

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

**CP(IB) No. 3061/MB-IV/2019**

Under Section 9 of the I&B Code, 2016

In the matter of:

**RMV IT Services Private Limited**

[CIN-U72300WB2014PTC200183]

...Operational Creditor/Applicant

V/s

**Red Eye Technologies Private Limited**

[CIN-U74999MH2016PTC281762]

...Corporate Debtor

Order Dated: 25.08.2023

*Coram:*

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

*Appearances (via videoconferencing):*

For the Petitioner(s) : Ms. Aishwarya Sharma, Advocate.

For the Corporate Debtor(s) : Mr. Devarajan Raman a/w  
Ms. Shaila Taware, Advocates.

**ORDER**

***Per: Kishore Vemulapalli, Member (Judicial)***

1. This is an Application being C.P. (IB) No. 3061/MB/C-IV/2019 filed on 16.05.2019 by RMV IT Services Private Limited, the Operational

Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Red Eye Technologies Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

- 1.1 The Operational Creditor has filed Board Resolution dated 10.07.2019 in support of authorization in favour of Mr. Parmeshwar Lal Dadhich of the Operational Creditor authorising him to file the present company application on behalf of the Operational Creditor.
- 1.2 The total amount of debt claimed by the Operational Creditor in the Part IV of the Company Petition is INR 2,26,56,666/- (Rupees Two Crores, Twenty-Six Lacs Fifty Six Thousand And Six Hundred And Sixty Six), which comprise of INR 82,46,912/-, the amount of rent due till date of termination, INR 13,80,201/- interest thereon and INR 1,30,29,552/- rent for the unexpired tenure of the Agreement. The date of default is stated as 11.02.2019, which is the day on which the last partial payment towards overdue rent was made and as 31.01.2019 for INR 1,30,29,552/-, being the date of implied termination of the agreement in terms of Clause 21 thereof. The implied termination of the contract by the Corporate Debtor

confers the liability to pay the rental dues of the remaining months upon the corporate debtor.

2. The Operational Creditor is engaged in the business of IT Services like networking solutions, AMC, Computer Rental etc. and the Corporate Debtor is engaged in the business of animation and VFX, IT Infrastructure ad Software Solutions etc.

2.1 The Operational Creditor and the Corporate Debtor entered into agreements for hire/rent of the computers on the following dates:

2.1.1 Agreement dated 31.01.2017 wherein the operational creditor agreed to supply 06 units of PROMISE Storage EX10 32TB (2x16) at the rate of INR 20,000 per month. It is pertinent to mention that the term of the agreement was 30 months with 24 months lock-in period. It was mutually agreed between the parties that 2 months rent will be paid in advance and the Corporate debtor shall pay the monthly rent of the goods on or before 20<sup>th</sup> of every month. Further, the agreement also stipulated that any delay after 20 days from the due date shall attract interest @20% p.a.

2.1.2 A Hire-Purchase Agreement dated 13.02.2017 wherein the operational creditor agreed to supply 20 units of

MAC Server (Dual Xeon Quad Core) at the rate of INR 7,250 per month. It is pertinent to mention that the term of the agreement was 30 months. Further, it was specified in the agreement that in case of termination by the Corporate Debtor before a period of 30 months, the Corporate Debtor shall pay full amount of the remaining period. It was mutually agreed between the parties that 2 months rent will be paid in advance and the Corporate debtor shall pay the monthly rent of the goods on or before 20<sup>th</sup> of every month. Further, it was also stipulated that delay exceeding 20 days after the due date shall be treated as Breach of Contract. Additionally, it was also agreed between the parties that if the corporate debtor terminates the contract before rental term then the corporate debtor shall pay 100% rental of first 12 months and 75% of the balance rental term.

2.1.3 An Agreement dated 10.03.2017 wherein the Operational Creditor agreed to supply 03 units of MAC Server (Dual Xeon Hexa Core) at the rate of INR 6,784 per month. It is pertinent to mention that the term of the agreement was 30 months with 24 months lock-in

period. It was mutually agreed between the parties that 2 months rent will be paid in advance and the Corporate debtor shall pay the monthly rent of the goods on or before 20<sup>th</sup> of every month. Further, it was also stipulated that delay exceeding 20 days after the due date shall be treated as Breach of Contract. Additionally, it was also agreed between the parties that if the corporate debtor terminates the contract before rental term then, the corporate debtor shall pay 100% rental of first 12 months and 75% of the balance rental term.

2.1.4 An agreement dated 10.03.2017 wherein the operational creditor agreed to supply 05 units of PROMISE Storage EX10 32TB (2x16) at the rate of INR 20,000 per month. It is pertinent to mention that the term of the agreement was 30 months with 24 months lock-in period. It was mutually agreed between the parties that 2 months rent will be paid in advance and the Corporate debtor shall pay the monthly rent of the goods on or before 20<sup>th</sup> of every month. Further, it was also stipulated that delay exceeding 20 days after the due date shall be treated as Breach of Contract.

Additionally, it was also agreed between the parties that if the corporate debtor terminates the contract before rental term then in that eventuality, the corporate debtor shall pay 100% rental of first 12 months and 75% of the balance rental term.

2.1.5 An agreement dated 08.09.2017 wherein the operational creditor agreed to supply 42 units of MAC Pro Cylinder at the rate of INR 19,048 per month. It is pertinent to mention that the term of the agreement was 36 months with 30 months lock-in period. It was mutually agreed between the parties that 2 months rent will be paid in advance and the Corporate debtor shall pay the monthly rent of the goods on or before 20<sup>th</sup> of every month. Further, it was also stipulated that delay exceeding 20 days after the due date shall be treated as Breach of Contract. Additionally, it was also agreed between the parties that if the corporate debtor terminates the contract before rental term then in that eventuality, the corporate debtor shall pay 100% rental of first 12 months and 75% of the balance rental term.

2.1.6 An agreement dated 08.09.2017 wherein the operational creditor agreed to supply 20 units of MAC

Server (Dual Xeon Hexa Core) at the rate of INR 7,000 per month. It is pertinent to mention that the term of the agreement was 30 months with 24 months lock-in period. It was mutually agreed between the parties that 2 months rent will be paid in advance and the Corporate debtor shall pay the monthly rent of the goods on or before 20days after the due date of every month. Further, it was also stipulated that delay exceeding 20 days after the due date shall be treated as Breach of Contract. Additionally, it was also agreed between the parties that if the corporate debtor terminates the contract before rental term then in that eventuality, the corporate debtor shall pay 100% rental of first 12 months and 75% of the balance rental term.

- 2.2 The Corporate Debtor defaulted in making the monthly payment to the Operational Creditor from the month of June 2018. The Corporate Debtor made part payments despite of various e-mails and reminders by the Operational Creditor.
- 2.3 Further, due to repeated defaults on the part of the Corporate Debtor, the Operational Creditor terminated the contract vide E-mail dated 13.03.2019 due to breach of terms of the contract by the Corporate debtor. Subsequently, some goods were

loaded from the office of Corporate Debtor by the Operational Creditor.

2.4 Furthermore, the pending rent amount was calculated and was mutually decided amongst the parties vide an e-mail dated 11.04.2019 as INR 96,27,114. Additionally, as per Clause 21 of the Agreements executed between the parties, the implied termination of the contract by the Corporate Debtor confers the liability to pay the rental dues of the remaining months upon the Corporate Debtor, the amount of which is INR 1,30,29,552.

The details of the said amounts are given in the following table-

S.NO	DATE OF AGREEMENT	Type	QTY	RENTAL PER QTY	MONTHLY RENTAL	TENURE OF AGREEMENT	DATE OF START OF CONTRACT	DATE OF END OF CONTRACT	TERMINATED-	BALANCE TENURE(in months)	Pre Termination Charges
1.	31/01/2017	Promise Storage ex 10 32 TB	6	20000	120000	30MONTHS	01/02/2017	31/07/2019	31/01/2019	6	540000
2.	13/02/2017	Mac servers	20	7250	145000	30MONTHS	13/02/2017	12/08/2019	31/01/2019	6	870000
3.	10/03/2017	Mac Servers	3	6784	20352	30MONTHS	02/03/2017	01/09/2019	31/01/2019	7	106848
4.	10/03/2017	Promise Storage ex 10 32 TB	5	20000	100000	30MONTHS	10/03/2017	09/09/2019	31/01/2019	7	525000
5.	08/09/2017	Mac Servers	20	7000	140000	30 MONTHS	20/03/2017	19/09/2019	31/01/2019	7.5	787500
6.	08/09/2017	Mac Cylinders	42	19048	800016	36 MONTHS	01/07/2017	30/06/2020	31/01/2019	17	10200204
											1,30,29,552

2.5 Further, the corporate debtor also issued a cheque dated 25.01.2019 in favour of Operational Creditor for INR 1,50,00,000 with instructions to encash the said cheque after a period of 90 days in lieu of repayment of the part amount which was due on the part of Corporate Debtor. The said cheque bearing cheque No. 000443 was drawn on HDFC Bank, Thane

Branch, Maharashtra. However, the cheque was returned by the bank with the note that "payment stopped by the drawer". The operational creditor sent a notice under section 138 of Negotiable Instruments Act, 1881 on 20.05.2019.

2.6 The Operational Creditor further sent a demand notice under Form 3 and Form 4 on 28.05.2019 to the Corporate Debtor demanding the payment of amount due i.e INR 2,26,56,666 (Rupees Two Crores, Twenty-Six Lacs Fifty Six thousand and six hundred and sixty six.). Thereafter, the corporate debtor sent a reply to the demand notice dated 12.06.2019 stating that the amount claimed under the demand notice is different from the amount mentioned in the Notice sent by the operational creditor under section 138 of Negotiable Instruments Act, 1881.

3. The Corporate Debtor filed a reply dated 30.01.2020 stating that the Operational creditor is not clear whether there is any amount due and payable to them as the Operational Creditor have sent 4 applications filed by them against the Corporate Debtor. The Corporate Debtor has objected on following grounds -

3.1 The authority given to Mr. Parmeshwarlal Dadhich vide board resolution dated 10.07.2019 does not authorise him to file an application under section 9 of the I & B Code 2016 against the Corporate Debtor. It has relied upon decision of The Hon'ble

Tribunal, Mumbai bench (Court IV) in *Rushabh Civil Contractors Private Limited Vs. Centrio Lifespaces Limited [2020] ibclaw.in 07]* to contend that there should be specific resolution.

- 3.2 The clubbing of debt due under various agreements, different in nature, dealing with equipment or rent or hire purchase, is not permissible. It has placed reliance on "*International Road Dynamics South Asia Pvt. Ltd. Vs. Reliance Infrastructure Limited*" CA (AT) (Ins) No. 72 of 2017.
- 3.3 The Operational Creditor is not clear as to the date of default, as in page 7 of the application, the date of default is indicated as June 2018 whereas in the application in form 5, Page 15 the date of default is indicated as 11.02.2019.
- 3.4 The tabular computation in Annexure A- 12 of the application is incorrect as there are six different agreements and the amount payable under each of these agreements are different.
- 3.5 The amounts paid to the Applicant is in excess of the invoice raised by them and as such it is submitted that the Corporate Debtor has to receive an amount of Rs.64,77,108/- after honouring the commitments under the agreement, till the date

on which we have returned the equipment to the Operational Creditor.

- 3.6 The copy of the invoice has not been attached to the demand notice when the operational creditor has sent a demand notice in both form 3 and form 4.
- 3.7 The Operational creditor has not affirmed in such a manner in the affidavit as is required as per section 9 (3)(b) of the I & B Code 2016. Thus, the application deserves to be dismissed as it has not complied with the requirement of Section 9(3)(b) of the code.
- 3.8 The reply given to the demand notice suggests that there is a pre-existing dispute which meets with the requirements of the Code and the ratio laid down in the Mobilox judgement.
- 3.9 These agreements are in fact lease agreements/ Hire purchase agreements though, they are termed as rental agreements and as such are not adequately stamped as per the provisions of the Bombay Stamp Act and as such are not admissible as evidence.
- 3.10 In three of the six agreements the annexures are incomplete and has not listed out the equipment that has been given on rent and the agreements were signed in blank by the CD and has been

filled later by the Applicant, witnessed and a copy has also not been furnished to us.

- 3.11 The equipment under the two agreements dated 8<sup>th</sup> September 2017 were received in April 2017 and the rentals were paid from April 2017 and as such the computation given by the operational Creditor in the Annexure to their application is completely incorrect. Thus, the alleged residual amount demanded by the Operational creditor too, is much in excess of the amount payable, presuming but without admitting, that these amounts are payable. All the agreements were terminated by the Operational creditor around March 2019.
- 3.12 The Operational Creditor had filed a Complaint u/s 138 of Negotiable Instrument Act, 1881 viz. 3319 of 2019 against Corporate Debtor for Cheque No.000443 dated 25.01.2019 amounting to Rs. 1,50,00,000/- before Special Metropolitan Magistrate Court, Jaipur.
- 3.13 The interest is payable only in one of the six agreements for Rent/Hire of Computer. On a delayed payment of the Principal Amount Rs. 1,38,000/- interest @ 20% p.a. works out to Rs.7,788.49/-. Even if this is considered the net-amount due from the Applicant/Operational Creditor is Rs. 64,69,320.25.

It was also specifically held in *Equipment Conductors and cables Ltd. Vs Transmission Corporation of Andhra Pradesh Ltd. CA(AT)(Ins) 517 of 2018* by the Hon'ble NCLAT that if there is a dispute with reference to calculation of dues then too it is a dispute and did not interfere with the decision of the Hon'ble NCLT in this regard.

- 3.14 The contract was terminated mutually due to dispute between the parties. It is evident from the email dated 13.03.2019 which is attached at page No. 77 of the Petition at annexure A7.
4. The Operational Creditor, vide its Additional Affidavit dated 14.09.2022, has placed on record the invoice dated 06.08.2018 of Rs. 10,00,000/-, against which the sum of Rs. 10,00,000/- was paid by the Corporate Debtor, and not against the debt claimed in default.
5. We have perused the documents and pleadings available on record and considered the arguments of both the sides.
- 5.1 On the perusal of the pleadings as well as records, this Bench finds that the Operational Creditor has deposited the application fees on 16.05.2019 vide Diary no. 2709138053132019, and the demand notice in Form 3 as well as Form 4 was sent on 28.05.2019 vide speed post acknowledgement dated 31.05.2019.

The Affidavit u/s 9(3)(b) has been sworn on 31.07.2019, and the petition has been filed on 13.08.2019. This Bench finds that the Applicant has filed the present petition with pre-meditated in mind as is indicated from its act of deposit of prescribed application fees on 16.05.2019, i.e. prior to the dispatch of demand notice to the corporate Debtor.

- 5.2 From the perusal of the Affidavit u/s 9(3)(b), it is noticed that the Deponent on behalf of the Applicant has affirmed that at para 3, *“Additionally, there is no existence of any suit or arbitration proceeding nor annexed a record of the pendency of the suit or arbitration proceedings filed before the receipt of demand notice issued by the Applicant/ Operational Creditor, abovenamed, nor sent a prof of repayment of unpaid operational debt as required under Section 8(2) of the Insolvency and Bankruptcy Code, 2016.”* Section 9(3)(b) mandates the operational creditor to furnish *“an affidavit to the effect that there is no notice to be given by the corporate debtor relating to a dispute of the unpaid operational debt”*. This Bench finds that the Affidavit purported to have been filed u/s 9(3)(b) does not in fact state whether any notice of dispute, which may be not in nature of suit or arbitration proceeding, was received from the Corporate Debtor or not.

- 5.3 On perusal of the emails, it is noticed that the Corporate Debtor vide its mail dated 21.02.2019 and 18.02.2019 informed the Applicant that invoices from July,2018 to February,2019 have not been received by them. The Corporate Debtor has also submitted that the invoices raised by the petitioner for these months are not reflecting in the GSTR-1 as well. However, the Petitioner has submitted that the agreement does not contemplate issuance of the invoice to make the Corporate Debtor pay the monthly rentals. We are of the considered opinion that the fact of non-appearance of the monthly invoices in the GSTR-1 under the GST law, evidences non-making of a claim for rentals for this period.
- 5.4 This Bench also finds that a sum of Rs. 130,29,552/- has been claimed as rental for balance tenure of the agreement. Nonetheless, the Applicant has taken back all Mac Pro Cylinders as is revealed from email communication dated 13.03.2019 between the parties. This Bench finds that the agreement between the parties clearly stipulate the transfer of ownership of assets given on rent after expiry of the tenure of the agreement in favour of Corporate Debtor. Since, the Corporate Debtor has made a claim for balance tenure of the rent agreement, this

Bench feels that the act of taking assets back and claim of rent for the balance tenure is contradictory in itself.

- 5.5 We find force in the argument of the Corporate Debtor that the alleged residual amount demanded by the Operational creditor too, is much in excess of the amount payable, that these amounts are payable. Accordingly, this Bench is of the considered view that the quantum of debt, in default, is in dispute and requires reconciliation at the end of both the parties in accordance with the terms of the Agreement. Since, this Bench can not go into this aspect in the proceedings u/s 7 of the Code, we feel that the present petition deserve to be dismissed.

### **ORDER**

This Application being C.P. (IB) No. 3061/NCLT/MB/C-IV/2019 filed under Section 9 of I&B Code, 2016, filed by RMV IT Services Private Limited, Operational Creditor/ Applicant against Red Eye Technologies Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **Dismissed.**

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.

Sd/-

Prabhat Kumar  
Member (Technical)  
//LRA-Akshata Shah//

Sd/-

Kishore Vemulapalli  
Member (Judicial)