

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

*(Exercising powers of Adjudicating Authority under
The Insolvency & Bankruptcy Code, 2016)
[Through Physical hearing/VC Mode (Hybrid)]*

C.P (IB) No. 165/BB/2022

u/s 9 of the I&B Code, 2016 r/w Rule 6 of
Insolvency and Bankruptcy (AAA) Rules, 2016

In the matter of

Mehta Real Assets Bangalore Private Limited,

Office at No.71, Ajay Arcade,

Vani Vilas North Road,

Basavanagudi,

Bengaluru -560004

Operational Creditor/Petitioner

Versus

Zen Building Solutions Private Limited,

No.616, 2nd Floor, 100ft Ring Road,

4th Phase, 7th Block,

Near Devegowda Petrol Bunk,

BSK III Stage,

Bengaluru -560085

Corporate Debtor/ Respondent

Order delivered on: 31st January 2024

Coram:

1. Hon'ble Shri K. Biswal Member (Judicial)

2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Parties/Counsels Present:

For the Petitioner : Shri Tanishq Kashyap

For the Respondent : None

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The present petition is filed on 23.08.2022 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity '**IBC/ Code**'), r/w Rule 6 of the I & B (Application to Adjudicating Authority) Rules, 2016, by **Mehta Real Assets Bangalore Private Limited** (for brevity 'Operational Creditor/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Zen Building Solutions**

Private Limited (hereinafter referred as 'Corporate Debtor/Respondent) on the ground that the Corporate Debtor has committed a default for a total outstanding amount of Rs.2,51,48,123/- (Rupees Two Crore Fifty One Lakhs Forty Eight Thousand One Hundred and Twenty Three only).

2. Brief facts of the case, which are relevant to the issue in question, and as narrated by the Petitioner as follows:

I. The Operational Creditor is a company engaged in the business of Real estate and development of properties in and around Bengaluru. Whereas, the Corporate Debtor is a company engaged in the business of UPVC Windows and Doors Fabrication and Installation utilizing LG Hausys UPVC extrusions. In the year 2016, the Corporate Debtor approached the Operational Creditor for entering into a long-term business relationship which would be profitable to both parties. Based on the representation and good faith of the Corporate Debtor, the Operational Creditor agreed to enter into the business relationship and the parties signed an Agreement of Association dated 09.12.2016 on mutually agreed terms and conditions.

II. It is submitted that as per the agreement, the Corporate Debtor agreed to procure UPVC Profiles and Extrusions from LG Hausys Tianjin Co. Ltd., S. Korea which had to be sold by the Operational Creditor as per profoma invoice issued by the Corporate Debtor as a High Sea Sale. The responsibility to pay for all the costs such as freight, transportation, insurance, port charges, and duties as applicable for the imports was on the Corporate Debtor. As per the agreement, the Operational Creditor also agreed to obtain a Letter of Credit from State Bank of India by mortgaging the property of its directors whereas the Corporate Debtor agreed to bear Corporate Debtor's responsibility including processing fee, mortgaging charges, LC charges, and Bank Interest. It was an understanding between the parties that Corporate Debtor would pay the amount of Letter of Credit between 90 and 100th day from the date of Invoice and in any event one week before the LC was

due for payment along with amount of 20% p.a over and above the LC billing amount of Letter of Credit to the Operational Creditor.

- III.** It is submitted that the Corporate Debtor began defaulting in its promises made to the Operational creditor over the period of time. The last consignment was given in 2019 where there was a default made by the Corporate Debtor at the banking level which led to the devaluation of Letter of Credit. The Operational Creditor was constrained to make the arrangement of supply of goods to the Corporate Debtor by importing goods from LG Hausys Tianjin Co. Ltd., by paying 100% margin money as the banker refused to honour LC facility to the Corporate Debtor.
- IV.** It is submitted that the Corporate Debtor after multiple follow ups made only a part payment towards the supplies made in respect of the invoices raised by the Operational Creditor and due to the pendency of invoices, the Operational Creditor initiated legal proceedings for it, when the Corporate Debtor approached the Operational Creditor and offered to amicably resolve the issue by paying the arrears in a time bound manner.
- V.** Further, submitted that the parties executed a Financial Memorandum of Understanding dt. 12.11.2020 where the Corporate Debtor admitted that an amount of Rs.2,67,26,094/- was payable as on 12.11.2020 to the Operational Creditor, which was agreed to pay in 15 instalments beginning from 28.11.2020 until 22.01.2022. The Corporate Debtor also agreed to pay interest at the rate of 24 % on delayed payments in case of default of making timely payment, and the Operational Creditor was given liberty to initiate legal proceedings on default of payment from the Corporate Debtor.
- VI.** It is submitted that the Corporate Debtor made prompt payments as per the Financial Memorandum of Understanding on 28.11.2020, 26.12.2020; 23.01.2021 and 27.02.2021 and from 17.04.2021 to 09.09.2021 the Corporate Debtor has paid a total amount of Rs. 21,25,000/- in small amounts. Thus, as of

09.09.2021, the Corporate Debtor paid only Rs. 61,25,000/- out of Rs. 2,67,26,094/-. However, thereafter, the Corporate Debtor began to default in making payments.

VII. The Operational Creditor stated that after repeated follow ups for payment; the Corporate Debtor requested time for making payment on frivolous grounds including financial constraints and the cheques furnished by the Corporate Debtor were dishonoured. The Operational Creditor issued a statutory demand notice dated 05.10.2021 calling upon the Corporate Debtor to make payments. On receipt of the notice, the Corporate Debtor sent a reply to the said notice through letter dated 15.10.2021 in which the Corporate Debtor informed about the business problems citing second wave of Corona and sought time to make the payments. The Corporate Debtor undertook to revert back by 21.10.2021 with revised payment schedule which however was not received by the Operational Creditor anytime. The last payment which was received by the Operational Creditor was on 27.02.2021.

VIII. It is stated that the goods were consistently supplied in a timely manner as a high sea level without any issue or dispute about the delivery whereas the Corporate Debtor grossly failed to remit the entire amount despite promising multiple times to settle the dues on the pretext of financial constraints without any basis.

IX. Therefore, the Operational Creditor was constrained into issuing a statutory notice dated 31.05.2022 in Form 3 under the Insolvency and Bankruptcy Code 2016. As on the date of the said notice, the due payable by the Corporate Debtor towards the principal amount was Rs. 2,06,01,094/- and Rs.34,63,355/- was payable by the CDR towards interest at the rate of 24%. The said notice was duly received and acknowledged by the Corporate Debtor. No response to the said notice has been provided by the Corporate Debtor nor has it made any payment towards the due payable despite the lapse of more than 2 months since the issuance of the demand notice on it. Hence the petition.

- X.** In support of its case, the Petitioner has filed the following:
- a. *Copies of the invoices issued to the Corporate Debtor;*
 - b. *Affidavit stating that there is no notice of dispute regarding payment of the Operational debt;*
 - c. *Copy of the statutory notice dated 31.05.2022 in Form-3 issued to the Corporate Debtor*
 - d. *Copy of the Bank statements wherein credits are normally received from the Corporate debtor along with Bank Certificate*
 - e. *Ledger account of Corporate Debtor as maintained by the Operational Creditor.*
- 3.** Heard the Learned Counsel for the Petitioner and perused the records available.
- 4.** On 22.09.2022, notice was issued to the Corporate Debtor/Respondent and the Operational Creditor/Petitioner was directed to file the affidavit of service along with tracking report within a period of two weeks. Pursuant to the same, the Financial Creditor filed an affidavit vide Dy. No.4677 dated 01.11.2022 stating that the notice sent to the Corporate Debtor by way of RPAD was delivered to the Corporate Debtor. Pursuant to the notice, the Counsel for the Respondent appeared and requested time to file reply and further submitted that the settlement talks were going on. However, even after granting sufficient opportunities i.e., on 16.11.2022, 12.01.2023 & 23.02.2023, the Respondent's Counsel did not file the reply, therefore, on 23.03.2023 the right to file reply of the Respondent was forfeited. Subsequently, new counsel appeared on 25.04.2023 for the Respondent and took a time to file Vakalath and reply to the main petition, but the same was not allowed. However, on 11.07.2023 again a new Counsel for the Respondent appeared and submitted that he has filed objection. This Adjudicating Authority observed that the right to file reply was already forfeited on 23.03.2023; therefore, the reply cannot be taken on record. Thereafter, none appeared for the Respondent for hearing, even though

the case was listed on various dates viz., 01.08.2023, 25.08.2023, 22.09.2023 and 17.10.2023. Therefore, on 22.11.2023 matter was decided to be proceeded against the Corporate Debtor on Ex-parte basis.

5. In Form-5, Part IV at Para 2 the details for default occurred, is mentioned as under:

2.	<p>Amount claimed to be in default and</p> <p>The date on which the default occurred</p>	<p>Total amount of debt is Rs.2,51,48,123/- of which the principal amount is Rs.2,06,01,094/- and interest as on 19.08.2022 is Rs.45,47,029/- when computed at the rate of 24% per annum. The computation is mentioned hereunder on Page___</p> <p>90 days from the dates the of respective invoices as per Annexure-E read with FMOU and all subsequent dates.</p>
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6. It is noticed that the Petitioner was directed to file clarification regarding the date of default and also proof of service for serving the demand notice in Form-3 on the Respondent, and the same was filed vide Dy. No.2255 dated 24.04.2023. Further, on 29.05.2023 the Petitioner was also directed to file Amended Form-5 mentioning the proper date of default and in compliance to the same, the Petitioner has filed Form-5 vide Dy. No.2942 dated 06.06.2023 and also Memo vide Dy.5045 dt. 03.10.2023 explaining the same.
7. On 22.11.2023, while reserving the order, the Ld. Counsel for the Petitioner requested to submit brief written submissions in the present

matter. Ld. Counsel for the Petitioner was permitted to file brief written submission within one week. The Petitioner has filed a Written submissions vide Dy. No. 5991 dated 29.11.2023 reiterating the facts mentioned in the petition and the same is taken on record.

8. The present petition is filed by Mehta Real Assets Bangalore Private Limited inter alia seeking Corporate Insolvency Resolution Process against Zen Building Solutions Private Limited on the ground that the Corporate Debtor/Respondent has committed a default for a total outstanding amount of Rs.2,51,48,123/- (Rupees Two Crore Fifty One Lakhs Forty Eight Thousand One Hundred and Twenty Three only); out of which the principal amount is Rs.2,06,01,094/-
9. The Learned Counsel for the Petitioner has attached Demand Notice under Section 8 (1) of the IBC in Form-3 dated 31.05.2022 and the copy of Tracking Report confirming the service is also attached. It is stated that no reply to the demand notice is received. Moreover, no dispute has been raised by the Respondent.
10. In Part-IV of Form-5 the total amount of debt is stated to be Rs.2,51,48,123/- which is inclusive of interest and the principal amount is Rs. 2,06,01,094/-. The date of default is stated to be 90 days from the date of the respective Invoices as per Annexure-E read with Financial Memorandum of Understanding (FMOU) dated 12.11.2020. However, it is noticed that as per Annexure -E, the Petitioner has enclosed a total of 60 invoices, large number of which pertains to the F.Y 2017-2018. On the other hand, from the Demand Notice dated 31.05.2022 in Form-3 under Section 8 of the IBC, it is noticed that though all these invoices from 07.01.2017 onwards have been included under the heading '*Particulars of the Operational Debt*', under Column No.1-"*Details of Transactions on account of which debt fell due*", and under Column No.2-"*Amount claimed to be in default and the date on which the default occurred*", a total of Rs. 2,06,01,094/- as outstanding dues has been mentioned, which related only to 11 invoices which are dated between 06.07.2018 to 01.03.2019. Further, under Column No.

2 of Para 2 of Form-3, the Date of Default has not been mentioned. Again in Column No.7-“List of Documents attached to this application in order to prove the existence of operational debt and the amount in default” all 60 invoices starting from 07.01.2017 till 01.03.2019 have been mentioned. Since the details mentioned in the Form No.3 at Column No.2 & 7 being inconsistent with each other, the Form No.3 under Section 8 of the IBC is considered to be defective.

- 11.** The tabular Form of Column No.2 of Para 2 in Form No.3 being the Demand Notice issued under Section 8 of IBC is extracted below:

Sl. No.	Invoice No.	Invoice Date	Invoice Amount
1.	009/2018-19	06.07.2018	23,91,822
2.	010/2018-19	21.07.2018	5,56,639
3.	011/2018-19	22.07.2018	24,11,366
4.	012/2018-19	22.07.2018	23,66,395
5.	013/2018-19	16.08.2018	6,37,921
6.	014/2018-19	17.08.2018	25,44,560
7.	015/2018-19	18.08.2018	24,93,663
8.	016/2018-19	20.09.2018	23,00,741
9.	017/2018-19	20.02.2019	25,53,771
10.	018/2018-19	28.02.2019	5,76,065
11.	019/2018-19	01.03.2019	24,91,077
			2,13,24,020
Partial payment towards bill No.009/2018-19			7,22,926.00
Total Amount Due			2,06,01,094.
Interest at the 24% till 31.05.2022			39,48,274
Total Amount payable (Inv. Amt+ Int			2,45,49,368.00

- 12.** The amount claimed to be in default mentioned in Column No.2 at Para-2 of Form No.3 being Rs.2,06,01,094/- as Principal amount matches with the amount shown in Item No.2, Part-IV of the Form No.5 as shown above.
- 13.** The Petitioner has relied upon the FMOU dated 12.11.2020 entered in between the Operational Creditor/petitioner and the Corporate Debtor /Respondent which is placed as Annexure-A at Page 191 of the C.P. It is submitted that in accordance with the said FMOU, the gross amount outstanding including interest upto 31.10.2020 is Rs. 2,67,27,094/-; and 15 monthly installments were fixed from 28.11.2020 onwards

ending at 22.01.2022. In the petition, it is stated that that after the payment of first four monthly instalments of Rs. 10,00,000/- each, and also some intermittent payments of smaller amounts on random dates totalling to Rs. 21,25,000/-; the balance was not paid, therefore, the petition was filed for the default in the payment of the monthly instalments in accordance with the FMOU.

- 14.** Now the question arises whether the amount mentioned as the debt in default in Part-IV of Form No. 5 which is related to the instalments for FMOU can qualify as operational debt as defined under Section 5 (21) of the IBC 2016. It has been held by different Benches of this Tribunal and in some orders from Hon'ble National Company Law Appellate Tribunal (NCLAT) that the default in payment of the installment under the settlement agreement/MOU does not qualify as an operational debt under Section 5 (21) of the IBC 2016. It is noticed from the schedule of the monthly payments of the instalments that the same are without any reference to the invoices which are specifically mentioned in Form-3, at Para-2 Column No.1 & 2 under the heading "*Details of Transactions on account of which debt fell due*", and "*Amount claimed to be in default and the date on which the default occurred*". In the Column No.2, in Particular, the invoice number, date and amount pertaining to the specific invoice has been mentioned. However, the FMOU only mentions the date of the monthly instalments starting from 28.11.2020 onwards giving the lumpsum amounts payable along with the corresponding post-dated cheque numbers. Therefore, there is mismatch in the contents of the Form No.3 accompanying notice under Section 8 of the IBC 2016 giving details of the invoices and the Part-IV of Form No.5 accompanying the petition. And the amounts and dates mentioned in the FMOU dated 20.11.2020 which has been referred to both the instances.
- 15.** In this regard, the judgement passed on 15.09.2022 by the *Hon'ble NCLAT in Company Appeal (AT) Insolvency) No.742 of 2020 in the case of Trafigura India Private Limited vs. TDT Copper Limited*, the Appellate

Tribunal has upheld the order passed by the NCLT, New Delhi Bench in which an application under Section 9 was dismissed, when the cause of action had arisen due to the default in making payments under the settlement agreement entered between the parties. In that case also the Corporate Debtor after making the payment of the initial instalments, defaulted in making payment of the remaining amounts due and payable in accordance with the settlement agreement. The debt in that case also related to the outstanding amount pertaining to supply under a contract, and it was claimed by the Petitioner that the claims were covered under the definition of the Operational debt as per Section 5 (21) of the IBC 2016. However, the NCLT, New Delhi Bench held that the unpaid amounts arising out of the settlement agreement do not constitute operational debt under Section 5 (21) of the IBC and the cause of action for the Petitioner actually arose on the Corporate Debtor default in payment under the settlement agreement. The Hon'ble NCLAT, Principal Bench, New Delhi held that the Adjudicating Authority had rightly come to the conclusion that the default in the payment of instalment as per the settlement agreement does not come with the definition of Operational debt as provided under Section 5 (21) of the IBC 2016. Therefore, the appeal was rejected by the Hon'ble NCLAT.

16. Further, in the order dated 14.05.2019 passed by the *NCLT, Allahabad Bench*, in *C.P (IB) No. 343/ALD/2018 between M/s. Delhi Control Devices (P) Limited v/s M/s. Fedders Electric and Engineering Limited*, similarly it was held that unpaid instalment cannot be treated as operational debt as per Section 5 (21) of IBC 2016; and the breach of said agreement due to not paying the instalments cannot be a ground to trigger CIRP against the Corporate Debtor. Further, in another order dated 11.08.2022 passed by the co-ordinate Bench of *NCLT New Delhi* in *IA No.3247 of 2022 in C.P (IB) No.1441/ND/2018 between Bajaj Rubber Company Private Limited vs. Saraswati Timber Private Limited* it was held that breach of the terms and conditions of payment according to a settlement agreement does not come under the purview of the Operational Debt as defined under the IBC, 2016 and it cannot be

ground to trigger CIRP against the Corporate Debtor. Similarly, in a recent order dated 07.12.2023 in the case of *Prodalim B.V versus Agson Global Private Limited in C.P (IB) No. 535/ND/2022 and I.A No.2650/ND/2023*, the New Delhi Bench has also held that a debt arising from breach of settlement agreement does not fall under the definition of operation debt as defined under section 5 (21) of the IBC, 2016.

- 17.** As already discussed above, in Form No.3 accompanying demand notice under Section 8 (1) of the IBC 2016, the list of specific invoices have been mentioned, however, the claim of default does not related to these invoices specifically, but to the default in payment of lumpsum monthly instalment for which post dated cheques in advance were also given. Therefore, considering the above discussion, the amount related to the unpaid instalment under the settlement agreement/FMOU dated 12.11.2020 would not constitute the term “operational debt” defined under clause (21) of Section 5 of the IBC, 2016.
- 18.** Accordingly, we are of the considered view that the outstanding debt claimed as per the petition filed under Form No.5 under Section 9 of the IBC 2016 does not fall under the definition of operation debt as defined under clause (21) of Section 5 of the IBC 2016. As a result, the present petition filed under Section 9 of the I & B Code 2016 r/w Rule 6 of the I & B (AAA) Rules, 2016 bearing **C.P (IB) No. 165/BB/2022** is hereby **dismissed**.

Sd/-
(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

Sd/-
(K.BISWAL)
MEMBER (JUDICIAL)