

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
COURT-I, MUMBAI BENCH**

**C.P. No. 79/IBC/MB/2023**

Under Section 9 of the Insolvency and  
Bankruptcy Code, 2016

*In the matter of*

**M/s. CABLE CORPORATION OF  
INDIA. LTD.**

**CIN: U31300MH1957PLC010964**

Having registered office at:

Laxmi Building, 6, Shoorji Vallabhdas  
Marg, Ballard Estate,  
Mumbai – 400 001.

... Operational Creditor/Petitioner

Vs

**M/s. DENTSU COMMUNICATIONS  
INDIA PRIVATE LIMITED** (formerly  
known as Dentsu Aegis Network  
Communications India Private  
Limited)

(CIN: U74300MH1986PTC039002)

Registered office at: Devchand House,  
C Block, 2<sup>nd</sup> floor, Shivsagar Estate,  
Dr. Annie Basant Road, Worli,  
Mumbai 400 018.

.....Corporate Debtor

**Order delivered on: 11.10.2023**

**Coram:**

Hon'ble Justice (Retd.) Sh. Virendrasingh Bisht, Member (Judicial)

Hon'ble Shri Prabhat Kumar, Member (Technical)

**Appearance :-**

For the Operational Creditor : Adv. Dinesh Kumar Seth i/b  
Adv. Mehul Rathod

For the Corporate Debtor : Adv. Rohan Agarwal a/w  
Adv. Kunal Parekh

*[Per: Justice (Retd.) V. G. Bisht, Member (J)]*

1. This is an application filed by operational creditor/applicant under section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as “IB Code” for short) against corporate debtor/respondent, for initiating corporate insolvency process (“CIRP” for short).

**Brief facts:-**

2. The operational creditor has claimed total amount of Rs.2,06,76,644/- which is net amount after adjustment of security deposit of Rs. 1 crore given by the corporate debtor to the operational creditor which fell due on different dates during the financial years 2020-2021 and 2021-2022.
3. The operational creditor is a manufacture of insulated wire and cable insulated wire, cable and other insulated conductors, insulated strip as is used in large capacity machines or control equipment and optical fibre cables. One of the businesses of the operational creditor is also to let out on lease or on hire, immovable property of the company.
4. On the other hand, the corporate debtor is a private limited company and has its registered office at Mumbai. The corporate debtor is involved in the business of advertising and printing of advertising material.
5. The operational creditor at the relevant time was the owner and was in possession of an office premises admeasuring approx. 9074 sq.ft. carpet area being ‘B-601’, on the 6<sup>th</sup> floor of Poonam Chambers, Dr. Annie Besant Road, Worli, Mumbai (said premises).

6. The operational creditor and corporate debtor had entered into a leave and license agreement dated 27.06.2014 for a term of 5 years, which arrangement was renewed vide a registered leave and license agreement dated 12.07.2019, whereby the said premises was licensed by the operational creditor to the corporate debtor for a period of 60 months commencing from 10.06.2019 and expiring on 09.06.2024, which included a lock-in period of twenty four months commencing from 10.06.2019 and ending on 09.06.2021, subject to a further six months notice period of termination by the corporate debtor (after the said lock-in period was over), in case, the corporate debtor was desirous of terminating the said agreement, before the expiry date 09.06.2024 of the said agreement. The operational creditor received an amount of Rs. 1 Crore as deposit under the aforesaid earlier leave and license agreement dated 27.06.2014 and the said amount of Rs. 1 crore was continued to be treated as a security deposit by the corporate debtor with the operational creditor, even for the said (2019 agreement's further 60 months commencing from 10.06.2019 and expiring on 09.06.2024).
7. According to the operational creditor, as per the said agreement, the corporate debtor was required to pay leave and license fees on a bi-monthly basis at the beginning of every 2 months on or before the 7<sup>th</sup> of first such month. The bi-monthly leave and license fees, as per the said agreement, was also paid for the months of March and April, 2020. Thereafter, the entire country was put under a lockdown due to the Covid-19 Pandemic from 24.03.2020 till early June, 2020. On the request of operational creditor,

the parties arrived at an arrangement, whereby the operational creditor gave the corporate debtor, a discount of 15 % in the license fees for the month of May, 2020 to August, 2020 and in turn the corporate debtor undertook to pay the regular agreed contractual license fees as per the said agreement from the month of September, 2020 onwards. Accordingly, corporate debtor paid the operational creditor, the discounted amount towards the license fees and GST thereon for the month of May, 2020 till August, 2020 pursuant to 15% discount as agreed by the parties. However, the operational creditor alleges that the corporate debtor failed to comply with its own contractual commitment to pay the regular bi-monthly license fees for the month of September and October, 2020 onwards.

8. The operational creditor then next contends that an email dated 07.10.2020 received from corporate debtor with subject "Termination of Lease", enclosing a letter dated 05.10.2020 claimed that they were adversely affected by the poor business sentiments and unable to pay their rent from September, 2020 onwards and also requested to review their lease terms. It further requested that the operational creditor should adjust the license fees from the month of September, 2020 onwards, out of the security deposit of Rs. 1 Crore. The operational creditor on its part apprised corporate debtor that if at all it wishes to vacate the said premises during the lock-in period and the subsequent notice period, the corporate debtor was liable to pay a sum of Rs. 3,24,76,646/-, (which amount was the unpaid license fees and the GST thereon for the balance lock-in period and mandatory notice period being from September, 2020 till

09.12.2021 as per the said agreement). Thereafter, both parties exchanged a number of correspondences through their respective Attorneys. The corporate debtor raised the plea of *force majeure* and informed that he shall be vacating the said premises at 6 p.m. and accordingly vacated the same and submitted the keys at the registered office of the operational creditor.

9. Thereafter, due to the corporate debtor's unilateral and unlawful action in violating the said agreement, the operational creditor's advocate sent the detailed notice dated 09.01.2021 for the recovery of his pending contractual principal dues along with contractual interest under the said agreement which has not been replied till date.
10. It appears that meanwhile the corporate debtor filed summary suit bearing no. 542/2021 seeking recovery of money towards refund and security deposit in the court of City Civil, Bombay. Similarly, the operational creditor also was forced to file a Commercial Suit bearing no. 258/2020 on 30.11.2021, in the High Court seeking *inter alia* recovery of the outstanding contractual dues payable to the operational creditor by the corporate debtor along with contractual interest.
11. Lastly, in view of the consistent failure of the corporate debtor to pay the outstanding debt, the operational creditor issued a formal notice under the Code, being a Form 3 notice dated 12.09.2022 under Rule 5(1)(a) of the IB Code which was duly received by the corporate debtor. The

corporate debtor didn't reply the aforesaid demand notice. Therefore, the present application.

12. The corporate debtor resisted the claim by filing affidavit in reply and alleged that operational creditor is guilty of suppressing the true nature (pre-existing dispute) between the parties. The said agreement is not disputed by the corporate debtor nor the license fees. According to it because of the out-break of pandemic and the nationwide lockdown, business took a major hit and was adversely impacted. It became impossible for the corporate debtor to pay the rent from September, 2020 onwards and to occupy the licensed premises and therefore, the corporate debtor decided to terminate the renewed agreement and vacate the licensed premises. It is also impossible to pay rent from September, 2020 on account of outbreak of pandemic and further requested to the operational creditor to adjust the rent for the upcoming months from September, 2020 from the security deposit that was lying with the operational creditor. However, the operational creditor rejected the request to adjust the security deposit amount against the license fees and informed that same will be refundable only subject to the corporate debtor paying a sum of Rs.3,24,76,646/- to the operational creditor. The corporate debtor again expressed his intention to hand over, vacant and peaceful possession of the licensed premises on 31.10.2020, upon the operational creditor refunding to the corporate debtor a sum of Rs. 33,40,000/- towards balance security deposit after deducting the license fees and Rs.33,40,000/- GST for the period from 10<sup>th</sup> September, 2020 to 31<sup>st</sup> December, 2020.

13. This clearly according to it is the pre-existing dispute between the parties. Since, the operational creditor did not refund the amount of Rs. 33,40,000/- towards refund of security deposit along with interest, it was constrained to file a Summary Suit bearing no. 542/2021 before the City Civil Court, Bombay.
14. Operational creditor, on its part also filed Commercial Suit bearing no. 258/2022 before High Court seeking recovery of license fees (termed as 'contractual amounts') and the dues under the said agreement. It is clear from that the suit for the identical claim have been made not only before the High Court but also before this Tribunal.
15. According to the corporate debtor, the correspondences between the parties would show the pre-existing dispute and as also from the legal proceeding filed by them against each other. Therefore, the petition is liable to be dismissed with exemplary costs, concluded corporate debtor.
16. By way of rejoinder, the operational creditor controverted the alleged pre-existing dispute between the parties and in essence contends that the corporate debtor in its Summary Suit bearing no. 542/2021 has claimed refund of its security deposit whereas operational creditor in its Commercial Suit bearing no. 258/2022 has claimed the contractual dues arising out of the said agreement.
17. We have carefully gone through the documents and pleadings made available on record by both the parties and have also given our anxious consideration to their respective submissions.

18. Section 8 of the IB code prescribes the procedure for the initiation of Corporate Insolvency Resolution Process by an operational creditor. An operational creditor may, on the occurrence of default, deliver a demand notice of such unpaid on operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016 read with from 3 or 4, as the case may be. Similarly, section 9 of the IB code provides that on expiry of period of ten days from the receipt of the notice or demand, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute, he can file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process in respect of such debt. Needless to say, he is also required to furnish a proof of default and proof of non-payment of debt along with an affidavit verifying that there has been no notice regarding the existence of dispute in relation to the debt claimed. What is imminently important is that existence of the disputes and/or the suit for arbitration proceeding must be pre-existing that is it must exist before the receipt of the demand notice or invoice, as the case may be.
19. The question which we are pose to ourselves is whether the payment was due to the operational creditor and if so;
- i) Whether default has been committed by the corporate debtor and,

- ii) Whether existed a dispute between the parties before receipt of demand notice or invoices, as the case may be.

This scrutiny necessarily has to be in terms qua the tests laid down by the Hon'ble Apex Court in ***Molilox Innovations Private Limited Vs. Kirusa Software Private Limited in Civil Appeal No. 9405 of 2017 dated 21.09.2017*** for the Adjudicating Authority while examining application under section 9. Paragraph 25 of the said judgment reads as under-

*“25. 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.”*

20. In the light of above, we would like to examine the rival contentions of the parties.
21. On perusal of the record, we find a serious of correspondences between the parties which are at page nos. 73 to 91 (volume -I) filed on record by the learned counsel for the operational creditor. It appears that on 5<sup>th</sup> October, 2020 (exhibit-P5) the corporate debtor issued notice of intent to vacate the premises because of ongoing of poor business sentiment due to the onset of Covid pandemic. It also informed that rent has already been paid till August, 2020 and also requested to adjust the rent from upcoming month from September, 2020 from the security deposit. This notice was duly replied in detailed (exhibit-P6) by the operational creditor and it raised dispute about the payment of license fees in the light of the said agreement and called upon the corporate debtor that it was in arrears of Rs. 3,24,76,646/- and called upon it to pay the said sum, fix a date for vacating the premises and then the operational creditor shall simultaneously handover the security deposit of amount of Rs. 1 crore. This response was again countered (exhibit P-7) by corporate debtor and it seriously raised the dispute about the license fees by taking recourse to Section 32, 56 of the Indian Contract Act. The operational creditor on its part again replied (exhibit -P8) and reiterated its stand in respect of the license fees and insisted the payment of Rs. 3,24,76,646/-. This was also further disputed by corporate debtor by responding (exhibit- P9). This did not stop here. The operational creditor and corporate debtor remained persistent on their demand which is apparent from their correspondences (exhibit P-10 to P-14).
22. The record therefore clearly suggest that both the parties were at logger heads as to the payment of license fees for their own reasons. Ultimately, the operational creditor served recovery notice dated 09.01.2021 on corporate debtor and claimed

recovery (exhibit-14) of its pending contractual dues. However, this notice was not replied to.

23. Lastly, the operational creditor served a formal notice under the code, being a form notice dated 12.09.2022 under Rule 5(1)(a) of the Insolvency and Bankruptcy Rules, 2016 and Section 8 of the IB Code. This notice was duly received by the corporate debtor on 17.09.2022.
24. Interestingly, we may note here that when the parties were engaged in various correspondence the corporate debtor filed a Summary Suit bearing no. 542/2021 before City Civil Court, Bombay against operational creditor.
25. We have carefully gone through the pleadings of the corporate debtor and the pleadings are identical to the stand taken by the corporate debtor in the present petition. The corporate debtor by way of prayer claimed Rs.33,40,000/- interest @ 10% p.a. along with future interest @ 18% p.a. till realisation. It may be noted incidentally here that the same amount which the corporate debtor claimed from the operational creditor after the adjustment of dues of license fees from the security deposit of Rs. 1 crore.
26. What is more interesting is that the operational creditor, on its part, also filed a Commercial Suit bearing no. 258/2022 before the High Court against corporate debtor on 30.11.2021 for recovery of outstanding contractual dues. We are not unmindful of the fact that notice of demand in accordance with law and as required under the provisions of Insolvency and Bankruptcy Rule, 2016 and as also under section 8 of the Code was issued on 12.09.2022. Whereas, both these proceedings that is Summary Suit at the instance of the corporate debtor and the Commercial Suit at the instance of operational creditor came to

be filed much earlier than the demand notice was set in motion. Very pertinently enough the cause of action in filing the Commercial Suit by the operational creditor was the same as has been the cause of action in the present petition which we are seized of. Needless to say the filing of legal proceeding are clear pointer to the fact that there existed dispute between the parties which was raised prior to issuance of demand by the operational creditor on 12.09.2022.

27. In view of above, we find merit in the submission of the learned counsel for the corporate debtor that the dispute certainly existed on the facts of the present case. Not only the correspondence between the parties reflected existence of disputes as to the license fees but the same also culminated in filing of the Summary Suit and Commercial Suit by the parties against each other. This certainly qualifies the test of “existence of a dispute”.
28. In view of what has been discussed so far, we find that present case is fit for dismissal under section 9(5)(2)(d) read with section 8(2)(a) and section 5(6) of the IB Code in the light of pre-existing dispute between the parties with respect to the purported claim.
29. We also find that the present petition is barred u/s 10A of the IB Code. The debt claimed to be in default comprise of license fee for the following periods –
  - a. License fee for the month of September, 2020 and October, 2020, amounting to Rs. 36,00,000/- plus GST falling due on 7.9.2020;
  - b. License fee for the month of November, 2020 and December, 2020, amounting to Rs. 36,00,000/- plus GST falling due on 7.11.2020; and

c. License fee for the unexpired lock in period i.e. January, 2021 to 9.06.2021, alongwith 6 month notice period thereafter, amounting to Rs. 2,03,22,280/- plus GST, after allowing credit of Security Deposit amounting to Rs. 1,00,00,000/- falling due on termination of the Agreement, aggregating to Rs. 1,21,80,644/-.

30. Accordingly, the Petitioner has claimed a debt of Rs. 2,06,76,644/- to be in default. We find from the perusal of Leave & License Agreement that the bi-monthly license fee falls due for payment on 7<sup>th</sup> of every bi-monthly period in terms of clause 3.2 of Leave & License agreement. It is admitted fact that the Corporate Debtor vacated the licensed premises on 31.12.2020, after duly notifying the Petitioner in advance on 9.12.2020. Accordingly, the amount of Rs. 1,21,80,644/- fell due on 31.12.2020 in terms of clause 3.2 read with clause 4.2 of Leave & License agreement, because it is the case of the Petitioner that a sum of Rs. 1,21,80,644/- becomes due on vacation of the premises on 31.12.2020 after appropriation of the amount of Security Deposit in terms of clause 4.2 of the Agreement. These dates falls in the period notified in Section 10A of the IB Code, whereby any application under the Code in terms of Section 7, 9, or 10 arising from the defaults taking place during the stated period is barred and could not be filed. Accordingly, we are also inclined to hold that this petition is not maintainable in terms of Section 10A as well.

31. For the aforesaid reasons, we pass following order.

### **ORDER**

- 1) Company Petition No. 79/2023 filed under section 9 of I & B Code, 2016, filed by Cable

Corporation of India Limited, Operational Creditor/Applicant against Dentsu Communication India Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **dismissed**.

- 2) 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.
- 3) File be closed and consigned to record.

**Sd/-**  
**PRABHAT KUMAR**  
**MEMBER (TECHNICAL)**

**Sd/-**  
**JUSTICE VIRENDRASINGH BISHT**  
**MEMBER (JUDICIAL)**

*SAPNA*