NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1459 of 2022

[Arising out of the order dated 17.10.2022 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi Bench (Court II) in CP(IB) No. 58(ND)2022]

IN THE MATTER OF:

Beetel Teletech Ltd.
(Erstwhile M/s Brightstar Telecommunications India Limited)
First Floor, Plot No.16,
Udyog Vihar, Phase IV,
Gurugram, Haryana - 122015 **...Appellant**

Versus

Arcelia IT Services Pvt. Ltd.
Flat No.26/13, Second Floor,
Deepak Building, Nehru Place,
New Delhi – 110019

Also at:

Level 2, Elegance Tower, Plot No.8,
Non-Hierarchical, Commercial Centre,
Jasola, New Delhi - 110025

...Respondent

Present:

For Appellant: **Mr. K.P. Singh, Advocate.**

For Respondents:

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**' in short) by the Appellant arises out of the order dated 17.10.2022 (hereinafter referred as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Delhi Bench (Court-II) in CP(IB) No. 58(ND)2022. By the impugned order, the Adjudicating Authority has dismissed the Section 9 application filed by the Operational Creditor-M/s Beetel Teletech Limited (the present Appellant) seeking initiation of Corporate Insolvency Resolution Process ("**CIRP**" in short) against the Corporate Debtor-M/s. Arcelia IT Services Private Limited (the present Respondent). Aggrieved by this impugned order, the present appeal has been preferred by the Operational Creditor.

2. Briefly recapitulating the factual matrix of the present case, the Corporate Debtor and the Operational Creditor had executed a Channel Partner Registration Form wherein both parties had agreed to work on mutually accepted terms and conditions. The Corporate Debtor raised a purchase order on 25.10.2019 pursuant to which the Operational Creditor supplied goods and services and raised an invoice No.RV1927813879 dated 31.12.2019 for which payments remained due. Despite several reminders including meetings held between the two parties as the entire payment assured by the Corporate Debtor was not received by the Operational Creditor, a demand notice under Section 8

of the IBC was issued by the Operational Creditor. The Corporate Debtor did not file any reply to the statutory demand notice. Subsequently the Operational Creditor filed a Section 9 application on 15.12.2021 seeking initiation of CIRP of the Corporate Debtor. The Corporate Debtor filed a reply to the Section 9 application. On hearing the matter, the Adjudicating Authority dismissed the Section 9 application as not maintainable on the ground that the Appellant had failed to establish beyond doubt that the unpaid operational debt was subsisting above the minimum threshold limit of Rs.1 crore. Aggrieved by the impugned order, the Operational Creditor has come up in appeal.

3. The Learned Counsel for the Appellant submitted that as per payment terms followed by the two parties, the payments were to be made by the Corporate Debtor 60 days from the date of invoice. It was further submitted that in terms of payment conditions as laid down at Clause 12.8.2, the Corporate Debtor was liable to pay interest at the rate 18% per annum if payment was not cleared within 60 days. The invoice raised vide No.RV1927813879 for Rs. 1,32,45,904.84 which was dated 31.12.2019 fell due for payment on 29.02.2020. It was further submitted that though certain payments were received from the Corporate Debtor post this invoice, these payments were adjusted both against invoice No.RV1927813879 and other outstanding invoices. After carrying out these adjustments, the payments still continued to remain outstanding in respect of invoice No.RV1927813879.

4. It is further contended by the Learned Counsel for the Appellant that though the Appellant took up the matter with the Corporate Debtor for release of the outstanding operational debt, the Corporate Debtor released only part payments. It was also added that a cheque issued by the Corporate Debtor also got dishonoured compelling the Appellant to issue a Section 8 demand notice which was allegedly never replied to nor disputed by the Corporate Debtor. It has been further admitted that post issue of demand notice, two cheques of Rs.5 lakhs were issued which were adjusted against other pending invoices. However, as the operational debt in respect of invoice No. RV1927813879 continued to subsist, this constituted sufficient basis for admission of Section 9 application. It was further pointed out that in Part IV, the operational debt claimed by the Operational Creditor is confined only to Invoice No. RV1927813879 for an amount of Rs.1,15,11,486/- which included a principal amount of Rs.1,01,80,986 and an interest amount of Rs.13,30,500/- at the rate of 18% per annum as agreed. It was vehemently contended that the Adjudicating Authority erroneously dismissed the Section 9 application on the ground that the threshold limit of Rs.1 crore is not fulfilled.

5. We have duly considered the detailed submissions advanced by the Learned Counsel for the Appellant and perused the records carefully.

6. None appeared for the Corporate Debtor before this Tribunal right since the first date of hearing on 13.12.2022. This Tribunal had directed issue of Notice to the Respondent - Corporate Debtor on 13.12.2022. Noticing that the

Notice sent to the Respondent by speed post having been returned undelivered, the Appellant was permitted to hand over Dasti Notice personally on 30.01.2023. The Learned Counsel for the Appellant informed this Tribunal on 24.03.2023 that the Appellant having been denied entry by the security staff, the Notice could not be served. This Tribunal had therefore directed that Notice be published in two leading newspapers which is found to have been complied with and an affidavit of service has also been filed. It is, therefore, held that service of Notice on Corporate Debtor is sufficient and that the Corporate Debtor has not appeared despite Notice.

7. We notice that the Adjudicating Authority has dismissed the Section 9 application of the Appellant on two grounds. One ground taken is that the period for which interest has been claimed by the Operational Creditor falls during the period 25.03.2020 to 24.03.2021 for which no CIRP could have been initiated in terms of Section 10A of the IBC. This ground has been elucidated in Paragraph 9 of the impugned order, where the following has been held: -

> *"9. On perusal of the Part IV of the application, it is observed that the Applicant has claimed an amount of Rs.1,15,11,486/-, comprising of the principal amounting to Rs.1,01,80,986/- and interest Rs.13,30,500/- from 29.02.2020 to 15.12.2021 @ 18% per annum. From the period for which the interest is being claimed by the Applicant, we observe that the majority of the period is falling under the suspension period of IBC (i.e., from 25.03.2020 to 24.03.2021),*

for which no CIRP can ever be initiated as stipulated under Section 10A of IBC, 2016. Hence, in our view, no interest can be claimed for the suspension period of IBC for triggering CIRP. Further, as held in the catena of the Judgements, this Tribunal is not a court of recovery, therefore, we will not indulge in calculating the interest amount for the remaining period."

(Emphasis supplied)

8. This finding of the Adjudicating Authority has been challenged by the Appellant on the ground that the default in payment having arisen before 25.03.2020, the interest that accrued on the principal amount so defaulted is also liable to be treated as part of operational debt and taken into account while computing the minimum threshold limit.

9. At this stage, it may be useful to have a look at Section 10A of IBC which is as follows: -

***Section 10A**: Suspension of initiation of corporate insolvency resolution process.*

10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.

10. A plain reading of Section 10A signifies that no application/ proceedings under Sections 7, 9 and 10 can be initiated for any default in payment which is committed during Section 10A period. Thus, what is essentially barred is initiation of CIRP proceedings when the Corporate Debtor commits any default during the Section 10A period. However, if the default is committed prior to the Section 10A period and continues in the Section 10A period, this statutory provision does not put any bar on the initiation of CIRP proceedings.

11. The law of Section 10A is well settled. The object and purpose of Section 10A has been explained in the ordinance by which Section 10A was brought into operation. Further, the object and intent underlying the insertion of Section 10A has also been propounded by the Hon'ble Supreme Court in its judgment of ***"Ramesh Kymal vs. M/s Siemens Gamesa Renewable [Civil Appeal No. 4050 of 2020]".*** In consonance with the tenor and spirit of the above-mentioned judgment of the Hon'ble Supreme Court, this Tribunal on 18.08.2023 in ***Company Appeal (AT) (Ins.) No. 914 of 2023*** in the matter of ***Raghavendra Joshi v. Axis Bank Limited & Anr*** ("***Raghavendra***" in short) had the occasion to notice the object of Section 10A of IBC and observed as follows:

"8. In Ramesh Kymal's Case, the Appellant had filed an Application under Section 9 on 11th May, 2020 on the ground of default. The

ordinance No. 09/2020 was promulgated by the President of India on 05th June, 2020 by which Section 10A was inserted into the I&B Code, 2016. An Application was filed by the Corporate Debtor for dismissal of Section 9 Application, the Section 9 Application was dismissed on the ground of Section 10A. Challenging the order of the Adjudicating Authority as well as Appellate Tribunal, Appeal was filed in the Supreme Court. Argument which was advanced before the Hon'ble Supreme Court was that Section 10A having been inserted in the statute book with effect from 05th June, 2020, it shall not apply on the Applications filed prior to the said date, which argument was rejected by the Hon'ble Supreme Court and relevant observations have been made in Paragraphs 22, 23 and 24 as has been noted above. The Hon'ble Supreme Court affirmed the Order of the Adjudicating Authority holding that default in Section 9 Application being on 30th April, 2020 it being covered by Section 10A, Application was rightly rejected. The above judgment of the Hon'ble Supreme Court has laid down that if the default is after 25th March, 2020, the Application is hit by Section 10A. The object as was indicated in the ordinance for bringing Section 10A in the statute book is relevant to notice which is to the following effect:

> *"AND WHEREAS a nationwide lockdown is in force since 25th March, 2020 to combat the spread of COVID-19 which has added to disruption of normal business operations: AND WHEREAS it is considered expedient to suspend under Sections*

7, 9 and 10 of the Insolvency and Bankruptcy Code, 2016 to prevent corporate persons which are experiencing distress on account of unprecedented situation, being pushed into insolvency proceedings under the said Code for some time; AND WHEREAS it is considered expedient to exclude the defaults arising on account of unprecedented situation for the purposes of insolvency proceeding under this Code."

12. Further this Tribunal while taking cognizance of the above judgment of this Tribunal in ***Raghavendra (supra)***, in the matter of ***Company Appeal (AT) (Ins.) No. 294 of 2023*** *in* ***Narayan Mangal v. Vatsalya Builders & Developers Pvt. Ltd*** it proceeded further to answer as to whether interest payments accrued during the Section 10A period is to be deducted while computing the threshold and it has been held that: -

"If the default is committed prior to Section 10A period and default continues there is no prohibition in initiating proceedings under Section 7 and we are not persuaded to accept the submission of the counsel for the respondent that the liability of interest which accrued during Section 10A period should be ignored or should not be computed in the amount while finding the threshold. Liability to pay interest which default committed prior to Section 10A period continues and is not obliviated by Section 10A."

13. Thus, the aim and objective of Section 10A was to protect a Corporate Debtor from the filing of any insolvency application against it for any default committed during the period when Covid-19 pandemic was prevailing. It was never intended to cover any default which occurred before Section 10A period and continuing thereafter.

14. The present is a case where default has been committed by the Corporate Debtor since 29.02.2020 which is prior to commencement of Section 10A period. Hence, this is a case where the default was undisputedly committed before the bar of Section 10A came into play. There being categorical default by the Corporate Debtor prior to Section 10A period, the Corporate Debtor was clearly not entitled to claim the benefit of Section 10A period.

15. Further, since the default was committed prior to Section 10A period and the liability to pay interest having clocked prior to Section 10A period, we are of the considered opinion that the view taken by the Adjudicating Authority that the liability of interest which accrued during Section 10A period should be ignored or should not be computed for triggering CIRP is misconceived.

16. The second ground which has been taken by the Adjudicating Authority to hold that the quantum of unpaid operational debt cannot be held to be above the minimum threshold limit of Rs.1 crore is that part payments received from the Corporate Debtor have been adjusted by the Appellant towards other debts

instead of adjusting the first against Invoice No.RV1927813879. The finding recorded by the Adjudicating Authority in this regard is as follows: -

> *"12. From perusal of the aforesaid table, it is observed that whereas the payments made on the earlier dates except the payment reflected at Serial no.1 are adjusted against the invoice no. RV1927813879, the part-payments dated 03.11.2021 and 08.11.2021 made by the respondents as reflected at serial. no. 8 and 9 are adjusted towards the interest outstanding of the invoice bearing No. RV2027804572. Hence, we do not find any consistency or pattern in the treatment accorded to the part-payments, while adjusting the same towards the outstanding dues. Had the amounts mentioned at Serial No. 8 and 9 been adjusted towards the invoice RV1927813879, the principal amount would be less than the minimum stipulated threshold of Rs 1 (one) Crore.*
>
> *13. We further observe that the invoice claimed in Part IV of the present application is only RV1927813879 and the other invoices as referred in aforesaid table are neither produced nor are the subject matter of the present petition. Hence, in our considered view, further investigation and scrutiny of facts is required that as to why the subsequent payments made on 08.11.2021 are adjusted against the invoice no. RV2027804572, whereas the previous payments made on 24.03.2021 and 25.03.2021 are adjusted towards the Invoice under reference i.e., RV1927813879."*
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> ***(Emphasis supplied)***

17. This finding of the Adjudicating Authority has been challenged by the Appellant on the ground that a creditor is entitled to apply his own discretion to appropriate any on-account payment received from the debtor against any

outstanding debt(s) due from the debtor in terms of the Indian Contract Act, 1872.

18. At this stage, it may be useful to have a look at Section 60 of the Indian Contract Act, 1872 which is as follows:

> ***Section 60. Application of payment where debt to be discharged is not indicated****. - Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitations of suits. — Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitations of suits."*

19. A plain reading of Section 60 of the Indian Contract Act 1872, shows that if the debtor makes any payment without any appropriation, then the creditor can use his discretion to wipe out any of the remaining debt(s) which is/are due. The right of appropriation lies with the creditor if the debtor does not indicate in what manner the debt is to be discharged. In such circumstances, the creditor has a lot of scope for exercising his right in such a manner so as to put himself in the most advantageous position. It is also a well settled business practice that

in a debt where the principal amount is outstanding and interest has also accrued on the debt, sums paid by the debtor is applied by the creditor first to the interest. In the present facts of the case, payments received by the Operational Creditor have been duly adjusted also against the principal amount or interest accrued in respect of invoices other than RV1927813879 which were all pending for payment. Without explaining how this action has Operational Creditor has been in contravention of the statutory provisions contained in the Indian Contract Act, it has therefore been unreasonable on the part of the Adjudicating Authority to hold that there is an inconsistency in the pattern adopted by the present Appellant while adjusting payments received against outstanding dues.

20. Given the above backdrop, we therefore do not commend the finding of the Adjudicating Authority that the Appellant/Operational Creditor by adjusting payments received from the Corporate Debtor against the principal amount outstanding in respect of other pending invoices or setting off these payments against interest accrued qua these invoices had committed any anomaly. There is no foundational basis shown by the Adjudicating Authority for disregarding the discretion exercised by the Operational Creditor which it was clearly entitled to exercise.

21. In sum, we have no hesitation in holding that the finding returned by the Adjudicating Authority that the criterion of minimum threshold limit of Rs 1

crore is not met in the facts of the present case is not tenable. Considering the overall facts and circumstance of the present case, we are of the considered view that the order of the Adjudicating Authority is unsustainable. The impugned order dated 17.10.2022 is set aside. In result, the appeal is allowed. The Section 9 application filed by the Appellant is revived and remanded back to the Adjudicating Authority to be considered again in accordance with law. We however would like to add that our observations contained herein may not influence the Adjudicating Authority in deciding the matter on merits. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 11.09.2023

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