

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**PRINCIPAL BENCH****NEW DELHI****COMPANY APPEAL (AT)(INS) NO.22/2023**

(Arising out of judgement and order dated 16.12.2022 passed by the Ld. Adjudicating Authority, National Company Law Tribunal, Mumbai Bench in CP(IB) No.1291/IBC/MB/2021)

In the matter of:

Vipin Choudhary,
H.No.504, 1st floor, Sector-8,
Faridabad 121001 (Haryana)
Ph No.9764554222
Email: vipin.mallforu@gmail.com

Appellant

Vs

1. Connect Residuary Pvt Ltd,
604, 6th Floor, D Wing, Corporate Avenue
New A.K. Link Road,
Andheri East,
Mumbai 4000963
Email: connect@connectrpl.com

2. MT Educare Ltd
Through the RP Mr. Ashwin Bhavanji Shah,
220, 2nd Floor, Neptune's Flying Colors,
Near Check Naka Bus Depot,
L.B.S. Cross Road,
Mulund (W), Mumbai 400080
Phone 9769468909
Email: ashwin@caashwinshah.com

For Appellant: Mr. Kunal Tandon, Ms Smriti Churiwal, Mr. Jaiveer Kant, Ms Richa Sandilya, Advocates.

For Respondents: Mr. T.N. Durga Prasad, Mr. Nazish Alam, Mr. Prakash, Ms Aparna Iyer, Advocates for R1.

Ms Rakshita Saxena, Proxy counsel for R2.

JUDGEMENT

(18th AUGUST, 2023)

JUSTICE RAKESH KUMAR, MEMBER (JUDICIAL)

The present appeal has been preferred under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as IBC) against an order dated 16.12.2022 passed by the Learned National Company Law Tribunal, Mumbai Bench (hereinafter referred to as the Adjudicating Authority) in CP(IB) No.1291/IBC/MB/2021. By the said order the application filed under Section 9 of the IBC by the Respondent No.1 was admitted and Corporate Insolvency Resolution Process (CIRP) was initiated. For better appreciation it is necessary to reproduce the impugned order as follows:-

“1. This Company petition is filed by Connect Residuary Private Limited (hereinafter called “Operational Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against MT Educare Limited. (hereinafter called

“Corporate Debtor”) by invoking the provisions of Section 9 Insolvency and Bankruptcy Code, 2016 (hereinafter called “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of an unresolved Operational Debt of Rs. 5,48,62,056/- (Rupees Five Crores Forty-Eight Lacs Sixty-Two Thousand and Fifty Six Only).

2. The submissions of Operational Creditor are as follows:-

a. The Applicant is in business of renting of equipment or other assets. Respondent, is an education support and coaching services provider.

b. Parties had entered into a Master Rental Agreement (MRA). It was during Jul 2019 and Jan 2020 Respondent had obtained use of certain assets like Servers, Routers, Desktops, UPS, and other IT related (Collectively, Rented Assets) on rent basis from Applicant under 8 Rent Schedules No. MTEL-015(A)-022(A) in terms of MRA.

c. In the contract in consideration of payment of rent instalment to Applicant, Respondent was entitled to use

Rented Assets for the agreed rent tenure as specified in each mentioned Rent Schedules.

d. Onward Jul/ Aug 2019, Respondent starting to commit default in payment of rent instalment and other monies. As a result, by end of March 2020 payment up to Rs. 1,31,89,068.00 (incl. GST) towards quarterly rent instalment were in default under 20 invoices. Various follow-up emails sent to Respondent on 05.03.2020, 11.03.2020. 13.03.2020, and 16.03.2020 were ignored as such remained unanswered. Pertinently, the mentioned outstanding as it then stands was pertaining to the period falling before COVID-19.

e. Later, between Apr 2020 Aug 2021 Applicant had issued several demand notices/reminders to Respondent regarding payment default and called them to pay the outstanding rent instalment and other monies under the contract.

f. In between Dec 2020-Jan 2021 Respondent returned certain Rented Assets to Applicant which resulted in some damage/loss to RentedAssets returned as such Applicant claimed a damage cost from Respondent by its

email dt. 15.02.2021; Respondent vide email dt. 18.02.2021 in reply had concurred to the damage cost provided by Applicant. At the same time, while ignoring the issue of outstanding Respondent had proposed to Applicant to consider revised rent rate to be made effective from Jan 2021 taking into account valuation of Rented Assets retained, the valuation ascribed by Respondent thereof was Rs. 7,98,31,083.00; the revision was not accepted by Applicant.

g. Thereafter, Respondent continued on payment default and Applicant was constrained to issue a termination notice inter-alia calling upon Respondent to pay Rs. 5,34,48,523.00 and other monies in terms of Clauses 12.3(c); there wasn't any reply by Respondent to Applicant thereof.

h. In view of the above, Applicant was constrained to issue a demand notice dt. 26.08.2021 under S. 8 of the Code 2016 to Respondent for default in payment of operational debt up to Rs. 5,37,65,669.00, the same was delivered to Respondent at its registered office on 28.08.2021 at 16:23:33 Hrs; there hasn't been any

response or payment from Respondent till date as such there is a complete neglect and callous attitude by the current management of Respondent to the said notice. i. The debt is an operational debt under S. 5 (21) of the Code, 2016, and Respondent continue defaulting the same, as such the instant Application.

3. The Corporate Debtor filed reply dated 14.03.2022 of Ms. Mansi Thakkar opposing the above Company Petition. The relevant paragraphs of the reply are extracted hereinunder:

a. It appears that since the year 2016 the erstwhile management of the Respondent rented IT equipment in the nature of electrical and computer appliances more particularly being Servers, routers, Desktops, UPS, Cable, Access points and other IT related accessories, etc ("Equipment") which were handed over and delivered to the Respondent on rental basis from time to time to run its coaching institute, situated at different parts of India.

b. The said equipment were lying idle at the Respondent's premises for a substantial period of time. In fact, the Rental Schedule in respect of such equipment also expired because of efflux of time. However, despite

expiry of the Rental Schedule, the Petitioner was still claiming rent from the Respondent respect to equipment which were of no use to the Respondent. It was put to the attention of the Petitioner that, in such circumstances it shall be prudent for the Respondent to return such non-effective equipment to the Petitioner, which were lying with the Respondent. Hence, the Respondent time and again sought necessary cooperation from the Petitioner to get the said equipment relocated from the Petitioner's premises and also requested the Respondent for not charging rent on such unused equipment. The Petitioner failed to pay any heed to the same and continued to levy a full amount of rent on such equipment, leading to Financial Loss to the Respondent. Hence, the question of levying rent on such non-effective and depreciated equipment does not arise. c. The Respondent time and again reiterated the aforesaid issues and put to the Petitioner's attention that the Respondents have been charging exorbitant amount of rent. However, the Petitioner failed to pay any heed to the same. To the shock and surprise of the Respondent, the Petitioners by

taking an advantage of the situation addressed a Legal Notice dated 28th October, 2020 upon the Respondent under a subject of “Legal Notice for Recovery of Rs. 2,56,28,968/- towards the outstanding rental instalment payment and overdue interest (ODI) charges.....The Petitioner had blatantly misinterpreted the clauses of the Master Rental Agreement and called upon the Respondent to repay a sum to the tune of Rs.2,56,28,968/- without any proper justification and explanation. Merely in an attempt to extort sums from the Respondent.

d. In response to the said Legal Notice for recovery, the Respondent vide emails dated 13th November, 2020 and 26 November, 2020 categorically denied the demands as raised by the Petitioner. Further, it was categorically put to the attention of the Respondent that the Petitioners have been charging exorbitant rent and it was once again reiterated that, the satiable portions of the equipment have become redundant and are stored unused at various locations causing Financial Losses in form of Rentals. It was further put to the Petitioner’s attention

that the rent period in respect of such equipment also expired due to efflux of time. Hence, the Respondent once again. Requested the Petitioner to take such equipment in its custody.

e. It is pertinent to note that, the Respondent has time and again paid rent in respect of the equipment actually utilized by the Respondent. The Respondent has been maintaining its tally data in respect of its various transactions containing the detailed particulars of payments made and the amounts due and payable. It is pertinent to note that, as per the Respondent's tally data in respect of the present transaction the only amount due and payable by the Respondent to the Petitioner amounts to Rs.12,78,385/-.

f. In view of the aforesaid, the Respondent vide an email dated 18th February, 2021, put to the attention of the Petitioner that the Respondent had rented assets worth Rs.10,22,48,455/- out of which the Respondent had returned assets worth Rs.2,30,52,372/-. Despite no reasonable explanation with regard to the alleged damages claimed, the Respondent was kind enough to

adjust the alleged damage cost of a sum of Rs.6,35,000/- by paying an extra sum towards the rent on equipment. Accordingly, the Respondent in the said email dated 18th February, 2021 called upon the Petitioner to consider and levy the rent on the basis of assets which are worth Rs.7,98,31,083/- lying with the Respondent. The said sum also includes the amount of alleged damages. It was further put to the attention of the Petitioner that the Respondent shall return further assets in the due course and the amount of rent shall be deducted accordingly.

FINDING

1. Heard Mr. Jayprakash Sen a/w Mr. Nazish Alam, counsel appearing for the Operational Creditor and Mr. Nausher Kohli a/w Mr. Umang Mehta, counsel appearing for the Corporate Debtor and perused the material available on record.

2. After hearing the submissions on both sides, this Bench notes that there is no dispute between the parties with regard to hiring of IT equipment in the nature of electrical and computer appliances more particularly Servers, routers, Desktops, UPS, Cable, Access points

and other IT related accessories since 2016 by Operational Creditor to the Corporate Debtor on rental basis from time to time to run its coaching institute situated at various parts of India. Similarly, the terms and conditions of the agreement are reduced into writing. Since there was a default committed by the Corporate Debtor in payment of the outstanding rental the Operational Creditor got issued a legal notice dated 20.10.2022 calling upon the Corporate Debtor to pay an amount of Rs. 2,56,28,968/- towards pending operational dues. The Corporate Debtor himself filed the following emails which are prior to issuing Demand Notice by operational creditor which are extracted hereunder for ready reference:

EXHIBIT-'B'

Ref: Your notice dated 28 October 2020

SAyyappan sayyappan@mteducare.com To: alamnazish2010@gmail.com

Fri, Nov 13, 2020 at 1:22 PM

13 November 2020

Through e-mail/Registered AD

To

Adv. Nazish Alam

D/12, Rameshwar CHS,

Near Surya Hospital,

S.V. Road, Santacruz (West), Mumbai-400 054

Ref.: Your notice dated 28 October 2020

Sir,

We are in receipt of the notice above referred, issued by you on behalf of your client M/s. Connect Residuary Pvt. Ltd.

Kindly be informed that, due to the ongoing Covid-19 pandemic situation and based on the instructions/circulars from the respective state and central governments, our organization has not started functioning yet with our full strength of employees/staff. This situation causes us difficulties to retrieve the relevant accounts/finance statements and related transactions details.

We have noted the contents/averments/claims of your notice above referred and we are not in a position to assess the veracity of the same at this point of time. We are in the process of compiling the documents in connection with the transactions as contemplated in your notice. Requesting you to bear with us for some extended period so as to enable us to get back with a formal reply to your notice.

This is without prejudice to our rights and nothing in the said notice under reply may be deemed to be admitted for want of denial or otherwise.

Sd/- Advocate

EXHIBIT C

FW Reply to nonce dated 28.10.20

November 26, 2000

By Registered AD Email

*To
Adv Nazish Alam
D12 Raneshwar CHS
Near Surya Hospital SV. Road Santacruz (West)
Mumbai-400054*

Ref: Your notice dated 28.10.2020) Our reply dated 13.11.2020

Dear Sir.

This is further to our reply dated 13 November 2020 in connection with the notice issued by you on behalf of your client Connect Residuary Pvt. Ltd.

It is the matter on record that, vide Master Rental Agreement dated 16 February 2015, we engaged your client to supply as various IT related equipments on rental basis. As your client is aware, we have complied with all our contractual obligations conferred on us vide the agreement with your client

However, the outbreak of Coronavirus (COVID-19) pandemic globally and in India has caused significant disruption of the supply chain and consequent slowdown of economic activity. Measures taken to contain spread of the virus, including travel bans, quarantines, social distancing, and closure of non-essential services have triggered significant disruptions to businesses worldwide, resulting in an economic slowdown. Business for most of the companies have had a severe negative impact all over the world including adverse impact on businesses in India resulting into a massive slowdown in the economy. In the present situation, it is difficult to ascertain the overall impact of the outbreak.

The sudden lockdown in March 2020 due to COVID-19 & the impact it caused into the schools coaching centers operation and more particularly our collection significantly. This has completely disrupted & significantly affected our operation as well during this period, which almost got standstill during this lockdown & created new set of challenges for us. Uncertainty continues even the re-opening of schools coaching centers amid the COVID-19 pandemic in the year and even the state government have taken a favorable stand towards it. COVID 19 has so impacted the financial position of the parents

3. It is very clear from the above emails that there is a continuous default in payment of rent committed by the Corporate Debtor from July/ August, 2019 till the demand notice was issued on 26.08.2021.

4. This bench also observes from the above emails addressed by the Corporate Debtor that the Corporate Debtor except pleading mercy in reducing certain amount

of rent and also expressing their financial difficulties due to Covid-19, did not raise any pre-existing disputes in the above emails. It is appropriate to mention here that the onus of proof lies on the Corporate Debtor to establish the pre-existing dispute by placing cogent and convincing evidence before this Tribunal which is totally lacking in this case. Whatever stand that was taken by the Corporate Debtor in response to the demand notice is only an afterthought and nothing but laying foundation to contest the company petition which does not stand to the test of legal scrutiny.

5. The contention of the Corporate Debtor in para 6 (b) of the reply to the effect that the erstwhile management of the Corporate Debtor has entered into transaction with Operational Creditor of completely with unreasonable and exorbitant terms and the current management realised the same and immediately proceeded to close the transaction by making an attempt to return the said equipment to the Operational Creditor clearly shows that there is no dispute with regard to the rent agreed between the parties. This Bench cannot decide the

reasonableness of rent etc. in an application filed under Section 9 of the code and it is beyond the purview of this Bench and it is purely the look out of Corporate Debtor and its erstwhile management.

6. Mr. Kohli, counsel appearing for the Corporate Debtor made an unsuccessful attempt to convince and establish before this Bench as if the defaulted period falls within section 10 A period. As rightly submitted by the Operational Creditor the default is continuous from July/August 2019 till the date of issuing demand notice and therefore, there is no question of attracting the benefits of Section 10 A in this case. In fact, the respondent did not raise the above plea in their reply. In fact, the entire reply filed by the Corporate Debtor is a mere general denial and narration of the mistake of the earlier management in entering into the rental agreements with the petitioner for higher rent etc. which are beyond the scope of an enquiry in an application filed under Section 9 of the Code.

7. For the aforesaid reasons this bench after hearing the submissions of both sides and upon perusing the

material available on record, is thoroughly convinced that the Operational Creditor has successfully demonstrated the existence of “debt” and “default” committed by the Corporate Debtor in this case and the above Company Petition being filed on 23.11.2021 is within three years from the date of default and is well within limitation and thus, the present Company Petition satisfies all the necessary legal requirements for admission. It is pertinent to mention here that the petitioner has included an amount of Rs. 6,35,000/- towards repair/damage costs and an amount of Rs. 15,27,116/- towards agreed liquidation damages which are beyond the purview of this application and therefore this Tribunal is disallowing the above two amounts along with the corresponding interest if any charged by the Petitioner in the above application. Accordingly, the above Company Petition is admitted by passing the following:

ORDER

a. The above Company Petition No. (IB) -1291(MB)/2021 is hereby allowed and initiation of Corporate Insolvency

Resolution Process (CIRP) is ordered against MT Educate Limited.

b. Since the Operational Creditor has not suggested the name of any Interim Resolution Professional (IRP) in the petition, this Bench is hereby appointing an IRP from the panel of RP's furnished by the Insolvency and Bankruptcy Board of India (IBBI). This Bench hereby appoints Mr. Ashwin Bhavanji Shah (ashwin@caashwinshah.com), Insolvency Professional, Registration No: IBBI/IPA-001/IPP02648/2021-2022/14054 (mobile No. 9769468909 as the interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

c. The Operational Creditor shall deposit an amount of Rs.5 Lakh towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount towards expenses only and not towards fee till his fees is decided by COC.

d. That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code. i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

k. Accordingly, this Petition is admitted.

l. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.”

2. The short fact of the case is that the Respondent No.1/Operational Creditor in view of non-reply to demand notice under Section 8 of the IBC by the appellant herein (Corporate Debtor) was constrained to file an application under Section 9 of the IBC disclosing therein that Operational Creditor and Corporate Debtor had entered into a Master Rental Agreement (MRA). It was during the month of July, 2019 and January, 2020. The Corporate Debtor had obtained use of certain assets like Servers, Routers, Desktops, UPS and other IT related (collectively, rented assets) on rent basis from the Operational Creditor under the rent schedule in terms of MRA. As per contract in consideration of payment of rent instalment to the operational creditor, the Corporate Debtor was entitled to use rented assets for the agreed rent tenure as specified in each mentioned Rent Schedule. However, subsequently on or after July/August, 2019 the Corporate Debtor started committing default in payment of rent instalment and other monies. As a result of which by the end of March, 2020 payment upto Rs.1,31,89,068/- (including GST) towards quarterly rent instalment were in default in 20 invoices. As per the operational creditor various follow up emails were sent to Corporate Debtor particularly on 05.03.2020, 11.03.2020,

13.03.2020 and 16.03.2020 which were ignored and remained unanswered. It was also indicated that all the demands were raised prior to Covid-19. Subsequently in between April, 2020 and August, 2020 the operational creditor issued demand notice/reminders to the corporate debtor regarding default and called them to pay the outstanding rent instalment and other monies under the contract. It was further pleaded that in between December, 2020 –January, 2021 the corporate debtor returned certain rented assets to the operational creditor but some were in damaged condition. Accordingly the operational creditor claimed damage cost from the corporate debtor by email of 15.02.2021 which was concurred by the corporate debtor vide email dated 18.02.2021. However, the corporate debtor while ignoring the issue of outstanding debt gave a proposal to the operational creditor to consider revised rent rate to be made effective from January, 2021 taking into account the valuation of the rented assets, the valuation ascribed by the Respondent thereto was Rs.7,98,31,083/- (Rupees Seven crore ninety eight lakh thirty one thousand eighty three only). Even thereafter since the corporate debtor continued with default the operational creditor was constrained to issue termination notice calling upon the corporate

debtor to pay Rs.5,34,48,523/- (Rupees Five crore thirty four lakhs forty eight thousand five hundred twenty three only) and subsequently on 26.08.2021 a notice under Section 8 of the IBC was issued to the corporate debtor for default in payment of operational debt to the tune of Rs.5,37,65,669/- (Rupees Five crore thirty seven lakh sixty five thousand six hundred sixty nine only) which was delivered at registered office of the corporate debtor on 28.08.2021. However, the corporate debtor did not give reply to the operational creditor.

3. According to the operational creditor it was an operational debt under Section 5(21) of the IBC and as such petition was filed under Section 9 of the IBC. After notice the corporate debtor appeared and raised an objection as if there were earlier dispute. However, the learned Adjudicating Authority after hearing both the sides has admitted the application and initiated CIRP by the impugned order which has been assailed in the present appeal.

4. The appellant primarily assailed the impugned order on the ground as if dispute were persisting much prior to the issues of the demand notice. A plea was also taken as if while calculating the debt the operational creditor had ignored the amount of returned assets. The appellant in the present appeal has also

raised a plea that admitting the application was contrary to the provisions of Section 10A of the IBC. A plea was taken as if default had occurred during the month of March, 2020.

5. At the time of hearing Mr. Vaibhav Gaggar, learned counsel for the appellant has argued that actual outstanding debt was only Rs.80 lakhs which was below the threshold for filing the application under Section 9 of the IBC. He argued that actual due amount was Rs.1,31,00,000/- and from the said amount value of the returned assets was to be deducted and after such deduction debt was about Rs.80 lakhs and as such there was no reason for initiation of CIRP. He has further referred to running page 76 and 77 to show as if the demand was continued by the corporate debtor and as such there was apparent dispute regarding debt. There was pre-existing dispute, therefore, there was no reason for admitting the application. He has also drawn our attention to running page 174 which is part of the demand notice dated 26th August, 2021 to show that the operational creditor has himself admitted in the notice regarding return of assets and regarding initiation of discussion on the outstanding. It is better to reproduce relevant portion of demand notice at running page 174 para (j):

“Thereafter, on 04.12.2020, the Corporate Debtor had approached the Operational Creditor and initiated a discussion on the outstanding and the return of some Rented Assets. By its email on 10.12.2020, the corporate Debtor had supplied to the Operational Creditor with the list of those Rented Assets intended for return. Pursuant thereof, the Operational Creditor had received some of Rented Assets from the Corporate Debtor in 3(Three) tranche(s) on 25.12.2020, 16.01.2021 and 27.01.2021

Details of the Rented Assets received by the Operational Creditor and those still retained with the Corporate Debtor are annexed and marked as Exhibit 9 hereto.”

6. By way of referring to aforesaid it was argued by Mr. Gaggar, learned counsel for appellant that there is no discussion regarding the deduction of the amount of rented assets from the operational debt. He has also disputed the actual debt as claimed by the operational creditor. In support of his argument regarding list of equipment he has also drawn our attention to running page 149 of the Memo of Appeal which is an email dated 28.10.2020. In sum and substance it was submitted by the learned counsel for the appellant that considering the pre-existing dispute and non-

disclosure of the amount relating to the returned assets the whole proceeding is vitiated and order impugned is liable to be set aside.

7. In the present appeal the Respondent/operational creditor has also field an exhaustive reply dealing with all contentions raised in the Memo of Appeal. Certain relevant facts which are deciphered from the reply which appears to be relevant are required to be reproduced for proper appreciation of the matter.

“5.6 Onward July-August 2019, the Corporate Debtor started to commit defaults in its payment for the invoices raised towards rent instalment and other monies, due and payable to the Respondent No. 1. There were multiple payment follow up emailed/sent to the Corporate Debtor by the Respondent No. 1 during the month of March 2020, particularly on 05.03.2020, 11.03.2020, 13.03.2020, and thereafter on 16.03.2020; however, none of those emails were ever addressed and or responded by the Corporate Debtor.

5.7 Earlier, on 06.09.2019 the Respondent No. 1 received a payment of Rs. 12,16,527.00 (in words, Rupees Twelve Lakhs Sixteen Thousand Five Hundred and Twenty-Seven Only), which was the last payment from the Corporate Debtor to the Respondent No. 1 till date in this matter, the said payment was a part payment towards an outstanding invoice in default bearing No. 10081927MTE0531, raised for rentals payable under the rent contract, the Rent Schedule MTEL-015(A). As a result of the continuing default in payment onward since July- August 2019, the

rentals to a tune of amount Rs. 1,19,72,541.00 (in words, Rupees One Crore Nineteen Lakhs Seventy-Two Thousand Five Hundred and Forty One Only) remained overdue in twenty (20) invoices. Copies of the mentioned invoices are referred to and relied upon by the Appellant in the Appeal Memo (Annexure "A-16" of the Appeal Memo).

5.8.2 On 28.10.2020, as there was continuing default in payment by the Corporate Debtor, the Respondent had served another demand notice to the Corporate Debtor calling upon to pay towards outstanding rent instalments and ODI, those which were recurring since July-August 2019. This time, on 13.11.2020 the Corporate Debtor had replied which was a ministerial response requesting for time to file its reply to the said notice dt. 28.10.2020.

5.8.3 Thereafter, on 26.11.2020, the Corporate Debtor had replied to the Respondent No. 1. In reply, the Corporate Debtor renege the payment obligations and denied to make payment citing reasons, namely, (i) delayed cash flow collection due to Covid- 19 and lockdown; and (ii) the rate for rent is exorbitant in view of the Covid-19 circumstances, and furthermore, the Corporate Debtor had requested the Respondent No. 1 to offer a subsidy in the rentals. In the said reply, the Corporate Debtor also alleged that the tenure of the Extension Schedules with respect to various rented equipment have 'expired due to efflux of time'. It is submitted before this Hon'ble Appellate Tribunal that none of the Extension Schedules were in expiration at that time. All Extension Schedules in question were well subsisting, valid and binding onto the

parties at that relevant time. The mentioned facts regarding the validity and term of the Extension Schedules is also not disputed by the Appellant, in fact, the Appellant has referred to and relied upon the Extension Schedules as stated above.

5.8.4 In addition, it was stated by the Corporate Debtor in its email reply dt. 26.11.2020 that the rented equipment have become redundant stored at its locations causing financial losses in form of the rentals, and it has no other option but to hand over such equipment to the Respondent No. 1. It is submitted to this Hon'ble Appellate Tribunal under the rent contract irrespective of use or non-use of the rented equipment, as claimed herein, the renter is liable to make payment towards all rentals as the payment are absolute and unconditional (See, Clause 4.6 of the MRA); besides, the renter has no right to terminate the rent contract at will or for convenience (see, Clauses 12.1 to 12.5 of the MRA), sought by the Corporate Debtor. It was also stated by the Corporate Debtor that the Respondent No. 1 forthwith take custody of the rented equipment from the Corporate Debtor, and that it will furnish a detailed list of those rented equipment which the Corporate Debtor wants to hand over.

5.10 On 26.08.2021 the Respondent No. 1 had duly served a demand notice to the Corporate Debtor for the outstanding operational debt in default (continuing default since July- August 2019), aggregating up to Rs. 5,37,65,669.00 (in words, Rupees Five Crore Thirty-Seven Lac Sixty-Five Thousand Six Hundred and Sixty-Nine only) in terms of Section 8(1) of the Insolvency and Bankruptcy Code, 2016 read along with Rule 5 of

the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. The said demand notice was delivered to the Corporate Debtor by way of a registered post on 28.08.2021 (at 16:23:33 Hrs. IST); still, the Corporate Debtor did not respond/replied to the said demand notice neither there was any payment towards outstanding operational debt in default to the Respondent No.1 by the Corporate Debtor.

5.11 In the circumstances, as particularly narrated herein above, and where there was no reply to Section 8 Demand Notice or payment to the Respondent No. 1 by the Corporate Debtor that in November 2021, the Respondent No. 1 had rightly proceeded to file an application for initiating Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor in terms of Section 9 of the Insolvency and Bankruptcy Code, 2016 read along with Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 due to the Operational Debt in default go a tune of Rs. 5,48,62,056.00 (Rupees Five Crores Forty-Eight Lacs Sixty- Two Thousand and Fifty-Six Only), due and payable to the Respondent No. 1 by the Corporate Debtor under the rent.”

8. Mr. Nazish Alam, learned counsel appearing on behalf of Respondent/operational creditor submits that the order impugned itself reflects a good reason for rejection of the present appeal. He submits that in the petition filed before the Adjudicating Authority under Section 9 of IBC each and every detail were explained in seriatim which reflects that the appellant defaulted in making of

payment of operational debt which had earlier occurred in the month of March, 2020 before starting of Covid19 pandemic, thereafter again default was committed and most of the rental assets were in possession of the corporate debtor and rental agreement was extended from time to time. Since the corporate debtor did not pay heed to clear the outstanding debt without raising any dispute, the operational creditor was left with no option but to issue demand notice under Section 8 of the IBC which admitted was not replied by the corporate debtor nor the corporate debtor made payment. The outstanding was to the tune of Rs.5,34,48,523/- and as such in absence of any reply application under Section 9 of the IBC was filed and after receipt of notice the corporate debtor appeared and filed its response raising an artificial dispute as if there were pre-existing dispute and some frivolous grounds were taken. The Learned Counsel for R1 submits that through in its reply before the Adjudicating Authority the appellant had referred to email i.e. email dated 13.11.2020 and 26.11.2020 and stand was taken that the corporate debtor had raised dispute, the said two emails does not reflect any dispute rather it indicates as if the corporate debtor was only requesting the extension of time taking shelter of Covid19 Pandemic.

9. Besides hearing learned counsel for the parties we have examined the materials available on record and after going through the same prima facie we are of the opinion that learned Adjudicating Authority has committed no error in passing the impugned order and initiating CIRP. From the order impugned itself it is evident that the learned Adjudicating Authority has reproduced two emails dated 13.11.2020 and 26.11.2020. On going through the aforesaid two emails, which has been incorporated in the impugned order, it is clear that regarding default or debt no dispute was raised. It only reflects the hardship or inconvenience of the corporate debtor due to Covid19 pandemic. On aforesaid emails it is difficult to draw an inference as if there was pre-existing dispute between the parties. Before the Adjudicating Authority a plea was also taken by the corporate debtor that rented assets were lying in the different premises of the corporate debtor without any use. However, on perusal of the MRA which has been brought on record in the Memo of Appeal as Annexure A-2 it is evident that in the said MRA there is a clause regarding return of equipment which is Clause 14 at running page 92 and 93 of the Memo of Appeal. For better appreciation it is necessary to reproduce only clause 14 of the MRA as follows:-

“14. Return of Equipment:

14.1 At the expiration or earlier termination of the renting of the Equipment the Renter will at the Renter's expense deliver the Equipment in good working order and condition, packed and crated in such manner to avoid any damage/loss to the Equipment during transportation, to our nominated place in Mumbai.

14.2 The Equipment will not be regarded as returned, unless (where applicable) it is decommissioned in accordance with the original manufacturers specifications by an authorised person and appropriate certificates have been supplied, and it is returned in accordance with the requirements set out in this Agreement.

14.3 It is not possible for the Renter to return the Equipment to Connect in accordance with the provisions of this Agreement then the Renter must immediately at the expiration or earlier termination of the renting of the Equipment in terms of this Agreement and at the Renter's cost deliver to Connect replacement equipment approved by Connect and of a similar nature to the Equipment, provided that Connect may in its sole discretion accept payment of an amount equal to the Residual

Value of the Equipment instead of deliver of such replacement equipment. A certificate duly completed by Connects auditors indicating the amount of the Residual Value will be prima facie evidence of the contents thereof. For purposes of this clause 14, Residual Value shall mean the financial interest which connect acquire in the Equipment at the inception of the rental of the Equipment in terms of this Agreement and retains for the duration of the rental of the Equipment in terms of this Agreement.

14.2 In case of breach of essential terms as specified in Clause 10 and default as per Clause 11 in addition to demanding payment of the unpaid dues, Connect shall also, at its option and in addition to claiming the liquidated damages, be entitled to dismantle and remove the Equipment from the place where it shall have been kept and take away there from and sell the Equipment by auction by private treaty and for that purpose, Connect shall have right to enter into any premises where such equipment is located subject to receiving permission from the owner or the occupant of the premises where the Equipment is located. The Renter shall provide all assistance in obtaining permission as aforesaid.

14.3 Connect may without prejudice to any of our other rights hereunder, by notice in writing terminate the Agreement and the Rental of the Equipment created hereby and thereupon, or upon the termination by efflux of time, as the case may be, the Renter shall forthwith deliver the Equipment at the Renter's own expenses to Connect and in accordance with any directions given by Connect and in default thereof Connect may re-possess and retake the Equipment, and for that purpose Connect by its servants and agents may enter upon any land, building or premises where the Equipment is or where Connect or its agents or servants suspect the Equipment is;

All costs and expenses incurred by Connect in exercising or attempting to exercise its rights under this clause shall be paid by the Renter to Connect on demand, and that in the event ourselves taking any financial or other assistance from any bank or any other lender this right shall ensure for the benefit of such bank or lender."

10. On perusal of the aforesaid clause contained in the MRA it is evident that in case of non-use of the assets by the corporate debtor onus was on the corporate debtor to return such assets on

his own transportation cost. After filing of the application under Section 9 of IBC the corporate debtor was not entitled to raise the issue as if those rented assets were lying idle and without use in different premises of the corporate debtor and as such cannot claim benefit of this issue. Moreover, at the time of hearing of application under Section 9 if the corporate debtor was in a position to satisfy the Adjudicating Authority that there was pre-existing dispute only then he would have got any benefit but in the present case there is no plausible explanation or reason shown by the corporate debtor as to whether there was pre-existing dispute in between the parties.

11. The petition filed under Section 9 before the Adjudicating Authority which has been brought on record in the Memo of Appeal in Volume II running page 183 to 239 reflects each and every detail and on perusal of the same there is no reason to raise any doubt on the claimed operational debt which was claimed amount. On the date of notice under Section 8 the total outstanding operational debt was Rs.5,37,65,669/- (Rupees Five crore thirty seven lakh sixty five thousand six hundred sixty nine only) and the same debt was operational debt under Section 5(21).

12. We have also noticed that when initially the present appeal was taken for admission before the Bench of this Tribunal, learned counsel for the appellant had made a statement that the appellant was also taking steps for settlement and thereafter recording submission of learned counsel for the appellant on 06.01.2023 an interim order was passed whereby constitution of CoC, if not constituted, was stayed. Thereafter interim order continued. However, at the time of hearing of present appeal learned counsel for the appellant completely remained silence on the said issue.

13. Considering the fact that the appellant/corporate debtor failed to establish pre-existing dispute and the fact that it was an operational debt we find that the Adjudicating Authority has committed no error in passing the impugned order. Accordingly we do not find any merit in the present appeal.

14. The appeal stands dismissed.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

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