for grant for the use and occupation of the cold storage unit. It is apparent from the material on record and the terms and conditions of the Leave and Licence Agreement that the Appellants have leased out the premises for 'Commercial Purpose', which comes within the meaning of 'Service' for the purpose of sub-Section (21) of Section 5 of the I&B Code, 2016.

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

> *"(42) "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of*

news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"

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

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

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

As the premises in the case on hand is leased out for 'Commercial Purpose', the cold storage owner/NAFED on collection is required to pay 'service tax' which is reflected in the tax invoices and 'Ledger Accounts' which is part of the record filed.

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

ambit of the definition of 'Operational Debt' as defined under Section 5(21) of the Code."

30. The next judgment relied by learned Counsel for the Appellant is ***Sanjeev Kumar vs. Aithent Technologies Private limited and another (2020) SCC OnLine NCLAT 734***, where the Corporate Debtor has taken on lease the basement and the ground floor of the premises and Lease Deed was executed for renting out the premises. Demand Notice was sent and then Section 9 Application was filed. One of the questions which arose for consideration in the case was as to 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(2) read with Section 5(21) of the Insolvency and Bankruptcy Code, 2016? In the above context, the Adjudicating Authority had admitted the Application, which order was upheld by this Tribunal holding that Operational Creditor had provided different type of services to the Corporate Debtor.

31. Next judgment relied by learned Counsel for the Appellant is ***Sarla Tantia v. Ramaani Hotels & Resorts Pvt. Ltd. and Anr.*** (supra) also a case of Leave and License Agreement entered between Operational Creditor and the Corporate Debtor. Application under Section 9 was filed claiming outstanding dues of Licence Fee, where this Tribunal took the view that the Application under Section 9 deserves admission. In paragraph 8 and 9, following has been observed:

*"**8.** The Adjudicating Authority was not supposed to conduct a roving enquiry though it could have been*

within its rights to go for a limited exercise of sifting the material available before it for separating the grain from the chaff and to reject the spurious defense. The contractual relations inter-se the parties which are governed by the Leave and License Agreement do not admit of any oral agreement contrary to stipulations therein. Thus viewed, the defense raised by the Respondent that the adhoc amount was paid on the basis of reduced 'carpet area' of the licensed premises or that the oral agreement running parallel to the Leave and License Agreement enjoined upon the Respondent to pay rent on the basis of 'carpet area', which was less as compared to the 'super built up area', was a mere moonshine and could not be entertained as a pre-existing dispute to defeat initiation of Corporate Insolvency Resolution Process. The Adjudicating Authority has clearly landed in error in rejecting the Appellant's version that the license fee was fixed for 'super built up area' and not for 'carpet area' as clearly stipulated in the Leave and License Agreement and the Appellant was under no obligation to reduce the rent. Reliance on irrelevant documents in coming to conclusion that there was a pre-existing dispute was uncalled for. The Adjudicating Authority also failed to notice that the Respondent never sought settlement of any dispute in regard to calculation of rent on 'carpet area' basis through arbitration which was the agreed mode of resolution of dispute between the parties in terms of the Leave and License Agreement. Significantly, no dispute was raised by the Respondent in reply to demand notice to which he did not at all respond.

> ***9.*** *Having regard for the factual matrix of the matter and the settled law on the subject, we are of the considered opinion that the impugned order suffers from serious legal infirmity and the same cannot be supported. A well merited case has been thrown out resulting in grave injustice. We accordingly, allow the appeal and set aside the impugned order. Since the debt and default is established, the Adjudicating Authority will admit the application under Section 9 of I&B Code after providing an opportunity to the Respondent — Corporate Debtor to settle the claim of Appellant, if it so chooses."*

32. Now, we come to the judgment relied by learned Counsel for the Respondent. The main judgment relied by learned Counsel for the Respondent is judgment of three Member Bench of this Tribunal in ***Mr. M. Ravindranath Reddy Vs. Mr. G. Kishan & Ors.*** (supra). In the above case the Corporate Debtor granted a license of industrial premises consisting of land measuring 1667 Sq. yards. The Corporate Debtor stopped making payment. A civil suit was also filed by the Corporate Debtor before the Civil Court. A Demand Notice under Section 8 was issued and Application under Section 9 was filed. The Adjudicating Authority admitted the Application against which order, the Appeal was filed by the suspended Director of the Corporate Debtor. This Tribunal took the view in the facts of the case that since the Lessor has filed the petition for the realization of enhanced lease rent from the lessee, the same does not come within the meaning of Section 5(21). Following were the observations made in the judgment:

"In the case in hand, the Respondent lessor has filed the petition for the realisation of enhanced lease rent from the lessee.

Thus understanding for not increasing the rent of a period of 6 years is a question of fact, which requires further investigation. Thus in the present case, there was a pre-existing dispute, which is proved by the issuance of notice under Section 106 of the TP Act, much before the issuance of demand notice, under Section 8 of the I&B Code. Based on the above, the application filed under Section 9 of the I&B Code could not have been admitted.

We are of the considered opinion that the alleged debt on account of purported enhanced rent of leasehold property does not fall within the definition of the operational debt in terms of Section 5(21) of the Code. On the above basis, it is clear that appeal deserves to be allowed.

ORDER

The appeal is allowed and the impugned order dated 21st January 2019 passed by the Adjudicating Authority/National Company Law Tribunal in CP (IB) No. 134/09/HDB/2018 Mr. G. Kishan & Ors. Vs. M/s Walnut Packaging Private Limited is set aside.

In effect, order (s) passed by Ld. Adjudicating Authority appointing "Interim Resolution Professional", declaring moratorium, freezing of account and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action taken by the "the Resolution Professional", including the advertisement published in the newspaper and all such orders and actions in pursuant to the impugned order are declared

illegal and are set aside. The application preferred by the 1st Respondent under Section 9 of the I&B Code is dismissed. The Adjudicating Authority will now close the proceeding. The 5th Respondent Company is released from all the rigour of proceedings and is allowed to function independently through its Board of Directors with immediate effect. The "Interim Resolution Professional"/"Resolution Professional" will hand over the management and records of the "Corporate Debtor".

The Adjudicating Authority will fix the fee of "Interim Resolution Professional" for the period he has functioned, which shall be paid by the applicant. The appeal is allowed with the observation above and direction; there shall be no order as to cost.

33. When we perused the judgment in ***Mr. M. Ravindranath Reddy's*** case, the observations of this Tribunal were with regard to the facts of the aforesaid case and the reply which was given by the Corporate Debtor was also with respect to the aforesaid case. We may further notice following observations of this Tribunal in ***Mr. M. Ravindranath Reddy's*** case :

"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 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.****"*

34. Reference has been made to Section 14(2) of the Code. Section 14, sub-section (2) is as follows:

*"**14(2)** The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.*

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and

preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified."

35. Section 14, sub-section (2) deals with supply of essential goods or services to the Corporate Debtor. The said provision has nothing to do with the extent and expense of 'operational debt' within the meaning of Section 5(21). The observation that '*any debt arising without nexus to the direct input or output produced or supplied by the Corporate Debtor, cannot be considered to be operational debt*' is conclusion drawn by this Tribunal contrary to the scheme of the Code. The 'operational debt' as defined in Section 5(21) has meaning much wider than the essential goods and services. Essential goods and services are entirely different concept and the protection under Section 14(2) as provided for is an entirely different context. Thus, the observations made that there has to be nexus to the direct input or output produced or supplied by the Corporate Debtor, is a much wider observation not supported by scheme of the Code.

36. The judgment of this Tribunal in ***Mr. M. Ravindranath Reddy's*** case does not consider the extent and expanse of the expression 'service' used in Section 5(21) of the Code. As noted above the Tribunal in the above case has relied on Section 14(2) of the Code for interpreting 'service', which was only a very restricted meaning of service. We are thus of the view that

the judgment of this Tribunal in ***Mr. M. Ravindranath Reddy*** does not lay down the correct law.

37. Now we come to the judgment of this Tribunal in ***Promila Taneja*** (supra), which was a case again of Section 9 Application, which was dismissed by this Tribunal relying on ***Mr. M. Ravindranath Reddy's*** case. In ***Promila Taneja's*** case this Tribunal again reiterated the view taken in ***Mr. M. Ravindranath Reddy's*** case. This Tribunal held that the reliance on the definition of 'service' in Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 are not relevant. In paragraph 11, following was laid down:

> *"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 Sushil 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.

38. This Tribunal relying on Section 3(37) observed that words and expression used in IBC, which have not been defined, but which have been defined under Section 3(37) can be directly imported. This Tribunal held that definition of 'service' in Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 are not covered under Section 3(37). Hence, they cannot be treated as supply of service. In paragraph 13 and 15, following has been laid down:

"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."

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

39. The observation of this Tribunal in the above case in respect of definition of 'service' under Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 are not covered by Section 3(37) of the Code, with regard to which observation, no exception can be taken. However, in the facts of the present case, where Agreement itself contemplate payment of GST for the services under the Agreement, on which GST is payable, the definition of 'service' under Central Goods and Services Tax Act, 2017 cannot be said to be irrelevant. More so, even if an expression is not defined in the statute, the meaning of expression in general parlance has to be considered for finding out the meaning and purpose of expression. After making above observation in ***Promila Taneja's*** case (supra), this Tribunal did not dwell with the question as to what is the meaning of expression of 'service' used in Section 5(21) of the Code. Reference to Section 5(8)(d) regarding 'financial debt' by this Tribunal in the above case also was not relevant for finding out definition of expression 'service' under Section 5(21). We, thus, are of the view that both in ***Mr. M. Ravindranath Reddy*** and ***Promila Taneja*** this Tribunal did not dwell upon the correct meaning of expression 'service' used in Section 5(21) of the Code. In any view of the matter, in the above mentioned two cases, the dues were in the nature of rent of immovable property whereas the present is a case of license granted for use of premises on Warm Shell Building with fittings and fixtures, electrical, flooring as per good corporate standards. Hence, the Licnesee was licensed for a particular kind of service for use by the Licensee for running a business of

Educational Institution. Hence, in the present case, debt pertaining to unpaid license fee was fully covered within the meaning of 'operation debt' under Section 5(21) and the Adjudicating Authority committed error in holding that the debt claimed by the Operational Creditor is not an 'operational debt'. The judgment of this Tribunal in ***Promila Taneja*'s** case reiterate the law as laid down in ***Mr. M. Ravindranath Reddy's*** case. We having held that judgment of ***Mr. M. Ravindranath Reddy*'s** case does not lay down correct law, the judgment in ***Promila Taneja's*** case can also not be followed.

40. In view of the foregoing discussion, we answer the two questions referred to the larger Bench in the following manner:

(1) Judgment of this Tribunal in ***Mr. M. Ravindranath Reddy*** (supra) as well as judgment in ***Promila Taneja*'s** case does not lay down the correct law.

(2) The claim of Licensor for payment of license fee for use of Demised Premises for business purposes is an 'operational debt' within the meaning of Section 5(21) of the Code.

41. In the result of foregoing discussion, we allow this Appeal and set aside impugned judgment of the Adjudicating Authority dated 04.03.2020 and hold that Application filed by the Operational Creditor (Appellant herein) deserves admission under Section 9 of the Code. We direct the Adjudicating Authority to pass an order of admission within a period of one

month from the date of producing certified copy of this order, during which period it shall be open to the parties to enter into settlement, if any. Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Justice Rakesh Kumar]
Member (Judicial)

[Mr. Barun Mitra]
Member (Technical)

[Mr. Naresh Salecha]
Member (Technical)

NEW DELHI

5th July, 2022

Ashwani