

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH: NEW DELHI**

**Company Appeal (AT) (Ins) No. 1443 of 2023**

**&**

**I.A. No. 5167, 5164, 5165, 5166 of 2023**

**[Arising out of the Order dated 31.03.2023, passed by the  
'Adjudicating Authority' (National Company Law Tribunal,  
Mumbai Bench-IV), In CP (IB) No.1285/MB-IV/2020]**

**IN THE MATTER OF:**

**HOTEL HORIZON PRIVATE LIMITED**

Acting Through Mr. Pravin R. Navandar  
Interim Manager of Hotel Horizon Private  
Limited

D-519/520, Neelkanth Business Park,  
Nathani Road, Vidhyavihar,  
Mumbai, Maharashtra

**...Appellant**

**Versus**

**Tea4Health Private Limited**

Unit No.501, B Wing, 5<sup>th</sup> Floor,  
Kankia Wallstreet, AK Road, Chakala,  
RI East, Mumbai, Maharashtra, India

**..Respondent**

**Present:**

**For Appellant** : Mr. Vaijant Paliwal, Mr. Nikhil Mathur & Ms.  
Shruti Poddar, Advocates.

**For Respondent** : Ex-Parte

**J U D G M E N T**  
**(Hybrid Mode)**

**[Per: Justice Mohd. Faiz Alam Khan, Member (Judicial)]**

**IA No. 5137 of 2023**-We have only heard Ld. Counsel for the  
appellant as the proceedings of the appeal are running ex-parte against the  
Respondent.

2. The instant application has been moved by the appellant to condone the delay of 133 days, occurred in refiling the appeal on the ground that the appeal was filed on 02.05.2023 and certain documents were required to be filed along with appeal which could not be made available timely.

3. It is further contended that the appellant runs a hotel Juhu in Mumbai and the business of the appellant was badly hit during the Covid - 19 Pandemic and thereafter due to certain defaults occurred during Covid - 19 Pandemic the appellant is facing multiple insolvency petitions and as the appellant is working with the very limited staff the documents required for refiling could only be provided to the Counsel only on 03.10.2023 and thus the delay which has occurred in refiling is not due to any deliberate act of the appellant and may kindly be condoned.

4. Ld. Counsel for the appellant submits that the appeal was filed by the CD however during the pendency of the appeal the appellant had gone into insolvency and the management of the CD was taken by the IRP appointed by the Tribunal and thus the defects which were highlighted by the Registry could not be condoned within the time stipulated.

5. It is further submitted that the appeal was also filed with some delay and this Appellate Tribunal vide order dated 29.07.2024 passed in IA No. 5137 of 2023 has condoned the delay in filing the appeal and since the proceeding of this appeal are running ex-parte the application for condonation of refiling may kindly be allowed.

6. Having heard Ld. Counsel for the appellant it is reflected from the record that initially the appeal was filed by the Operational Creditor whose application filed under Section 9 of the Code was dismissed and it was

during the pendency of the instant appeal the appellant was also pushed into the CIRP and Mr. Pravin R. Navandar was appointed as the Resolution Professional (RP) these facts have been recorded in the order of this appellate tribunal of date 01.04.2025.

7. It is also true that the appeal was filed with some delay and the same has been condoned. Thus having regard to all the facts and circumstances of the case and keeping in view that the proceedings of this appeal are running ex-parte against Respondent and the delay occurred in filing the appeal has already been condoned and also the fact that the appeal was initially filed by the OC who according to the contention of the application was running short of hands and during the pendency of the appeal the appellant has also been pushed into CIRP and the management of the appellant is now vested in the RP the delay occurred in refiling the appeal may be condoned.

8. In result the application is allowed and the delay of 133 days occurred in refiling the appeal is hereby condoned.

9. We notice that co-ordinate Bench while disposing of an application for condonation of delay in filing the appeal of two days vide order dated 29.07.2024 has inadvertently written application bearing IA No. 5137 of 2023 while the same should have been written as IA No. 5167 of 2023. We thus order that IA No. 5137 of 2023 disposed of vide order dated 29.07.2024 shall now be read as IA No. 5167 of 2023 i.e. the application for condonation of delay in filing the appeal.

**Company Appeal (AT) (Ins) No. 1443 of 2023**

10. The instant appeal has been preferred by the Appellant-Hotel Horizon Pvt. Ltd. under Section 61 of the Insolvency and Bankruptcy Code, 2016 (Code) challenging the impugned order dated 31.03.2023, passed by the National Company Law Tribunal, Mumbai, Bench-IV (Adjudicating Authority) in CP IB No. 1285/MB-IV/2020 whereby the petition of the appellant moved under Section 9 of the Code for liability of Rs. 2.62 crore has been dismissed.

11. The case of the appellant as is reflected from the memo of appeal is that appellant/operational creditor is the owner of a land and building situated at Juhu Tara Road, Juhu Mumbai on which a hotel comprising hotel facility, food and beverages outlets, retail outlets and offices was constructed and a registered leave and license agreement (agreement) dated 06.03.2018 was entered into between the operational creditor/appellant and Corporate Debtor (CD) Respondent No.1 for license of a unit bearing no. 4 admeasuring 3500 sq. feet carpet area situated on the 3<sup>rd</sup> floor of the C wing of the said hotel for running restaurant under the name of Wine Villa for 5 years and as per the terms of the said agreement the OC agreed to grant license to the CD for the use and occupation of the license unit on leave and license basis for a period of 5 years commencing from 21.02.2018 and ending on 20.02.2023.

12. It is further contended that as per clause 4.1 of the agreement the CD was under an obligation to pay to the appellant the higher of the following amounts referred in the agreement as license fees on a monthly basis for the use and occupation of the license unit;

a. Fixed License fee shall be paid on monthly basis by the Licensee to the Licensor in the following manner;

S. No.	TERM	FIXED LICENSE FEE
1.	Throughout the first year of License Period i.e. from 21.02.2018 till 20.02.2019	Rs. 12,00,000/- (Rupees Twelve Lacs Only) per month plus all applicable taxes
2.	Throughout the Second Year of the License Period i.e. from 21.02.2019 till 20.02.2020.	Rs. 12,60,000/- (Rupees Twelve Lacs Sixty Thousand Only) per month plus all applicable taxes
3.	Throughout the third year of the License Period i.e. from 21.02.2020 till 20.02.2021	Rs. 13,23,000/- (Rupees Thirteen Lacs Twenty Three Thousand only) per month plus all applicable taxes
4.	Throughout the Fourth Year of the License Period i.e. from 21.02.2021 till 20.02.2022	Rs. 13,89,150/- (Rupees Thirteen Lacs Eighty Nine Thousand One Hundred and Fifty Only) per month plus all applicable taxes.

5.	Throughout the Fifth Year of the License Period i.e. from 21.02.2022 till 20.02.2023	Rs. 14,58,608/- (Rupees Fourteen Lacs Fifty Eight Thousand Six Hundred and Eight Only) per month plus all applicable taxes.
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OR

*b.Revenue Share i.e. 18% of the Net Sales of the Business conducted in the Licensed Unit form commencement of Business”.*

13. It is further contended that in terms of the said clause 4.1 of the agreement the OC raised 18 invoices from 01.07.2018 to 01.12.2019 for aggregating to an amount of Rs. 15,909,729/- towards license fees.

14. It is also contended that as per clause 5.2 of the agreement the CD was required to pay to the appellant, common area maintenance charges (CAM Charges) at a fixed rate of Rs. 40 per sq. feet plus all applicable taxes in advance on quarterly basis and in pursuance of the same five invoices from 01.10.2018 till 01.10.2019 aggregating to an amount of Rs. 1,495,750/- was raised towards CAM charges.

15. It is also contended that as per clause 6.3 (a) and 6.3 (b) of the agreement the CD has agreed to pay charges for all utilities, electricity and other charges not specifically mentioned in the agreement and in this regard the OC has raised 11 invoices from 13.11.2018 to 16.09.2019 aggregating to an amount of Rs. 2,168,936/- towards HVAC running cost.

16. It is further contended that as per clause 6.3 (1) of the agreement 9 invoices were raised from 25.03.2019 to 10.04.2019 for payment of water consumption charges aggregating to Rs. 3,84,111/- and keeping in view clause 6.2 (b) of the agreement for installation of air conditioning infrastructure a sum of Rs. 26.624 lakhs was agreed out of which only a part payment of Rs. 5 lakhs has been made and the invoice towards the remaining amount was raised by the appellant.

17. It is also contended that as per clauses 4.7,5.7, 6.1 (h), 6.2 (b), 6.3 (b) the CD had agreed to pay interest on delayed payment of license fee and for

other charges @ 24% p.a. pertaining to which the two invoices of date 31.03.2019 of Rs. 11,52,201/- and of date 05.12.2019 amounting to Rs. 3,010,344/- in total Rs. 4,162,545/- were raised.

18. It is further contended that the Respondent CD had admitted liability by way of the TDS deposit under Form 26 AS and also by making part payments under agreement to the appellant and also in August 2018 the Respondent CD and in February, 2019 the CD through its subsidiary VINO Villa Ventures Pvt. Ltd. acknowledged its liability by making TDS payments under the provisions of the Income Tax Act towards the heads of rent and payment under Contractual Services and has also deducted TDS from the license fees payable to the OC between the period July 2018 to February 2019 and illegally retained the same.

19. It is further contended that CD also acknowledged its liability under the said agreement by issuing 24 Cheques between July, 2019 to June, 2021 through its subsidiary amounting to Rs. 3,49,33,608/- however all these Cheques were dishonored.

20. It is also stated that in 2019, vide order dated 29.01.2019 passed by the NCLT, Mumbai in CP IB No. 1458 of 2017 the CIRP process was initiated against the OC and Interim Resolution Professional (IRP) was appointed which were ultimately closed and set aside vide order dated 07.02.2020 of this Appellate Tribunal passed in CA (AT) (Ins) No. 177 of 2019, and during the course of the said CIRP the IRP has issued emails to the CD demanding the arrears of payment of license fees and other charges however to avoid payment of these dues the CD has lodged a false claim to the tune of Rs. 3.23 Crores before the IRP which was ultimately rejected and no payment in

this regard was made by the CD, nor any charges were paid including the electricity charges of Rs. 7,18,474/- and in an attempt to avoid outstanding liability a frivolous application being MA 2011 of 2019 in CP IB No. 1458 of 2017 was filed for alleged restoration of water and electricity services in the premises and order dated 12.06.2019 was passed in this regard by the Ld. Adjudicating Authority observing that non-payment of license fees/rent by the CD and directing the IRP to set off the same against the claim of the Respondent, if any. The said order was challenged by the IRP of the appellant by filing an appeal before this Appellate Tribunal wherein direction was given to the CD to deposit admitted license fees to the appellant however no amount was deposited.

21. It is further stated that in violation of clause 20.3 of the agreement the lien property, goods, equipment of the CD were illegally transported out of the premises by the CD and when this issue was brought to the notice of the Tribunal by the IRP of the appellant the Hon'ble Tribunal permitted and granted liberty to the parties to file appropriate proceedings.

22. It is further contended that since CD failed to make payments to the appellant a demand notice dated 27.12.2019 was given to the CD calling upon it to pay Rs. 2,62,83,471/- and in failure of the CD to pay this amount petition under Section 9 of the Code was preferred which was dismissed by the Ld. Adjudicating Authority by passing the impugned judgment which has been challenged by filing the instant appeal.

23. It is pertinent to mention here that despite service of the notice the Respondent CD did not appear before this Appellate Tribunal and vide order dated 09.03.2026, the proceedings of this appeal were drawn ex-parte

against the Respondent and there is no reply to the appeal filed by the Respondent. In this background we are constrained to take the help from the reply filed by the CD before the Ld. Adjudicating authority a copy of which has been placed on record by the appellant.

24. The CD in his reply filed before the Ld. Adjudicating Authority has denied all the claims of the appellant admitting only that vide leave and license agreement dated 06.03.2018 the aforesaid premises admeasuring 3500 sq. feet were taken under the said agreement.

25. It is further stated therein that the operational creditor has lured the CD to enter into this agreement on the pretext that he is going to construct a 4-5-star category hotel and it is on this pretext the CD had invested Rs. 2 Crore 50 lakhs amount of money and entered into the agreement and also paid a sum of Rs. 60 lakhs as security deposit and Rs. 8,40,000/- as CAM deposit and Rs. 5 lakhs as HVAC installation charges to the OC.

26. It is further stated that the OC was itself declared as Non-Performing Asset (NPA) and the proposed star category hotel was far from being constructed and the premises became unsuitable for any activity and regular repeated power cuts, HVAC failures, water cuts have made the premises unusable to the CD and in the meantime, on 29.01.2019 the Corporate Insolvency Process was initiated against the OC and the CD and other occupants of the premises approached the IRP for Resolution of their grievances however of no use and ultimately the CD filed an application being MA No. 2011 of 2019 before Ld. Adjudicating Authority seeking intervention and for issuance of appropriate directions for enabling the CD to be able to enter upon his own premises as the OC has forcefully took

control of all the furniture, fixtures, interior and stocks of the CD which were lying in the premises and the possession could only be regained with the help of the Police under the orders of the Ld. Adjudicating Authority and all these activities of the OC constrained the CD to vacate the said premises and discontinue its business forever leading to a massive loss to the CD and so much so the operational creditor failed to refund the security deposit of the CD and also prevented it from removing its own furnishings and fixtures from the said premises and thus a prior dispute is pending between the OC and the CD and also that all the claims of the OC are false and frivolous. The OC has also caused loss to the CD as he has collected GST @ 18% on the invoice values raised upon the CD from March 2018 till March 2019 but did not deposit a single rupee with the GST department as result of that the CD having paid the GST has been deprived of the benefit of input tax credit to the tune of Rs. 2,16,000/- monthly for about 12 months which is due and recoverable from the OC.

27. Ld. Adjudicating Authority after considering the case of rival parties rejected the petition moved by the appellant by passing the impugned order.

The relevant part of the said judgment is reproduced as under:

*“12. We find that the Corporate Debtor has paid license fees dues for the period up to February 2019 except amount of GST payable on license fees, which was withheld on account of failure of Operational Creditor to deposit GST with Government. It is also noted that the Applicant was admitted into CIRP on 29.01.2019 and could come out of it only upon settlement with its creditors vide order dated 07.02.2021 passed by NCLAT. In other words, the control of the Applicant was vested in the Resolution Professional during that period.*

*13. From the analysis of facts placed before us by both the parties, we find that dues till February 2019 have mostly been cleared by the Corporate Debtor and only amount*

*charged on account of GST on such dues is withheld in the absence of cross verification of payment of such GST by the Applicant to the Government. We also find that a sum of Rs. 68.40 lakh was with the Applicant in form of Security Deposit, the appropriation of which was denied by the Resolution Professional in control of Applicant even though the same was specifically requested. by the Corporate. From the facts, it emerges that an issue whether Corporate Debtor could exploit the licensed premises commercially for its intended use in the background of admission of Operational Creditor into CIRP from 29.01.2019 for the period from March, 2019 to September, 2019. This issue acquires importance in wake of nature of business the Corporate Debtor was engaged in. Since, we are not appropriate forum to adjudicate on this issue, we find that the amount claimed for the period from March 2019 onwards can be held as payable only upon adjudication of the said dispute. In view thereof, we find there exists prior dispute in relation liability to pay for charges arising after admission of Applicant into CIRP.*

*14. The petition bearing CP (IB) 1285/MB-IV/2020 filed by Hotel Horizon Private Limited, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Tea4Health Private Limited, Corporate Debtor, is hereby **Rejected**.*

*15. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present Petition”.*

28. Ld. Counsel for the appellant submits that Ld. Adjudicating Authority has failed to appreciate that the CD has only made part payments from March 2018 onwards and has failed to fully satisfy its obligations under the agreement while the CD remained in complete use and enjoyment of the premises until September, 2019 and the total amount payable to the appellant for this period amount to Rs. 17,164,926/- Principal and interest of Rs. 18,317,127/- which is above the statutory threshold.

29. It is further submitted that the CD in its reply submitted that all outstanding dues until March 2019 were paid and even if this fact is assumed for the sake of argument, even then the amount from April 2019 onwards till September 2019 is due on the CD which is also above the threshold.

30. It is submitted that the Ld. Adjudicating Authority is only required to see that the amount is above threshold and in this regard Ld. Counsel for the appellant has relied on the following case laws:

“(i) Manmohan Gupta vs. MDS Digital Media Pvt. Ltd. & Anr., CA (AT) (Ins) No. 202 of 2023.

(ii) Nandamuri Meenalatha vs. Quality Steels and Wire Products, 2023 SCC Online NCLAT 1757.

31. It is further submitted that there is no pre-existing disputes between the parties as no proceedings etc. were pending before any forum and the CD never expressed any intention to avoid the agreement and remained in possession of the licensed premises until September, 2019 and even if according to the CD the premises are rendered unfit, the lessee could only avoid its liability to pay if it has vacated the premises. Reliance in this regard has been placed on Section 108 of the Transfer of Property Act and following case laws:

(i) Sangeet Batra vs. M/s VND Foods & Ors., 2015 SCC Online Del 101.

(ii) The Chamber of Colours and Chemicals vs. Trilok Chand Jain, 1973 SCC Online Del 142.

(iii) Gandavalla Munuswamy vs. Marugu Muniramiah, 1964 SCC Online AP 20.

32. It is further submitted that Ld. Adjudicating Authority has committed error in holding that Rs. 60 lakhs were paid by the CD as security deposit had not been appropriated despite the request of the CD while it is not clear as to whether the Ld. Adjudicating Authority treated the non-appropriation of the security deposit by the appellant as the pre-existing dispute and any question of appropriation of such security deposit is a right provided to the licensor which could only be exercised at its discretion and this security deposit could not be taken into cognizance to determine whether the operational debt is beyond the prescribed threshold. Therefore, the impugned order is liable to be set aside and the petition of the appellant is liable to be admitted.

33. Having heard Ld. Counsel for the Appellant and having perused the record, it is reflected that the execution of registered leave and license agreement dated 06.03.2018 between the OC and the CD with regard to Unit No. 4 admeasuring 3500 sq. feet carpet area situated at the 3<sup>rd</sup> floor of the 'C' wing of the said hotel is admitted to the parties including its various clauses and schedule of payment.

34. It appears that the license was granted by the OC to the CD to use the aforesaid premises from 21.02.2018 to 20.02.2023 (for 5 year), unless terminated earlier and the locking period wherein this agreement could not be terminated was for 36 months.

35. In Part-IV of the application moved by the OC under Section 9 of the Code he has written the due debt on CD as Rs. 26,283,471/-. In Part-V of the application deposit of Rs. 60 lakhs has been admitted as security deposit and Rs. 8,40,000/- as the CAM deposit. In Part-IV of the

application the license fee from 01.07.2018 to 01.12.2019 i.e. for Rs. 15,909,729/- has been shown as due on the basis of various invoices and similarly CAM charges to the tune of Rs. 1,495,750/-has been shown to be due on CD from 01.10.2018 to 07.10.2019 while HVAC running cost is shown as Rs. 2,168,936/- from 13.11.2018 to 23.09.2019 along with water consumption charges as Rs. 3,84,111/- from 25.03.2019 to 17.04.2019 and infrastructure charges from 01.06.2018 to 07.06.2018 is shown as Rs. 2,162,400/- and the interest on the cumulative figure of this due amount is shown as Rs. 4,162,545/- and therefore the whole default amount has been shown as Rs. 26,283,471/-.

36. At the cost of repetition, it is reiterated that CD has not disputed the execution of leave and license agreement or any of its clauses but in nut shell has taken the defense before the Adjudicating Authority that the CD has lured him on the pretext that he is constructing a 4-5 Star hotel and believing on his promises CD had invested about Rs. 2.5 Crore. However, the OC was declared NPA and was not in a position to complete the construction and it was not possible for him to construct a 4-5 Star hotel and also that on 29.01.2019 the OC was inducted into CIRP and IRP was appointed, who took over its management and from that moment onwards the complex, housing the premises was left in a estate of complete neglect and was rendered unfit for commercial exploitation.

37. It is also the defense of the CD that soon after the CIRP initiation water supply to the premises was completely ceased and operating restaurant was not possible and CD has to arrange water tankers the payment of which is to be compensated by the OC and the Central Air

Conditioning Services were also breakdown for want of service and maintenance and routine maintenance of the complex was completely stopped as well as the service staff, security etc. was also ceased and when the grievances of the CD were not addressed by the IRP of the OC (CD) the Respondent CD filed an application before the Ld. Adjudicating Authority on which certain directions were passed for restoration of electricity and water connection and the direction for police aid was also passed as according to the CD the appellant has forcefully taken control of all furniture, equipment's etc. of the CD worth Rs. 3.5 Crore.

38. At this juncture, it is also fruitful to recall that the CD had taken the license for running a restaurant in the premises in the name of Wine Villa and it is also admitted to the CD that he has paid the rent till March 2019.

39. In the background of the above facts when we peruse the application bearing MA No. 2011 of 2019 which was moved by the CD in CP IB No. 1458 of 2017 on 03.06.2019 it will emerge that the same was moved for grant of the following prayers:

*“(A) Forthwith commence and sustain regular water supply to the Premises of the Applicant;*

*(B) Forthwith commence and sustain regular running of the air-conditioning chiller plant providing air-conditioning to the Premises;*

*(C) Forthwith undertake a structural audit of the Complex and provide a copy of the same to the undersigned evidencing that the Complex is fit for habitation and commercial exploitation;*

*(D) Forthwith conduct a fire audit of the Complex and provide a copy to the undersigned evidencing the availability and the working condition of the requisite working safety and security measures in the Complex;*

*(E) Forthwith ensure the eviction of the goon/bouncers placed outside the Premises and continually ensure that*

*no anti-social/detrimental activity is being permitted in the Premises;*

*(F) Forthwith reconcile the account with the Applicant and disregard all or any unlawful claims inflated by the Ex-Directors of the Respondent Company;*

*(G) Forthwith provide a credit note to the extent of the expenses incurred by the Applicant in the purchase of water tankers etc on and from 1<sup>st</sup> March 2019,*

*(H) Forthwith install water and BTU meters in the Complex for measuring the actual usages of the respective Premises and revise all water and HVAC bills accordingly;*

*(I) Ensure peaceable circumstances for the commercial exploitation and operation of the Premises;*

*(J) Forthwith ensure implementation of expected levels of maintenance and sanitation at the Complex and remove all unsanitary waste lying inside the Complex;*

*(K) Forthwith prevent the mala fide interference of the Ex-Directors from the working of the Applicant from its Premises in the Complex;*

*(L) Forthwith acknowledge and verify the claims of the Applicant filed with the Insolvency Resolution Professional under Form "F" of the Insolvency and Bankruptcy Code 2016 and communicate the same to the Applicant;*

40. It is also evident that Ld. Adjudicating Authority has passed an order on this application on 12.06.2019, which is reproduced as under:

*“1. The Learned Representatives for both sides are present.*

*2. MA-2011/2019 Through this M.A. the Applicant has made a prayer for Restoration of Water Supply, Operation of Central Air Conditioner and not to obstruct the total business. Evidences are on record. Perused.*

*3. The Learned Representative for the R.P. has informed that the R.P. in person is not present, therefore seeking time.*

*4. The reason for the disconnection stated to be that certain dues have not been paid by the Licensee, however, licensee has already lodged its claim of 3.23 Crores vide Form-F dated 04.04.2019 before the Learned R.P.*

*5. As a consequence the R.P. is directed that, if there are any dues to be recovered from the Licensee the same can*

*be adjusted against the said lodgement of claim as reflected on Form-F.*

*6. Meanwhile the R.P. is directed to restore the Water Supply, Operation of Central Air Conditioner and alleged bouncers immediately, henceforth, on receiving a copy of this Order.*

*7. This Order shall be effective till the date of next hearing, by that time R.P. shall place on record the Reply a copy in advance to the Applicant.*

*8. Matter is adjourned to **23.07.2019**.*

*9. Registry is directed to serve a copy of this Order as **DASTP**.*

41. It is further reflected that on 23.07.2019 the Ld. Adjudicating Authority has again passed following order with regard to MA No. 2011 of 2019:

*“1. The Learned Representatives for both the sides are present.*

*2. MA-2032/2019- This is a Mentioning Application for urgent hearing of MA-2011/2019. Since the main Application is listed today MA-2032/2019 stood disposed of.*

***3. MA-2011/2019- An Order had already been passed on 12.06.2019 wherein certain directions were issued for restoration of Water Supply etc., however, reported by the Learned Counsel of the Applicant that compliance not yet made by the Learned IRP Mr. Jayesh H. From the side of the Applicant an Additional Affidavit is on record annexed therein certain correspondence made with the IRP. Also annexed a compliant lodged before the Police Station having territorial jurisdiction, however police assistance was not granted on the ground of absence of proper instructions from this Bench.***

***4. Considering the observations made on the last occasion and the totality of circumstances narrated today, it is hereby directed that the Applicant shall file Application for police assistance and the Police Authorities are directed to give proper assistance for allowing free access to the property as per law.***

**5. The compliance from Police Authority and from the IRP be reported to this Bench on the next date of hearing. MA-2011/2019 is disposed of accordingly.**

6. MA-1657/2019 This is an Application by the Members of the Committee of Creditors for substitution of existing IRP Mr. Jayesh H. In this regard annexed along with Resolution of the Member of Committee of Creditors dated 26.02.2019 which show the voting result through which after considering the names, the name of Professional Mr. Abhilash Lal was approved by 82% majority voting. Since the process of voting is completed, therefore, the Resolution of the Committee of Creditors for **substitution is hereby approved.**

7. The outgoing IRP shall tender the information of datas, statements and all documents to the incoming Resolution Professional on or before 08/8/2019. The Committee of Creditors shall ratify the costs of the out-going IRP followed by due payment on submission of the bills. With these directions MA-1657/2019 is allowed and disposed of.

5. Since substantive time has already lapsed the incoming Resolution Professional shall complete the CIRP process expeditiously and report the progress by 22.08.2019. Matter is adjourned to **27.08.2019**”.

42. It is further reflected that on 27.08.2019 following order was passed by the Ld. Adjudicating Authority on IA No. 2011 of 2019:

“1. This is an Application submitted on 23.06.2019 and the main prayers as raised before this bench are reproduced below: -

“(a) Forthwith commence and sustain regular water supply to the Premises of the Applicant;

(b) Forthwith commence and sustain regular running of the air-conditioning chiller plant providing air-conditioning to the Premises;

(e) Forthwith ensure the eviction of the goon/bouncers placed outside the Premises and continually ensure that no anti-social/detrimental activity is being permitted in the Premises;

*(k) Forthwith prevent the mala fide interference of the Ex-Directors from the working of the Applicant from its Premises in the Complex;"*

2. *In the past vide an Order dated 29.01.2019 a Petition (CP 1458/IB/MAH/2017) u/s.7 of IBC of a Financial Creditor (Phoenix ARC) was "Admitted" by pronouncing commencement of "Moratorium" and appointment of an Interim Resolution Professional. In this regard vide an Order of 23.07.2019 an Interim Order was passed on MA 2011/2019 (the impugned Application) wherein it was held as under: -*

*"3. MA-2011/2019 - An Order had already been passed on 12.06.2019 wherein certain directions were issued for restoration of Water Supply etc., however, reported by the Learned Counsel of the Applicant that compliance not yet made by the Learned IRP Mr. Jayesh H. From the side of the Applicant an Additional Affidavit is on record annexed therein certain correspondence made with the IRP. Also annexed a complaint lodged before the Police Station having territorial jurisdiction, however, police assistance was not granted on the ground of absence of proper instruction from this Bench.*

*4. Considering the observations made on the last occasion and the totality of circumstances narrated today, it is hereby directed that the Applicant shall file Application for the police assistance and the Police Authorities are directed to give proper assistance for allowing free access to the property as per law.*

*5. The compliance from, Police Authority and from the IRP be reported to this Bench on the next date of hearing. **MA-2011/2019 is disposed of accordingly"**.*

3. *Since the Learned Resolution Professional was required to take Police assistance, therefore, following the directions of this Bench the Resolution Professional has written letters seeking protection to DCP, Bandra Police Station, Bandra, Mumbai and Senior Inspector, Juhu Police Station, Vile Parle, Mumbai, copies of letters dated 10.08.2019 and 14.08.2019 placed on record. Learned Resolution Professional has informed that no assistance was provided by the Police authorities.*

4. *It is very strange that even on informing the Police authorities that a Court Order for police assistance/protection is passed, no cognizance was taken by the aforesaid Police authorities. Police is the only Arm for implementation of an Order. A lackadaisical approach in not carrying out the directions cannot be appreciated. At*

*best, again this Bench hereby direct the Applicant to approach the respected Commissioner of Police of the territorial jurisdiction and narrate the difficulty in entering into the premises in question. This Bench is hopeful that the respected Commissioner shall look into the matter and issue necessary directions.*

*5. The Applicant shall furnish all the Orders of this bench passed earlier for ready reference to the respected Police Commissioner. Thereafter, a compliance report by the Applicant be submitted to this Court on the next date of hearing.*

*6. Listed for **09.09.2019**".*

43. It is also reflected that on 18.09.2019, the Ld. Adjudicating Authority has observed that directions has already been given to the Police Authorities and they are again instructed that directions be complied with and thereafter the matter was to be reported to the Ld. Adjudicating Authority about due compliance on 09.10.2019.

44. It is also pertinent to mention here that CIRP initiation order against OC of date 29.01.2019 was assailed before this Appellate Tribunal by filing CA (AT) (Ins) No. 177 of 2019, and vide order dated 05.09.2019 this appeal was dismissed. The Judgement of this Appellate Tribunal was challenged before Hon'ble Supreme Court by filing Civil Appeal No. 7673 of 2019 and by passing an order dated 30.09.2019 the same was disposed of by remanding the matter back to this Appellate Tribunal for decision afresh and thereafter this Appellate Tribunal decided the CA (AT) (Ins) No. 177 of 2019 afresh and by passing order dated 07.02.2020, allowed the appeal and the order of the NCLT dated 29.01.2019 was set aside and the Ld. Adjudicating Authority vide order dated 12.03.2020 dismiss the IA No. 2011 of 2019 as the same has become infructuous on the CIRP initiation order dated 29.01.2019 set aside by this Appellate Tribunal.

45. Significantly, it is evident that in the IA No. 2011 of 2019 the CD has categorically stated of entering into the agreement on the pretext that a 4-5 Star hotel would be constructed by the OC and on account of the declaration of the OC as NPA and initiation of the CIRP against it has rendered the construction of the said Star hotel impossible. It is also stated in the application that the water supply to the complex was ceased completely and the CD being in the business of food and beverage outlet was constrained to buy expensive water tanker from water suppliers and till the moving of the application the water supply was not restored and also that the centralized air conditioning service of the complex was in complete state of breakdown and the service staff, security, valet operator etc. all ceased to perform their duties and thus the occupants of the complex were unable to manage and operate their outlets and in this regard the IRP of the CD/OC was contacted but the grievances of the CD were not addressed. The emails of date 03.04.2019 and 04.04.2019 have also been highlighted in order to establish that the appellant and other users of the complex had met with the IRP of the CD and has informed him about the above problems.

46. It is further stated in the aforesaid application that the appellant had filed its claim to the IRP in the insolvency of the OC on 04.04.2019 which was not verified by the IRP till date and it is also highlighted that around 20.04.2019 the Ex-Director of the Company disconnected the apparatus supplying water to the complex so as to prevent the occupants from purchasing their own water and they also tampered with the chiller plant providing air conditioning to the complex whereby the supply of air

conditioning was completely stopped and this fact was brought in the knowledge of the IRP who failed to intervene.

47. It is also highlighted in the aforesaid application that certain bad elements were deployed by the Ex-Director of the Company at the site of the complex who began interfering with the ingress and egress of persons with the intent of creating complete havoc in the premises pertaining to which a police complaint was filed at Police Station Juhu Mumbai on 30.04.2019. It is also stated that temporary air conditioners were installed by the applicant in an attempt to commence its business however the Ex-Directors again placed some bad elements outside the premises of the applicant which was also brought to the notice of the IRP while email date 05.05.2019 and also by email dated 08.05.2019 and thereafter a notice was issued to the IRP on 10.05.2019 stating therein that the usage of the premises has become impossible for the CD and other users.

48. It is also highlighted in the aforesaid application that the entire complex has become in a dilapidated condition and in this background the reliefs herein mentioned were requested by the CD and the orders were passed thereon by the Ld. Adjudicating Authority.

49. It appears to be an admitted position that from 29.01.2019 till 07.02.2020 the appellant had remained in the CIRP which was initiated by order dated 29.01.2019 passed in CP IB No. 1458 of 2017. The IA No. 2011 of 2019 was filed by the CD on 02.06.2019 raising various issues which in our considered opinion prima facie constitutes dispute and keeping in view the fact that appellant was inducted into the CIRP following declaration of its account as NPA and remained therein from 29.01.2019 to 07.02.2020

the allegations and disputes mentioned in IA No. 2011 of 2019 could not be termed as moonshine particularly when the effective orders has been passed by the Ld. Adjudicating Authority to restore water electricity etc. and also for police assistance.

50. Ld. Counsel for the Appellant has relied on **Manmohan Gupta (supra)** however the said case is with regard to the reaching of threshold similarly **Nandamuri Meenalatha Erstwhile Director of Vantage Machine Tools Pvt. Ltd. (supra)** is also a case which is pertaining to the threshold and therefore is not having any relevance with regard to the prior dispute existing between the parties which we have discussed herein before. In **Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd., (supra) (2018) 1 SCC 353** the Hon'ble Supreme Court in paragraph no. 33,34,38 and 51 has opined as under:

*“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. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self- same 10 days send an attested copy of the record of the electronic transfer of*

*the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor [Section 8(2)(b)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2). This application is to be filed under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under Rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under Section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section (5), may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice [Section 9(5)(i)(b)] or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor [Section 9(5)(i)(c) ], or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility [Section 9(5)(i)(d)], or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor [Section 9(5)(i)(e)]. it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7 days*

granted by the proviso [Section 9(5)(ii)(a)], It may also reject the application where there has been repayment of the operational debt [Section 9(5)(ii)(b) ], or the creditor has not delivered the invoice or notice for payment corporate debtor [Section 9(5)(ii)(c)]. It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility [Section 9(5)(ii)(d)]. Section 9(5)(ii)(d) refers to the notice of an existing dispute that received, as it must be read with Section 8(2)(a) Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected [Section 9(5)(ii)(e)].

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)
- (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.

38. It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(A) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or ". If read as "and". Disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and

*not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an Arbitral Tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an Arbitral Tribunal or a court for up to three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.*

*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 supurious, hypothetical or illusory, the adjudicating authority has to reject the application”.*

The perusal of the above paragraphs would reveal that the prior dispute which is alleged to be existing between the parties must be having some substance and must not be a moonshine dispute or the dispute which has been crafted only for the purpose of defeating the cause of the operational

creditor and it is also evident from the above law that all what the Adjudicating Authority is to see is whether there is a plausible contention which requires further investigation and that the dispute is not patently feeble legal argument or an assertion of fact unsupported by the evidence. At the cost of repetition, we reiterate that the prior dispute as is evident from the IA No. 2011 of 2019 moved by the Respondent before Ld. Adjudicating Authority and the allegations levelled therein may not be termed as the allegations without any substance or supporting document or a moonshine dispute. Therefore the cases relied on by Ld. Counsel for the Appellant may not be of any help to the appellant.

51. Thus keeping in view all the facts and circumstances of the case, we are in agreement with the conclusions drawn by the Ld. Adjudicating Authority that there exists prior dispute in relation to the liability of the CD to pay for charges arising after admission of the OC in the CIRP. It is also being recalled that despite various provisions contained in the leave and license agreement the security deposit of the CD appears to have not been adjusted or set off by the OC. In result of the aforesaid discussion we do not find any good ground to interfere in the impugned judgment passed by the Ld. Adjudicating Authority and consequently the appeal being devoid of merits is **dismissed** as such.

52. There is no order to costs.

53. Pending IA's if any are also closed.

**[Justice Mohd. Faiz Alam Khan]**  
**Member (Judicial)**

**[Naresh Salecha]**  
**Member (Technical)**

**New Delhi.**  
**06.05.2026.**

*sr*