

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI SPECIAL BENCH (COURT-II)

Company Petition No. (IB)-272(ND)2022

IN THE MATTER OF:

DHL Supply Chain India Private Limited

Through its Regional Finance Controller - North

Registered office at:

702, 7th Floor, Tower B-247

Park, L.B.S. Marg, Vikhroli,

Mumbai, Maharashtra – 400083

... Applicant/Operational Creditor

VERSUS

Eicher Motors Limited

Through its Managing Director

Registered office at:

3rd Floor, Select Citywalk,

A-3 District Centre,

Saket, New Delhi - 110017

... Respondent

Section: 9 of the IBC, 2016

Order Delivered on: 29.05.2023

CORAM

SH. BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Amit Dayal

For the Respondent : Adv. Anoop Dawar

ORDER

PER: SH. L. N. GUPTA, MEMBER (T)

DHL Supply Chain India Private Limited (for brevity, the **'Applicant/Operational Creditor'**) has filed the present petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the **'IBC, 2016'**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate the Corporate Insolvency Resolution Process against M/s. Eicher Motors Limited (for brevity, the **'Respondent'**).

2. The Respondent namely, M/s. Eicher Motors Limited is a Company incorporated on 14.10.1982 with CIN L34102DL1982 PLC129877 under the provisions of the Companies Act, 1956 having its Registered Office at 3rd Floor, Select City walk, A-3 District Centre, Saket, New Delhi - 110017, which is situated within the jurisdiction of this Tribunal. The Authorized Share Capital of the Respondent Company is Rs.31,01,00,000/- and Paid-up Share Capital is Rs.27,34,11,022/- as per Master Data.

3. It is stated by the Applicant that the parties entered into an Agreement called "Service Agreement for Warehouse" (hereinafter referred to as **'Agreement'**) dated 29th August 2019. By the said Agreement, the Respondent engaged the services of the Applicant for delivering Logistics and Warehousing Services as listed in Schedule A to the said Agreement (termed as 'Third Party Logistics and

Warehousing' services) on the terms and conditions mentioned therein.

The Applicant has further stated that -

3.1 In terms of the Agreement (ibid), the Applicant provided services to the Respondent and raised invoices. After adjusting for the payments received and excluding the default arising from 25th March 2020 to 24th March 2021, 6 invoices aggregating to Rs. 1,30,54,713.00 (inclusive of GST) remained due and payable by the Respondent to the Applicant towards the 'Third Party Logistics and Warehousing' services, for which the dates of default are falling between 30.03.2021 and 05.06.2021. The Applicant has further submitted that in terms of the invoices containing stipulation regarding "Interest @18% will be charged on the overdue invoice amount for the delayed period", an amount of Rs.25,82,954/- (inclusive of GST) towards interest up to 31st October 2021 is also due and outstanding.

3.2 As per clause 12.1, the term of the Agreement was three years effective from 01.10.2019 to 30.09.2022. The entire term constituted a lock-in period for both parties. In November 2020, the Respondent informed that it proposed to use the warehouse for storing Bikes and Spare Parts instead of storing Genuine Motorcycle Accessories (GMA) and Apparel. The Respondent discussed the said possibility with the Applicant. In or about February 2021, the Respondent decided not to use the warehouse even for bike storage and sought to prematurely terminate the Agreement dated 29.08.2019. The Applicant rejected the said proposal of the Respondent for premature termination of the

Agreement vide its letter dated 21.04.2021. On the failure of the Respondent to respond to the letter/notice dated 21.04.2021, the Applicant vide emails dated 10th May 2021 and 25th May 2021 informed the Respondent to remove the assets lying in the warehouse.

3.3 The Respondent sent a reply dated 31.05.2021 to the Applicant in response to the letter/notice dated 21.04.2021 and the email dated 10.05.2021. As the dismantling and shifting etc. was to be done by the Applicant, the Applicant raised an Invoice bearing Number 61006552 dated 24.06.2021 of Rs.1,11,734.34 on the Respondent.

3.4 The Applicant raised another Invoice No. 61007855 dated 28-Oct 2021 of Rs. 2,19,55,341.96/-, (inclusive of GST) on the Respondent towards Fixed Warehousing Charges for the period 1st May 2021 to 31st October 2021. The Applicant further raised Invoice No. 61007856 dated 28-Oct-2021 of Rs. 4,51,81,303.20/-, (inclusive of GST) on the Respondent towards Fixed Warehousing Charges for the period 1st November 2021 to 31st October 2022.

4. During the course of the hearing on 20.07.2022, the Ld. Counsel appearing for the Applicant sought to amend the Part-IV of the application to clearly indicate the amount of debt and date of default which is not failing under the Section 10A period. Accordingly, one week's time was allowed. In compliance with the aforesaid order, the Applicant filed the amended Part IV of the application vide their filing dated 26.07.2022, which is reproduced overleaf:

Part – IV

PARTICULARS OF OPERATIONAL DEBT

1.	TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE	Total amount of debt due from the corporate debtor (excluding the default arising on or after 25 th March, 2020 till 24 th March, 2021) is : Rs.8,28,86,046.00 (rounded off) (exclusive of interest after 31.10.2021). The aforesaid total amount of debt comprises of the following components:												
<table border="1"> <thead> <tr> <th data-bbox="644 837 730 920">S. No.</th> <th data-bbox="730 837 1066 920">Particulars</th> <th data-bbox="1066 837 1323 920">Amount (Rs.) (rounded off)</th> </tr> </thead> <tbody> <tr> <td data-bbox="644 927 730 1357">I.</td> <td data-bbox="730 927 1066 1357">Debt arising on account of Third Party Logistics and Warehousing services provided to the corporate debtor by the operational creditor (inclusive of GST)</td> <td data-bbox="1066 927 1323 1357">1,30,54,713.00</td> </tr> <tr> <td data-bbox="644 1364 730 1608">II.</td> <td data-bbox="730 1364 1066 1608">Interest charged on overdue invoices till 31st October, 2021 (inclusive of GST)</td> <td data-bbox="1066 1364 1323 1608">25,82,954.00</td> </tr> <tr> <td data-bbox="644 1615 730 1975">III.</td> <td data-bbox="730 1615 1066 1975">Debt becoming due on account of premature termination of the service agreement for warehouse (comprising Fixed Warehousing</td> <td data-bbox="1066 1615 1323 1975"></td> </tr> </tbody> </table>			S. No.	Particulars	Amount (Rs.) (rounded off)	I.	Debt arising on account of Third Party Logistics and Warehousing services provided to the corporate debtor by the operational creditor (inclusive of GST)	1,30,54,713.00	II.	Interest charged on overdue invoices till 31 st October, 2021 (inclusive of GST)	25,82,954.00	III.	Debt becoming due on account of premature termination of the service agreement for warehouse (comprising Fixed Warehousing	
S. No.	Particulars	Amount (Rs.) (rounded off)												
I.	Debt arising on account of Third Party Logistics and Warehousing services provided to the corporate debtor by the operational creditor (inclusive of GST)	1,30,54,713.00												
II.	Interest charged on overdue invoices till 31 st October, 2021 (inclusive of GST)	25,82,954.00												
III.	Debt becoming due on account of premature termination of the service agreement for warehouse (comprising Fixed Warehousing													

Charges for the balance lock-in period, asset dismantling and transportation cost and GST)	6,72,48,379.00
TOTAL	8,28,86,046.00

DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE ARE GIVEN BELOW:

- a) The operational creditor has, *inter alia*, been engaged in the business of providing Logistics and Warehousing services to its clients. 'Royal Enfield' is a unit of the corporate debtor. The corporate debtor has, *inter alia*, been engaged in the business of designing, developing, manufacturing and selling a range of two wheeler vehicles and two wheeler vehicle spare parts. The parties entered into an agreement called 'Service Agreement for Warehouse' dated 29th August, 2019. By the said agreement, the corporate debtor engaged the operational creditor for delivering Logistics and Warehousing Services which

were enumerated in Schedule A to the said agreement (which were termed as 'Third Party Logistics and Warehousing' services) on the terms and conditions mentioned therein. Under the said agreement the operational creditor was to provide the services of receiving, storing and releasing the goods in accordance with mutually agreed Standard Operating Procedure and the corporate debtor's reasonable instructions. Under the Harmonized System of Nomenclature/ Services Accounting Code (HSN/SAC) used to classify goods and services under GST regime, the services provided by the operational creditor to the corporate debtor under the agreement fell under the code 996729 – Warehouse Management Services. A copy of the agreement dated 29th August, 2019 is annexed herewith as 'Annexure-A2'. Location of the warehouse at which the services were to be provided is – Kirtimaan Warehouse, Khasra No. 3//18, 23/1 & 23/2 Village Tajnagar, Tehsil Farrukhnagar, Jamalpur Farrukhnagar Road, Dist. Gurgaon, Pin – 122506 ("the warehouse"). As per clause 12.1 of the said agreement, the term of the agreement was three years i.e. effective from

October 1, 2019 to September 30, 2022. The entire term constituted lock-in-period for both the parties.

- b) In terms of the aforesaid agreement dated 29th August, 2019 the operational creditor provided services to the corporate debtor and raised invoices in terms of the said agreement from time to time. After adjusting for the payments received from the corporate debtor from time to time and excluding the invoices with respect to which the defaults arose on or after 25th March, 2020 till 24th March, 2021, 6 invoices have remained due and payable by the corporate debtor to the operational creditor towards the Third Party Logistics and Warehousing services provided to the corporate debtor. Details of the invoices (for the services provided) including the transactions on account of which the debt (mentioned at S.No. I above) fell due and the date from which such debt fell due are given in Annexure-A3 hereto. A copy of the outstanding invoices for the services provided aggregating Rs.1,30,54,713.00 (rounded off) (inclusive of GST) is annexed herewith as 'Annexure-A4(Colly.)'.

c) The invoices raised by the operational creditor on the corporate debtor contained the stipulation that "Interest @18% will be charged on the overdue invoice amount for the delayed period". All the invoices raised by the operational creditor were digitally signed on its behalf and were delivered to the corporate debtor. The stipulation regarding interest thus constituted a binding agreement between the parties. Even assuming without admitting otherwise, interest, being recompense for the amount wrongly enjoyed by the corporate debtor to which the operational creditor was wrongly deprived of, became payable by the corporate debtor. As the corporate debtor failed to pay various invoices raised by the operational creditor within time, the operational creditor raised Invoice No. 61006214 dated 18-May-2021 in the sum of Rs.4,70,588.54 (inclusive of GST) i.e. Rs.4,70,589/- (rounded off) on the corporate debtor towards interest on overdue invoices till 30th April, 2021. The 'Due Date' of the said invoice was 17-Jun-2021. The operational creditor further raised Invoice No. 61006377 dated 06-Jun-2021 in the sum of

	<p>Rs.2,68,027.04 (inclusive of GST) i.e. Rs.2,68,027/- (rounded off) on the corporate debtor towards further interest on overdue invoices till 31st May, 2021. The 'Due Date' of the said invoice was 06-Jul-2021. The operational creditor further raised invoices bearing Nos. 61007083 dated 11-Aug-2021 in the sum of Rs.7,19,772.20; 61007840 dated 27-Oct-2021 in the sum of Rs.3,78,929.70; 61007838 dated 27-Oct-2021 in the sum of Rs.3,66,706.15 and 61007934 dated 30-Oct-2021 in the sum of Rs.3,78,929.70 towards interest on overdue invoices for the months of June & July 2021, August 2021, September 2021 and October 2021 respectively. A copy of the Invoice No. 61006214 dated 18-May-2021, Invoice No. 61006377 dated 06-Jun-2021, Invoice No. 61007083 dated 11-Aug-2021, Invoice No. 61007840 dated 27-Oct-2021, Invoice No. 61007838 dated 27-Oct-2021 and Invoice No. 61007934 dated 30-Oct-2021 is annexed herewith as '<u>Annexure-A5 (Colly.)</u>'. The aforesaid 6 invoices aggregating Rs.25,82,954/- (rounded off) also constitute debt due (mentioned at S. No. II above) from the corporate debtor to the operational creditor. Details of the invoices</p>
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(for the Interest) including the transactions on account of which the debt (mentioned at S.No. II above) fell due and the dates from which such debt fell due are given in Annexure-A6 hereto. The operational creditor is entitled to get interest till the date of receipt of all payments to which it is entitled from the corporate debtor.

- d) As per clause 12.1 of the agreement dated 29th August, 2019, the term of the agreement was three years i.e. effective from October 1, 2019 to September 30, 2022. The entire term constituted lock-in-period for both the parties. As per the agreement between the parties, the corporate debtor was using the warehouse for storing Genuine Motorcycle Accessories (GMA) and Gear (Apparel) in the warehouse in question. In or about November 2020 the corporate debtor informed the operational creditor that for purely commercial reasons and as per its planning it proposed to use the warehouse for storing Bikes and Spare Parts instead of storing Genuine Motorcycle Accessories (GMA) and Apparel for which the warehouse was then being used. The corporate debtor discussed the said possibility with the

operational creditor. Vide email dated 12.11.2020, the corporate debtor through its Head – Logistics Royal Enfield viz. Mr. Rakesh Sharma informed the operational creditor that both the units i.e. GMA and Apparel had been planned by the corporate debtor to move out from the warehouse in next few weeks' time. It further stated that: “...Soon after the Apparel division moves out, start using WH for Bike storage and distribution purposes. We can target this by **Dec 1st week, 2020**”. For the Spare part division, the corporate debtor requested the operational creditor to come out with cost calculation numbers. It was specifically written that “...RE logistics is hopeful as this WH may appear commercially viable (North Region Spare Center) considering estimated cost and geographical benefits.” It was further specifically stated that “**Please treat this email as a letter of intent to use this WH for rest of agreement tenure.**”. This email conclusively shows that the repurposing proposed by the corporate debtor had been occasioned purely due to its own commercial reasons and planning which had nothing to do with the operational creditor. It further

demonstrates that the corporate debtor was fully aware that it was liable to pay the warehouse lease commitment costs and other charges agreed for the entire lock-in period irrespective of its user of the warehouse. It further shows that the proposal of the corporate debtor for repurposing was to have no effect on the tenure of the agreement dated 29.08.2019. A copy of the email dated 12.11.2020 and 15.02.2021 is annexed herewith and marked as 'Annexure-A7(Colly.)'.

e) Vide email dated January 19, 2021, the corporate debtor indicated its desire to use the warehouse for 'Finished Bike movement'. A copy of the email dated January 19, 2021 is annexed herewith and marked as 'Annexure-A8'. Vide email dated 27th January, 2021 the operational creditor sent the calculations which were requested for by the corporate debtor. A copy of the email dated January 27, 2021 is annexed herewith and marked as 'Annexure-A9'.

f) On 10th February, 2021 a meeting was held between the representatives of both the parties for the purpose of finalizing the repurposing of

the warehouse. The meeting, however, remained inconclusive. It was always clearly understood between the parties that the repurposing, if any, would only be added as an addendum to the agreement dated 29.08.2019 (as per the corporate debtor's request) and except for the change in the user of the warehouse with respect to the items stored and the consequential changes, if any, it would not affect the main agreement at all. Vide email dated 15.02.2021 {'Annexure-A7 (Colly.)'} the operational creditor made it absolutely clear that ".....We, however, would continue to provide services to you based on the present agreement terms and as per your request, are willing to execute the repurposing addendum at the earliest.". In the email dated 15th February, 2021 the corporate debtor was also reminded of its promise by stating that "...Please also refer to our call of January 4, 2021 and subsequent emails where you assured us that you will continue to keep honour the terms of the Agreement including payments even when the warehouse is empty.". It was thus abundantly clear to the corporate debtor throughout that whether it chose to keep the warehouse empty or stored any goods in it;

whether it stored the goods which were originally agreed to or chose to store different goods by way of an addendum to the main agreement, it was liable to pay the charges under the Agreement dated 29.08.2019 for the entire lock-in period.

- g) For the reasons best known to the corporate debtor, the corporate debtor decided not to use the warehouse even for bike storage and sought to pre-maturely terminate the agreement dated 29.08.2019. Vide letter dated April 21, 2021, the operational creditor rejected the proposal of the corporate debtor for premature termination of the agreement. It was further stated that "In the event EIL intends to prematurely terminate the Agreement, then EIL has make payment of **INR 9.15 crores (excluding billing for March 21)** (excluding applicable taxes) to DHL as stated in Annexure A herein....". A copy of the email dated April 21, 2021 is annexed herewith and marked as '**Annexure-A10**'. On the failure of the corporate debtor to respond to the letter/notice dated 21st April, 2021, vide emails dated 10th May, 2021 and 25th May, 2021, the corporate debtor was

informed that in order to minimize the risks of the operational creditor and reduce the amounts payable by the corporate debtor, the operational creditor had agreed to remove the assets lying in warehouse and move the same to the operational creditor's other operations. As a result, vide email dated 25th May, 2021 the amount demanded from the corporate debtor previously on account of unilateral premature termination was reduced to Rs.6,71,36,645.00 (inclusive of GST). Calculations for the said sum were duly attached with the said email. A copy of the emails dated 10.05.2021 and 25.05.2021 is annexed herewith and marked as 'Annexure-A11(Colly.)'. The corporate debtor sent a reply dated 31.05.2021 to the operational creditor in response to the letter/notice dated 21.04.2021 and the email dated 10.05.2021. The reply dated 31.05.2021 clearly showed that the corporate debtor was trying to wriggle out of its contractual obligations by creating the illusion of a defence. It became further evident from the reply that the corporate debtor had no defence to the operational creditor's notice and the emails mentioned above and with *malafide* intention it was trying to create

an illusion of a defence where none existed. It became further evident that the purported defence set up by the corporate debtor was no defence in the eyes of law as the same was totally bogus, sham and practically moonshine. A copy of the reply dated 31.05.2021 is annexed herewith and marked as 'Annexure-A12'. The operational creditor sent a rejoinder by way of letter dated July 6, 2021 in response to the reply dated May 31, 2021 mentioned above. A copy of the rejoinder by way of letter dated July 6, 2021 is annexed herewith and marked as 'Annexure-A13'. On 13th July, 2021 the corporate debtor sent a frivolous reply dated 13/07/2021 in response to the rejoinder. A copy of the reply dated 13/07/2021 sent by the corporate debtor is annexed herewith and marked as 'Annexure-A14'. From the said reply dated 13/07/2021 it is evident that the corporate debtor has no defence on merits.

- h) Vide email sent on June 18, 2021 the operational creditor called upon the corporate debtor to remove the racks and assets of the corporate debtor from the warehouse in question within the next 7 days. If the

dismantling was to be done by the operational creditor it was informed that the cost of dismantling, transportation for shifting, storage, management fees and applicable taxes and duties will be to the account of the corporate debtor. A copy of the email dated June 18, 2021 is annexed herewith and marked as 'Annexure-A15'. On failure of the corporate debtor, the dismantling and shifting etc. had to be carried out by the operational creditor. The said services fell under HAN/SEC 998599 i.e. Other Support Services for the purposes of GST payment. The operational creditor accordingly raised an Invoice bearing Number 61006552 dated 24-Jun-2021 in the sum of Rs.1,11,734.34 on the corporate debtor.

- i) The operational creditor raised Invoice No. 61007855 dated 28-Oct-2021 in the sum of Rs.21,955,341.96 (inclusive of GST) on the corporate debtor towards Fixed Warehousing Charges for the period 1st May, 2021 to 31st October, 2021. The operational creditor further raised Invoice No. 61007856 dated 28-Oct-2021 in the sum of Rs.45,181,303.20 (inclusive of GST) on the corporate debtor

towards Fixed Warehousing Charges for the period 1st November, 2021 to 31st October, 2022. It is pertinent to mention that under the agreement dated 29th August, 2019 the invoices were raised by the operational creditor with effect from 1st November, 2019. A copy of the Invoice No. 61006552 dated 24-Jun-2021 in the sum of Rs.1,11,734.34, Invoice No. 61007855 dated 28-Oct-2021 in the sum of Rs.21,955,341.96 and Invoice No. 61007856 dated 28-Oct-2021 in the sum of Rs.45,181,303.20 is annexed herewith as 'Annexure-A16 (Colly.)'. On account of the premature termination of the agreement, the corporate debtor has become liable to pay a debt of Rs.6,72,48,379/- (rounded off) to the operational creditor (inclusive of GST) (mentioned at S. No. III above) being the aggregate of Invoice Nos. 61006552 dated 24-Jun-2021 in the sum of Rs.1,11,734.34, Invoice No. 61007855 dated 28-Oct-2021 in the sum of Rs.21,955,341.96 and Invoice No. 61007856 dated 28-Oct-2021 in the sum of Rs.45,181,303.20. The computation of the said amount along with the dates on which the debt fell due is given in 'Annexure-A17' hereto. The corporate debtor is liable to pay

		<p>interest on the said amount as well till its realisation.</p> <p>j) The Operational Creditor through its Advocate served a Demand Notice dated 07.12.2021 on the Corporate Debtor as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Demand Notice was served through emails dated 07.12.2021 at the email address furnished by the corporate debtor in the Company Master Data available at the MCA website. The emails were not received back undelivered. A copy of the emails and the Demand Notice dated 07.12.2021 is annexed herewith and marked as '<u>Annexure-A18 (Colly.)</u>'. Neither any reply nor any payment has been received from the Corporate Debtor despite service of the demand notice.</p>
2.	<p>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR</p>	<p>Rs.8,28,86,046.00 (rounded off) (exclusive of interest after 31.10.2021 and excluding the default arising on or after 25th March, 2020 till 24th March, 2021). Working showing computation and dates of default is attached herewith as '<u>Annexure-A19</u>'. Working showing computation and dates of default in brief is also given below:</p>
	<p>COMPUTATION OF DEFAULT IN TABULAR FORM)</p>	

BRIEF COMPUTATION AND DATES OF DEFAULT

PART-I

INVOICE NO.	DATE OF INVOICE	DATE ON WHICH DEBT FELL DUE	DATE OF DEFAULT	INVOICE AMOUNT (IN RS.)	Outstanding Debt (Rounded off)
61005555	27/02/2021	29/03/2021	30/03/2021	41,06,130.96	41,06,131
61005557	27/02/2021	29/03/2021	30/03/2021	2,45,440.00	2,45,440
61005906	12/04/2021	12/05/2021	13/05/2021	41,06,130.96	41,06,131
61005907	12/04/2021	12/05/2021	13/05/2021	2,45,440.00	2,45,440
61006143	05/05/2021	04/06/2021	05/06/2021	41,06,130.96	41,06,131
61006144	05/05/2021	04/06/2021	05/06/2021	2,45,440.00	2,45,440
				1,30,54,712.88	1,30,54,713

PART-II

INVOICE NO.	DATE OF INVOICE	DATE ON WHICH DEBT FELL DUE	DATE OF DEFAULT	INVOICE AMOUNT (IN RS.)	INVOICE AMOUNT (IN RS.) (ROUNDED OFF)
61006214	18/05/2021	17/06/2021	18/06/2021	4,70,588.54	4,70,589
61006377	06/06/2021	06/07/2021	07/07/2021	2,68,027.04	2,68,027
61007083	11/08/2021	10/09/2021	11/09/2021	7,19,772.20	7,19,772
61007840	27/10/2021	26/11/2021	27/11/2021	3,78,929.70	3,78,930
61007838	27/10/2021	26/11/2021	27/11/2021	3,66,706.15	3,66,706
61007934	30/10/2021	29/11/2021	30/11/2021	3,78,929.70	3,78,930
				25,82,953.33	25,82,954

PART-III

INVOICE NO.	DATE OF INVOICE	DATE ON WHICH DEBT FELL DUE	DATE OF DEFAULT	INVOICE AMOUNT (IN RS.)	INVOICE AMOUNT (IN RS.) (ROUNDED OFF)
61006552	24-Jun-2021	24-Jul-2021	25-JUL-2021	1,11,734.34	1,11,734
61007855	28-Oct-2021	27-Nov-2021	28-Nov-2021	21,955,341.96	21,955,342
61007856	28-Oct-2021	27-Nov-2021	28-Nov-2021	45,181,303.20	45,181,303
				67,248,379.50	67,248,379

PART I + PART II + PART III = Rs.8,28,86,046.00 (Rounded off) (exclusive of interest after 31.10.2021)



5. As evident from Part IV (ibid), the Applicant has claimed unpaid Operational Debt of Rs.8,28,86,046/-. We notice that despite the opportunity for rectification of the Application, the Applicant failed to indicate the specific date of default at Serial No.2 of Part IV.

6. It is stated by the Applicant that a Demand Notice dated 07.12.2021 under Section 8 of IBC 2016 was sent by E-mail to the Respondent. The Applicant has filed the Affidavit under Section 9(3)(b) of IBC, 2016 stating that no notice of dispute has been received by it.

7. On issuance of the notice, the Respondent filed its reply and written submissions stating the following:

7.1 The Demand Notice issued by the Applicant is not in compliance with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Demand Notice is not served upon the Corporate Debtor at the registered office by hand, registered post, or speed post with acknowledgment due or by electronic mail service to a whole-time director or designated partner or key managerial personnel. It is served via email only at <info@eicher.com> which is not the email address of a key managerial personnel.

7.2 The e-mail ids of the Directors are publicly available on the website of the Ministry of Corporate Affairs in Form DIR-12. The Applicant was also aware that Mr. Kaleeswaran Arunachalam was the Chief Financial Officer of the Respondent and Mr. Manhar Kapoor was the Company Secretary of the Respondent.

7.3 The Applicant was also aware of the registered address of the Respondent (see Form-5 on pg. 12-44, Vol. 1 of the Petition). Invoices attached to the Petition were also served upon the registered address. Despite having knowledge of this information, the Applicant deliberately served the Demand Notice at info@eicher.com in breach of Rule 5. Such service is defective.

7.4 Additionally, whereas in the Section 9 Application, the Applicant has made a claim for Rs. 8,28,86,046/-, in the Demand Notice it has made a demand for Rs. 9,07,25,209/- (see pg. 287, Vol. II of the Petition). Hence, the higher amount being claimed in the Demand Notice makes the demand notice defective.

7.5 Various emails were exchanged between the parties evidencing deficiency in services provided by the Applicant under the Agreement. These deficiencies in services caused a huge loss to the Respondent and amounted to a breach of clauses under the Agreement. A list of correspondence regarding deficiencies is given below:

7.5.1 Emails dated 3rd June 2020 addressed by Respondent citing business loss of 25 to 28 Lacs sales every day (Annexure -1 Page No. 34 of Reply).

7.5.2 Emails dated 20th February 2020 and 8th June 2020 citing delay in the processing of orders at the warehouse due to which there were several cases of dissatisfaction amongst customers. (Annexure-3 Page No. 41-42 of Reply) and 8th June 2020.

7.5.3 Emails dated 3rd January 2020 citing losses suffered by Respondent on account of SLA breach and the resulting failure of Applicant to dispatch the online orders to customers. (Annexure-3 Page No. 44 of Reply). Email dated 28th January 2020 for non-dispatch of orders despite the material being available at the warehouse (Annexure-3 Page No. 46 to 48 of Reply).

7.5.4 Emails dated 20th February 2020 and 21st February 2020 stating backlogs in the dispatch of orders and lack of productivity by Applicant (Annexure-3 Page No. 49 of Reply).

7.5.5 Email dated 27th May 2020 by Respondent stating that “there is no point in coming with reasons after 6 months into operations. This project is completely mismanaged, that we are forced to take out helmets first to Jaipur, then GMA to bike depot, and another set of Gear Category to another warehouse. The storage volumes are drastically dropped...” (Annexure-3 Page No. 51 to 58 also on Page 134 of Reply).

7.5.6 Emails dated 6th and 7th December 2019 highlighting that operational issues of the Applicant are seriously affecting the business of the Respondent (Annexure-4 Page No. 60-61 of Reply).

7.5.7 Emails dated 13th December 2019 and 16th December 2019 citing operational issues (Annexure -5 Page No. 65 to 68 of Reply)

7.5.8 Email dated 26th February 2020 stating that an outward stock of Rs. 2.89 Crores was readily available but not billed as per the stock report (Annexure-6 Page No. 69 of Reply).

7.5.9 The Applicant was obligated to perform its obligations as enumerated under Schedule A of the Agreement (see clauses 2.1, 2.4 and 3.2 of Agreement @ pg. 52 of Petition). Non-compliance of KPI's for outbound operations (Key Perform Indicators) (part of Schedule A @ pg. 72 of Petition).

7.5.10 Emails dated 3rd January 2020 to 7th January 2020 stating that 52 online orders are picked, packed, and invoiced but not dispatched (Annexure-7 Page No.76 of Reply).

7.5.11 Emails dated 17th June 2020, wherein the Applicant states that “the instability, lack of training, ownership and process violations by DHL Team has resulted in failure of operational KPI to internal and external customers. DHL has also failed in providing agreed MIS, Accuracy in the daily reports, Productivity per each activity/category per manpower and KPI as per agreed format....” (Annexure-8 Page No. 82-83 of Reply).

7.5.12 Non-compliance of KPI's for billing/dispatch (Key Perform Indicators) (part of Schedule A @ pg. 72 of Petition).

7.5.13 Email dated 28th January 2020 stating that orders dated 31st December 2019 to 21st January 2020 were not billed

despite stock availability as per SAP records (Annexure 9 Page No. 86 of Reply).

7.5.14 Emails dated 20th February 2020 demonstrating a list of products available in high stock in quantity not seen available on the website of Respondent for sale (Annexures- 10 & 11 Page No. 92 to 95 of Reply).

7.5.15 Non-compliance of KPI's for billing/dispatch (Key Perform Indicators) (part of Schedule A @ pg. 72 of Petition).

7.5.16 Emails dated 04th February 2020 and 22nd February 2020 stating daily productivity target is not being achieved. The list provides a summary of delays shared (Annexure 12 Page No. 96 to 99 of Reply).

7.5.17 Non-compliance of KPI's for inbound and inventory operation (Key Perform Indicators) (part of Schedule A @ pg. 72 of Petition).

7.5.18 Emails dated 5th February 2020, 06th February 2020, 7th February 2020, 21st February 2020, 21st February 2020, 22nd June 2020, and 24th June 2020 stating that the items were not properly handled by the representatives of the Applicant and had the wrong MRP labels. Photographs were shared. (Annexure- 13 Page No. 100 to 122 of Reply).

7.5.19 There was no change even in the month of June 2020. Emails dated 26th May 2020, 1st June 2020, 3rd June 2020, and 4th June 2020 highlighting the same issue with photographs placed at Annexure- 13 Page No. 100 to 122 of Reply.

7.5.20 Emails dated 5th June 2020, 8th June 2020, and 11th June 2020 highlighting issues regarding output at the warehouse (Annexure - 17 Page No. 149 to 156 of Reply). Email dated 8th June 2020 addressed by Corporate Debtor stating that “there are a lot of operational challenges on a daily basis which are affecting the warehouse operations and end customer satisfactions. Please look into the same quickly to ensure warehouse operations are aligned with internal and external basic customer requirements.” (see pg. 153 of Reply)

7.5.21 Non-compliance of KPI’s for billing/dispatch (Key Perform Indicators) (part of Schedule A @ pg. 72 of Petition)

7.5.22 Despite addressing numerous emails to the Applicant as stated above, the Applicant did not take any steps to rectify these inadequacies. As a result of these inadequacies, the Respondent had to separately take up additional warehouse space of 40,000 sq. ft. at Jaipur and 15,000 sq. ft. at Gurgaon with an increased cost to the Respondent. Despite this, the Applicant could not perform with reduced pressure. As a result of which the Respondent was forced to vacate the premises.

7.5.23 Email dated 17th June 2020 addressed by the Respondent highlighting losses suffered by stating that "...DHL being the expertise in warehousing solutions, it was expected DHL to provide proper warehousing solutions based on the data shared and the understanding of live operations gathered during various visits to RE warehouse. The compulsory helmet management involved unloading vendor trucks opening each box/physical verification of each quantity/scanning for GRN/repacking of boxes/internal movement/put away/storage/picking /opening each box/scanning/repacking of each boxes/dispatch/labelling/loading into transporter trucks and dispatches. All these activities got removed from the warehouse due to direct dispatches of helmets to depots due to non-control on the floor and lack of operational experience by the DHL team at the site. DHL failed to reallocate or effectively utilise that manpower. There was an additional manpower of 50 headcounts provided to DHL at the beginning to stabilize the operations but unfortunately with additional manpower also, DHL was not able to meet the operational KPI's and required output on a daily basis. In the absence of clear proof and quantifiable productivity data, it will be difficult to conclude the losses due to EWM issues claimed. There were various meetings happening and DHL failed to provide valid proof and data to RE-IT Team to analyse. The IT Team has observed various process violations and wrong practices by the DHL team at site, which leads to errors,

reworking and productivity losses....” (Annexure- 18 Page No. 163 of Reply).

7.5.24 Despite being forced to vacate, the Respondent herein in good faith attempted to see if the warehouse could be repurposed, However, the parties could not agree upon any terms and conditions. As a result, the discussions for repurposing failed and the Respondent vacated the premises in the month of January 2021.

7.5.25 Email dated 12th January 2021 stating these good faith discussions and subsequent unilateral blockage of dispatches of inventory by the Operational Creditor. In the said email, the Corporate Debtor had clearly pointed out to the Corporate Debtor that:

“While parties were, in good faith negotiating terms of repurposing the services to make them suit the motorcycle and spares business, DHL has unilaterally blocked dispatches of our inventory since 28 December 2020. this is causing us irreparably loss of sales profit and goodwill. We have sent several emails and escalations over the past few days but these have been to no avail. This is a material breach of the agreement. Royal Enfield views this as a grave provocation that could potentially permanently v shaped the goodwill between the parties and severely hamper any Business Association going forward...RE had highlighted that performance of DHL in the services rendered were not up to the expectations in spite of the fluctuations in the business dynamics which is part and parcel of any business. Not

withstanding such contentions on either side, RE has stopped engaging the warehouse operations during the past and has been making payments regularly during the past, in fact in an enhanced manner for added manpower which are additional costs to RE. in fact RE went the extra distance to temporarily engage another 40000 sq. ft., rendered by the very same DHL for a temporary period and has been paying up nearly 8-10 lacs every month for the past 8-9 months. In other words, RE had been more than fair to ensure business is carried out despite the deliverables not being on target. In such circumstances resorting to blockades is the last thing which is expected from DHL.” (Annexure- 19 Page No. 167 of Reply).

7.5.26 Emails dated 29th April 2021 and 13th May 2021 pertaining to reconciliation statements exchanged between the parties where the Operational Creditor admitted that an amount of Rs.41,98,073/- was due and payable by Applicant to the Respondent (Annexure- 20 Page No. 171 to 173 of Reply).

7.5.27 Email dated 15th February 2021 pertaining to the repurposing of the warehouse space (Annexure- 21 Page No.174 to 176 of Reply).

7.5.28 Email dated 23rd December 2020, 28th December 2020 and 29th December 2020 stating delay in inventory transfer from warehouse to Jaipur causing sales loss to Respondent (Annexure- 24 &25 Page No. 189 to 200 of Reply).

7.5.29 The Applicant then issued a legal notice which was replied to by the Respondent. A rejoinder to the Reply was

thereafter issued by the Applicant and all this was prior to the issuance of demand notice.

7.5.30 Legal notice dated 21st April 2021 issued by Applicant through its advocate regarding termination of the agreement and raising a claim of Rs. 9.15 crores (see pg. 144, A-10, Petition).

7.5.31 In reply, Respondent vide its advocate's letter dated 31st May 2021 disputed the claim on account of deficiency in services along with relevant correspondence exchanged between the parties (see pg. 158 to 164, A-12, Vol. I, Petition).

7.6 The correspondence mentioned above overwhelmingly establishes severe disputes between the parties inter-se, with each party having claims/counter-claims against the other.

7.7 In view of the unilateral blockage of dispatches of inventory pointed out by the Respondent and refusal on the part of the Applicant to rectify the same, it was agreed between the parties to terminate the agreement in December 2020 itself and consequently, steps were taken by both parties to mitigate their losses. (Annexure 19 on Page No.167 to 170 of Reply).

7.8 By way of an e-mail dated 27th May 2020 (Annexure 3 on Page No.41 to 58 of Reply), the Respondent had already pointed out to the Applicant its intention to vacate the warehouse as the project was totally mismanaged and the Respondent was forced to take out its helmets to a

warehouse in Jaipur and the GMA to the bike depot and another set of gear category to another warehouse.

7.9 Thereafter, some negotiations took place to explore alternate business models to revive the business relations between the parties by way of a fresh agreement in relation to the warehouse, however, the same failed.

7.10 In the meanwhile due to the deficiency in service on the part of Applicant, the Respondent removed its inventory and vacated the warehouse in January 2021 and the said fact is not disputed by the Applicant.

7.11 The same is also well documented in an e-mail dated 29th April 2021 (Annexure 20 at Page No.171 to 173 of Reply) addressed by the Respondent to the Applicant wherein the Respondent has clearly shared a full and final reconciliation statement taking into account the shortfall of stock, shipment storages, pending sales returns, stock mismatch, shortage of assets scrapped without approval.

7.12 The Applicant did not dispute any of the deficiencies with justifiable reasons but also admitted that an amount of Rs. 41,98,073/- was due and payable by the Applicant to the Respondent on account of such deficiencies by email dated May 13, 2021.

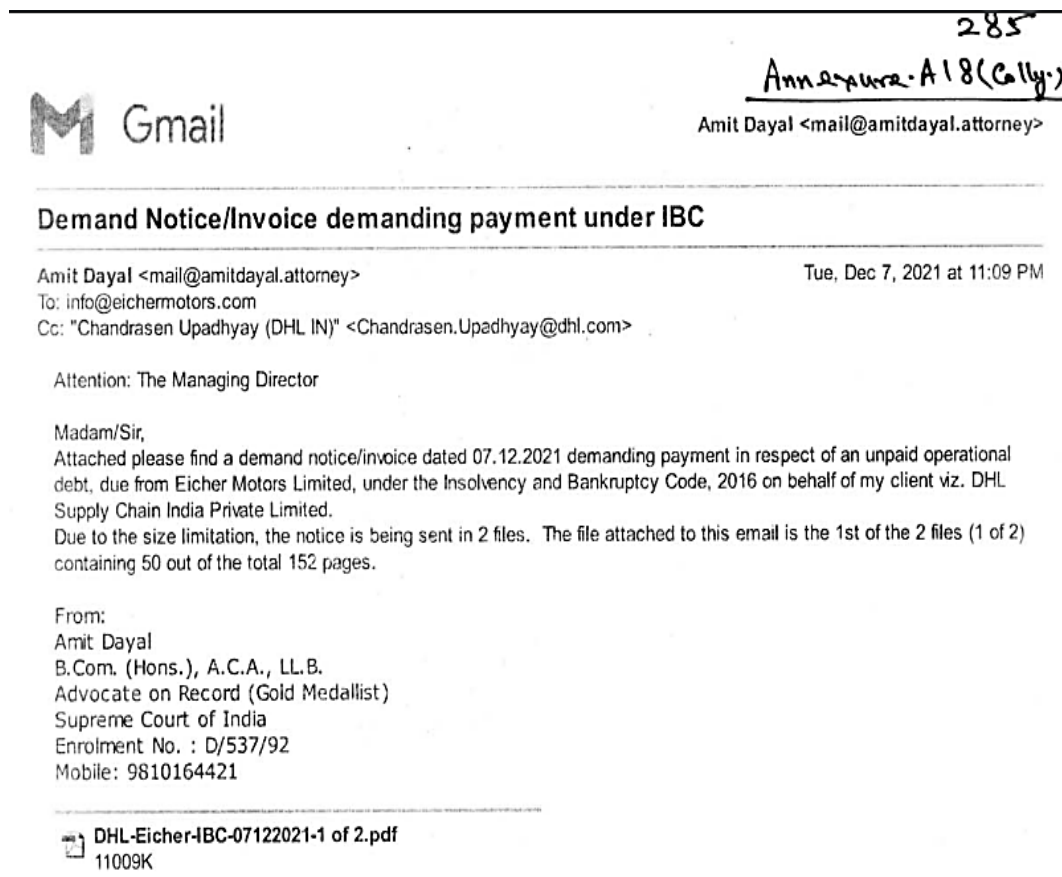
8. We have heard the submission of the parties on 21.11.2022, 22.12.2022, and 01.02.2023 and perused the documents placed on the record including the written submissions filed by both parties. During

the hearings on 21.11.2022, the Ld. Counsel appearing on behalf of the Applicant argued and reiterated almost all the points as stated in its application, written submission, and rejoinder. He stated that the Applicant has claimed an amount of Rs. 8.28 Crores, for which the Applicant had served the Demand Notice on the Respondent on 07.12.2021 at the email id mentioned in the master data of the Company. The Ld. Counsel appearing on behalf of the Respondent contended that the present petition is not maintainable as the service of Section 8 Demand Notice was defective, three categories of claims have been bunched together and there were pre-existing disputes between the parties. Further, he argued that the Agreement dated 29.08.2019 was prematurely terminated in January 2021 and thereafter, no services were rendered by the Applicant to the Respondent. Therefore, all the invoices raised by the Applicant thereafter are not related to any services rendered by the Applicant.

9. The Respondent has argued that the Demand Notice issued by the Applicant is not in compliance with Rule 5 of Application to Adjudicating Authority Rules, 2016 as the Demand Notice is admittedly not served upon the Respondent at the registered office or by electronic mail service to a whole-time director or designated partner or key managerial personnel. Whereas the information/email-ids of its Directors are publicly available on the website of the Ministry of Corporate Affairs, the applicant had chosen to serve the demand notice

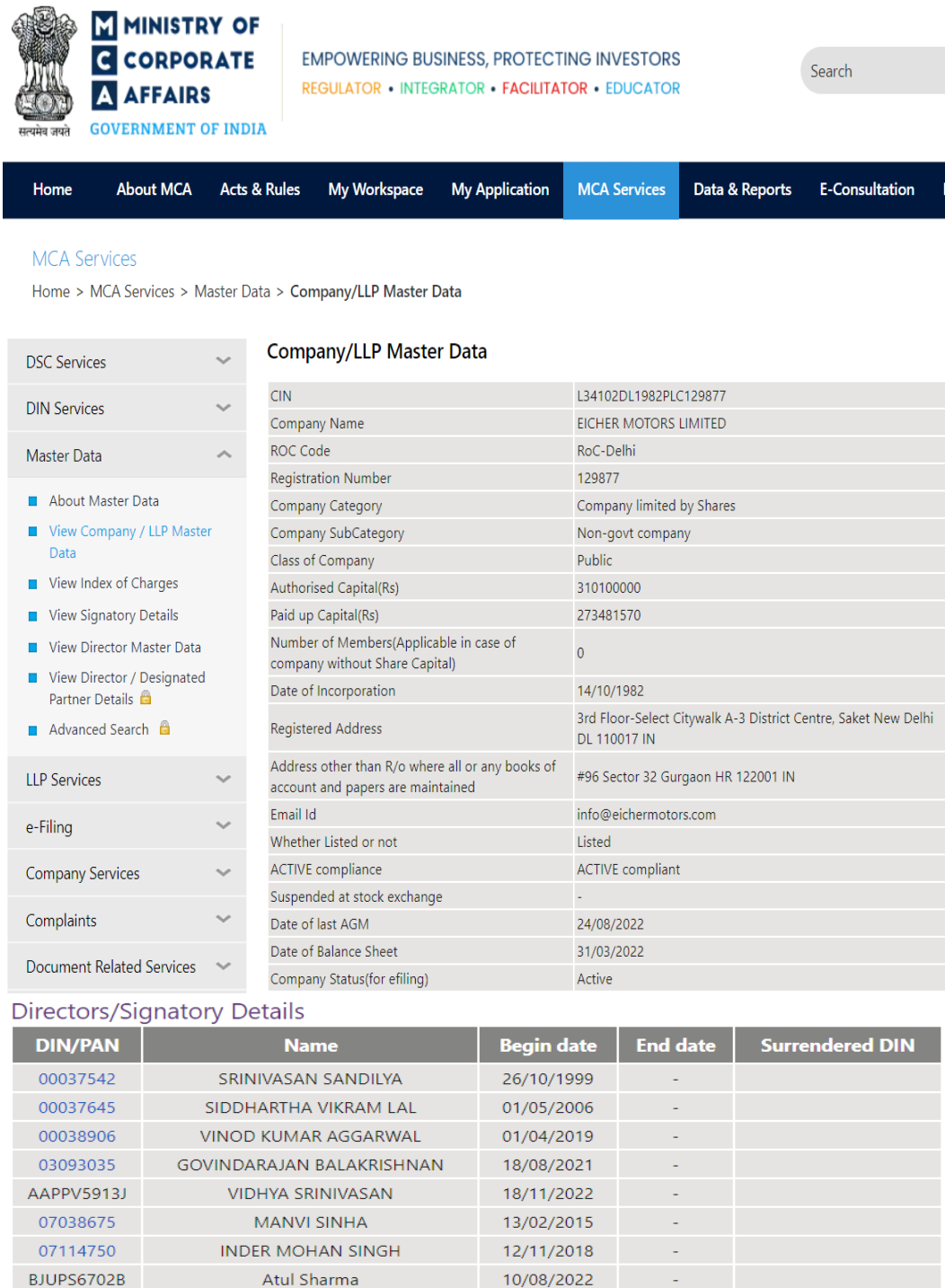
via e-mail only at info@eicher.com which is not the email address of its whole-time director or key managerial personnel.

9.1 Hence, before going into other aspects, we would like to examine **Whether the service of Section 8 demand notice upon the Respondent was a valid one.** From the record, it is observed that the Applicant had served the Section 8 Demand notice via email, which is reproduced below:



On perusal of the aforesaid email, it is seen that the Demand Notice was mailed to info@eichermotors.com with “Attention (to): *The Managing Director*”.

9.2 At this juncture, we refer to the Master Data of the Respondent Company, which reads thus:



The screenshot displays the MCA Services portal for Eicher Motors Limited. The page title is "MCA Services" and the breadcrumb trail is "Home > MCA Services > Master Data > Company/LLP Master Data".

Company/LLP Master Data

CIN	L34102DL1982PLC129877
Company Name	EICHER MOTORS LIMITED
ROC Code	RoC-Delhi
Registration Number	129877
Company Category	Company limited by Shares
Company SubCategory	Non-govt company
Class of Company	Public
Authorised Capital(Rs)	310100000
Paid up Capital(Rs)	273481570
Number of Members(Applicable in case of company without Share Capital)	0
Date of Incorporation	14/10/1982
Registered Address	3rd Floor-Select Citywalk A-3 District Centre, Saket New Delhi DL 110017 IN
Address other than R/o where all or any books of account and papers are maintained	#96 Sector 32 Gurgaon HR 122001 IN
Email Id	info@eichermotors.com
Whether Listed or not	Listed
ACTIVE compliance	ACTIVE compliant
Suspended at stock exchange	-
Date of last AGM	24/08/2022
Date of Balance Sheet	31/03/2022
Company Status(for e-filing)	Active

Directors/Signatory Details

DIN/PAN	Name	Begin date	End date	Surrendered DIN
00037542	SRINIVASAN SANDILYA	26/10/1999	-	
00037645	SIDDHARTHA VIKRAM LAL	01/05/2006	-	
00038906	VINOD KUMAR AGGARWAL	01/04/2019	-	
03093035	GOVINDARAJAN BALAKRISHNAN	18/08/2021	-	
AAPPV5913J	VIDHYA SRINIVASAN	18/11/2022	-	
07038675	MANVI SINHA	13/02/2015	-	
07114750	INDER MOHAN SINGH	12/11/2018	-	
BJUPS6702B	Atul Sharma	10/08/2022	-	

On conjoint reading of the E-mail dated 07.12.2021 and the Master Data of the Respondent Company, it is seen that the Demand notice was sent to the official email id of the Respondent Company. Further, we notice

that “Directors/Signatory Details” in the Master Data do not contain the e-mail ids of the individual Directors and on its perusal, one cannot determine who is the whole-time Director/Key Managerial Personnel of the Respondent, and moreover, a director may or may not be falling under the category of whole-time Director/KMP.

9.3 At this juncture, we refer to Rule 5 of the Application to Adjudicating Authority Rules, 2016, which reads thus:

“5. Demand notice by operational creditor. — (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely -

.....

.....

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.”

(Emphasis supplied)

Thus, as per Rule 5(2)(b), an Operational Creditor shall deliver the Demand Notice to the Corporate Debtor -

- ***Either*** at the registered office by hand, registered post or speed post with acknowledgement due,

- **Or by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.**

9.4 It is evident from the Master Data of the Respondent that the email ids of whole-time Directors and Key Managerial Personnel are not available in the public domain. However, the official email id of a Company is known to all. Further, Section 8 notice is a demand against the Corporate Debtor and not against its whole-time Director or Key Managerial Personnel, in their personal capacity. Even the Form 3 and Form 4 formats of issuing a Demand Notice do not stipulate that the Demand Notice shall be addressed to a whole-time Director or Key Managerial Personnel.

9.5 At this juncture, we refer to the Judgement of the Hon'ble Supreme Court dated 06.05.2015 passed, in the context of service of Demand Notice under Section 138 of Negotiable Instruments Act proceedings, in the matter of **Kirshna Texport and Capital Markets Ltd. Vs Ila A. Agrawal and others in Criminal Appeal No.1220 of 2009**, wherein the following was held:

“14. Section 141 states that if the person committing an offence under Section 138 is a Company, every director of such Company who was in charge of and responsible to that Company for conduct of its business shall also be deemed to be guilty. The reason for creating vicarious liability is plainly that a juristic entity i.e. a Company would be run by living persons who are in charge of its affairs and who guide the actions of that Company and that if such juristic entity is guilty, those who were so responsible for its affairs and who guided actions of such juristic entity must be held responsible and ought to

*be proceeded against. Section 141 again does not lay down any requirement that in such eventuality the directors must individually be issued separate notices under Section 138. **The persons who are in charge of the affairs of the Company and running its affairs must naturally be aware of the notice of demand under Section 138 of the Act issued to such Company. It is precisely for this reason that no notice is additionally contemplated to be given to such directors.** The opportunity to the 'drawer' Company is considered good enough for those who are in charge of the affairs of such Company. If it is their case that the offence was committed without their knowledge or that they had exercised due diligence to prevent such commission, it would be a matter of defence to be considered at the appropriate stage in the trial and certainly not at the stage of notice under Section 138."*

(Emphasis supplied)

9.6 The ID mentioned in Master Data is the official id of the Corporate Debtor/Company and in terms of the judgment of the Apex Court (supra), the whole-time Directors or Key Managerial Personnel, who are in charge and running the affairs of the Company, are supposed to know what all is being received at the official/publicly notified email id of Company especially when "attention" is drawn to its Managing Director.

10. The Respondent has relied upon the Judgement of Hon'ble NCLAT dated 05.02.2021 in the matter of **Jyoti Strips Pvt Ltd Jyoti Strips Pvt Ltd Vs Jsc Ispat Pvt Ltd, COMPANY APPEAL (AT) (Insolvency) No. 775 of 2020**, wherein the following was held:

"12. We have perused the 'Master Data' relied upon by the Appellant Counsel and also the subject email and note that there is no documentary evidence on record to establish that the email was sent

*as per the provisions mandated under Rule 5 of the Insolvency and Bankruptcy Rules, 2016. Hence, **we concur with the findings given by the Learned Adjudicating Authority with respect to the fact that the Appellant herein had nowhere mentioned in the Application to whom the email was addressed to as it is clearly stipulated in Rule 5(1) of the Insolvency and Bankruptcy Rules 2016, that the notice shall be delivered by electronic mail service to a whole time Director or Designated Partner or Key Managerial Personnel, if any, of the Corporate Debtor.***

(Emphasis supplied)

Per contra, in the instant case, as we have already noted that the email containing the demand notice was sent to the E-mail ID of the Respondent Company with “Attention to the Managing Director” of the Respondent, who is very well covered under the definition of a Key Managerial Personnel as defined under Section 2(51) of the Companies Act 2013, which reads thus -

“2. Definitions — *In this Act, unless the context otherwise requires-*

(51) “*key managerial personnel*”, in relation to a company, means –

(i) the Chief Executive Officer or the managing director or the manager;

(ii) the company secretary;

(iii) the whole-time director;

(iv) the Chief Financial Officer; and

(v) such other officer as may be prescribed.”

Thus, in view of the above, we find no illegality or deficiency in the service of the Demand Notice, which has been duly served through the E-mail addressed to the Respondent with “Attention to its Managing Director”, who is a “Key Managerial Personnel” of the Respondent Company. Hence, we would like to proceed ahead in examining the application on its merits.

11. The next plea raised by the Respondent is that there were disputes existing between the parties prior to the issuance of the Demand Notice. In order to determine, whether there is any genuine pre-existing dispute, we would like to visit some of the e-mail communications, on record, that are exchanged between the parties prior to the issuance of the Demand Notice dated 07.12.2021. Accordingly, we first refer to an e-mail dated 17.05/06.2021 written by one Mr. Jayaprakash Gopalkrishna Pillai, official of the Respondent Company to Mr. Anup Bhattacharya official of the Applicant Company, which reads thus:



Jayaprakash Gopalakrishna Pillai <jayaprakash.pillai@royalenfield.com>

DHL Agreement Vs. Line Productivity.

Jayaprakash Gopalakrishna Pillai <jayaprakash.pillai@royalenfield.com>
To: M G Madhu <mgmadhu@royalenfield.com>

Mon, May 17, 2021 at 7:47 PM

Best Regards,

Jayaprakash
M. 9731861863

----- Forwarded message -----

From: Jayaprakash Gopalakrishna Pillai <jayaprakash.pillai@royalenfield.com>

Date: Wed, Jun 17, 2020 at 9:08 AM

Subject: Re: DHL Agreement Vs. Line Productivity.

To: Arup Bhattacharya (DHL Supply Chain) <arup.bhattacharya@dhl.com>

Cc: M G Madhu <mgmadhu@royalenfield.com>, Ajay Kumar Sharma <aksharma6@royalenfield.com>, Rakesh Sharma <rakeshsharma@royalenfield.com>, Tridiv Sethi (DHL Supply Chain) <Tridiv.Sethi@dhl.com>, Vijay Dhillon (DHL Supply Chain) <Vijay.Dhillon@dhl.com>, Gaurav Pandey (DHL Supply Chain) <pandey.g@dhl.com>, Naveen Sharma (DHL Supply Chain) <Naveen.Sharma@dhl.com>, Rajeev Gangwar (DHL Supply Chain) <rajeev.gangwar@dhl.com>

Dear Mr. Arup Bhattacharya,

Good Morning!

This refers to your below email, we hereby summarize the points and there by our comments.

As DHL being the expertise in Warehousing solutions, it was expected DHL to provide proper Warehousing Solutions based on the data shared and the understanding of live operations gathered during various visits to RE Warehouse.

The compulsory helmet management involved like; unloading vendor trucks/ opening each boxes/ physical verification of each quantity/ scanning for GRN/ repacking of boxes/ internal movement/ put-away/ storage/ picking/ opening each boxes/ scanning/ repacking of each boxes/ dispatch labelling/ loading into transporter trucks & dispatches. All these activities got removed from Warehouse due to direct dispatches of helmets to depots. Due to non-control on the floor & lack of operational experience by the DHL Team at site, DHL failed to reallocate or effectively utilize that manpower.

There was an additional manpower of 50 head count provided to DHL at the beginning to stabilize the operations. But unfortunately with additional manpower also, DHL was not able to meet the operational KPI's and required output on a daily basis.

<https://mail.google.com/mail/u/0/?ui=2&ik=c9091637b&view=lg&permmsgid=msg-a%3Ar-2526223321996264736&ser=1>

1/31

In absence of clear proof and quantifiable productivity data, it will be difficult to conclude the losses due to EWM issues claimed. There were various meetings happening and DHL failed to provide valid proof and data to RE - IT Team to analyse. The IT Team has observed various process violations & wrong practices by DHL Team at site, which leads to errors, reworking and productivity losses.

Since DHL was unable to manage the volume in the current Warehouse, RE has to take additional warehouses to manage the existing volume. RE has taken 40K square feet space at Jaipur to manage helmets, 15K square feet at Gurgaon as DHL was unable to unload the incoming volume at DHL Warehouse. There was long waiting of incoming trucks, high lead time for unloading of vehicles, heavy detention charges by the transporters, transporter denying of delivery to DHL Warehouse, etc.

The inventory history is below for your information.

Month	Inventory Unit	% Inventory Managed	% Reduction in Inventory
Data to DHL	486267		
Nov-19	303978	63%	-37%
Dec-19	316212	65%	-35%
Jan-20	343191	71%	-29%
Feb-20	356450	73%	-27%
Mar-20	356817	73%	-27%
Apr-20	349802	72%	-28%
May-20	335348	69%	-31%

The instability, lack of training, ownership and process violations by DHL Team has resulted in failure of operational KPI to internal and external customers. DHL also failed in providing agreed MIS, Accuracy in the daily reports, Productivity per each activity/category per manpower and KPI as per agreed format.

Further, there are various operational failures and non-adherence to contractual agreement clauses are reported and discussed with DHL site operation team by RE site operation team as below.

S. No.	Description	Clause as per agreement	Current status	Per month cost addition spend by RE.	Total Cost/UOM for 8 months.	Agreed QTY.
1	Cycle count	Variance limit will be +/- 0.05%	No Cycle count done by DHL.			+/- 0.05%
2	Bin Audit	Daily bin audit to ensure location accuracy. All bin location to cover in a month	No Bin Audit done by DHL.			
3	Uniform	Uniform orders should be dispatch in 24 hours of receipts	It is delayed upto one month then after multiple requests to DHL they request 15 additional manpower to execute uniform orders. While uniform execution was in the DHL Agreement.		1,29,375	0
4	Customer complaints	Allow limit is 1 complaint line per 5000 line dispatches Complaint will be close in 3 working days	At any point of time 7-8 complaints are always open. Complaints are pending since Jan-20.		More than agreed	Jan-00 3 Days
5	Packing material	Area is 300 sq. feet	No Area is defined now		Packing Material	Dedicated Area

<https://mail.google.com/mail/u/0/?ui=2&ik=c9091637b&view=lg&permmsgid=msg-a%3Ar-2526223321996264736&ser=1>

5/31/2021

Royal Enfield (A unit of Eicher Motors Ltd.) Mail - DHL Agreement Vs. Line Productivity.

					stored in operation area many places affect packaging of goods.	
6	Inclusion of service	food of manpower, electricity, all statutory, MHE, maintenance, water, stationary, IT hardware, chairs, office set up, telephone, courier, internet, Printers	Food for manpower not available. Water for RE employees not provided. IT hardware 9 Laptops not given by DHL. No Telephone No Printer provided by DHL.		DHL Fixed cost is same but services are less.	DHL Fixed cost vs. services.
7	Capex	Bin separator	DHL never used a BIN separator in the warehouse.		1,251	5941
8	Capex	Iron table	No Iron Table, No manpower, No area for this. Also the inventory condition is very poor. Refer attachment.	1,012	8,093	3
9	Capex	Attendance system	No attendance system and DHL don't want to share or not allow audit of manpower. Agreed vs. actual is a big gape.	50000 Machine & 1625.12 Rent.	13,001	1
8	Canteen crockery	Capex budget is 15000	7 sets of plate bowls available only. Taken 15000 from RE and 322 per month cost is given to DHL.	322	2,576	1
9	Signage racking	Capex budget is 50000	No such things right now	1,075	8,600	1
10	IT	Lan cabling, IP Phone, electric connections	No such things right now	1,988	15,904	1
11	Quality & Kitting	One supervisor should be available in Quality area	There is no manpower also DHL took approval for 2 additional manpower and earlier also took 3 manpower cost from RE.	1,725	13,800	1
12	MIS/ Wave planner	One person has to be available for MIS	There is no any manpower	20,500	1,94,500	1
13	CSR	2 CSR should be available	Only 1 CSR available. RE Employee is handling CSR work.	20,650	1,87,650	2
14	HR Executive	Should be available in alternate days	We didn't see any HR executive in the warehouse.	16,667	1,33,336	0.5
15	Strapping machine	2 Semi automatic strapping machine should be available	Strapping machine provided by RE to support operation not by DHL.	1,891	17,023	2
17	Dock leveller	2 nos 10 ton capacity dock leveller should be available	Only 1 is available	4,723	37,784	2
18	Laptops	9 nos of laptops should be available	Total 9 are not available	9,528	76,224	9
19	Data Cards	5 nos of data cards should be available	Not seen any till now	192	1,536	5
20	UPS	Printer with UPS connectivity	Printer is not connected with UPS also provided by RE.	1,280	10,240	1
21	Opex Items	Refreshments (per head 260 rupees)	Not avail any type of these services from long time	17,550	1,40,400	68
	Opex Items	Consumables + Stationary	No such things right now	18,000	1,44,000	1
22	Information board	There should be a board with having information that all material lying in	There is no board			

<https://mail.google.com/mail/u/0/?ui=2&ik=cf9091637b&view=lg&permmsgid=msg-a%3Ar-252622321996264736&sr=1>

5/31/2021

Royal Enfield (A unit of Eicher Motors Ltd.) Mail - DHL Agreement Vs. Line Productivity.

		warehouse in Eicher Motors Ltd, property				
23	DEO efficiency	DEO should have basic knowledge of excel and can read and write reports in English.	Against 22000 Salary they recruited 7-10 k salary type people who don't know how to operate computers.	60,000	4,80,000	
				Total	16,05,473	

Best Regards,

Jayaprakash
M: 9731861863

On perusal of the aforesaid e-mail, it transpires that the Respondent had shown dissatisfaction towards the services of the Applicant and has communicated that it had to take an Additional Warehouse space at Jaipur and Gurgaon to manage its operations.

12. We also come across e-mail communications dated 20.02.2020 written by Jayaprakash of the Respondent Company to Mr. Rajeev Gangwar of the Applicant Company and subsequently, by M.G Madhu of the Respondent Company to one Mr. Rajeev Gangwar, Mr. Naveen Sharma, and Mr. Vijay Dhillon of the Applicant Company, which reads thus:

ANNEXURE-3 41

From: M G Madhu <mgmadhu@royalenfield.com>
Sent: Thursday, February 20, 2020 6:49 PM
To: Rajeev Gangwar (DHL Supply Chain); Naveen Sharma (DHL IN); Vijay Dhillon (DHL IN)
Cc: Ajay Kumar Sharma; Ashok Kumar; Jayaprakash Gopalakrishna Pillai; Rakesh Sharma
Subject: Re: Online Cut Line Parts / Order Delays

Team DHL,

This is a serious concern, and creating lots of dissatisfaction among customers.
Can i know the reason for the same, actions taken to eliminate the same and the timeline.

Let me have the list of parts and the nos for connecting to the order, the book stock of those items, PI done date and details etc.

Thanks and Regards

M G Madhu

M: 09176663625

On Thu, Feb 20, 2020 at 6:43 PM Jayaprakash Gopalakrishna Pillai <jayaprakash.pillai@royalenfield.com> wrote:

Dear Rajeev,

Online orders are getting delayed for processing.
egs. order # 83014 dated dated 07/02 is processed and dispatched only on 20/02.
Pl check why this was delayed for so many days?

Further, pl share a list of part codes with SAP stock where orders are stuck / not processed due to searching of part codes in Warehouse.

Best Regards,

Jayaprakash
M: 9731861863

On perusal of aforesaid e-mails, it is observed that again the Respondent had pointed out that the “*Online orders are getting delayed for processing*” and it had asked the Applicant Company to check “...*why this was delayed for so many days?*”. Subsequently, M.G Madhu on behalf of the Respondent Company had communicated that “*this is a serious concern and creating lots of dissatisfaction among customers.*”

13. We find another e-mail dated 18.05.2021 sent by Ms. M.G. Madhu official of the Respondent to Mr. Rajeev Gangwar, Mr. Naveen Sharma, and Mr. Vijay Dhillon officials of the Applicant, which reads thus:

5/18/2021

Royal Enfield (A unit of Eicher Motors Ltd.) Mail - Fwd: DHL Agreement Vs. Line Productivity.



134
Owais Khurshid Makhdoomi <owais@royalenfield.com>

Fwd: DHL Agreement Vs. Line Productivity.

1 message

Rakesh Sharma <rakeshsharma@royalenfield.com>

18 May 2021 at 15:44

To: Owais Khurshid Makhdoomi <owais@royalenfield.com>, Manhar Kapoor <manhar@eichermotors.com>, Kotteeswaran S <kottees@royalenfield.com>, S Venkatesan <sv@royalenfield.com>

Hi Owais

As required, I am sending a mail chain showcasing DHL productivity post April 2020 month.

It is a long email chain having detailing of productivity metrics v/s actual and gap.

Regards/

Rakesh Sharma

Head - Logistics

Royal Enfield (A Unit of Eicher Motors Ltd.)

Plot # A-19/1 , Sipcot Industrial Growth Centre,

Oragadam Village, Kancheepuram District

Tamil Nadu - 602 105

Mob: **9911100682**

----- Forwarded message -----

From: **M G Madhu** <mgmadhu@royalenfield.com>

Date: Wed, May 27, 2020 at 8:21 AM

Subject: Re: DHL Agreement Vs. Line Productivity.

To: Ajay Kumar Sharma <aksharma6@royalenfield.com>, Naveen Sharma (DHL Supply Chain) <Naveen.Sharma@dhl.com>, Rajeev Gangwar (DHL Supply Chain) <rajeev.gangwar@dhl.com>

Cc: Ashok Kumar <ashokkumar@royalenfield.com>, Jayaprakash Gopalakrishna Pillai <jayaprakash.pillai@royalenfield.com>, Sraddhanjali Behera <sraddha@royalenfield.com>, Vijay Dhillon (DHL Supply Chain) <Vijay.Dhillon@dhl.com>, Rakesh Sharma <rakeshsharma@royalenfield.com>

+
Dear Team DHL

There is no point in coming with reasons after 6 months into operations. This project is totally mismanaged, that we are forced to take out helmets first to Jaipur, then GMA to bike depot, and another set of Gear Category to another warehouse. The storage volumes are drastically dropped. Moreover, This was designed and signed off with all given metrics.

It's expected to be executed OTIF. Would like to see a detailed plan on execution and ramping up with timelines by tomorrow.

If DHL is not able to manage or live to the expectations we need a clear statement from them to look for other options.

Business and customer satisfaction cannot suffer.

Thanks and Regards

M G Madhu

M: 09176663625



On perusal of the aforesaid e-mail, it is noticed that the Respondent had observed that “...*The project is totally mismanaged.... The storage volumes are drastically dropped....*”.

14. In the sequel to the discussion above, **we find** that though in the instant case, the demand notice was issued on 07.12.2021, **there is sufficient material in the form of e-mail communications between the parties on record, which clearly demonstrates that there were pre-existing disputes between the parties.**

15. It is still contented by the Applicant in its written submissions that out of the total amount of Rs.1,30,54,713/- mentioned in Part IV at Serial No. 1 (I), the invoices for the fixed charges aggregate to Rs. 1,23,18,392.88 [Rs.41,06,130.96 @ pages 113-114 + Rs.41,06,130.96 @ pages 117-118 + Rs.41,06,130.96 @ pages 121-122], while invoices for variable charges aggregate to Rs.7,36,320.00 (pages115-116/119-120/123-124). Thus, the fixed charges component for the services provided alone exceeds the threshold limit of Rs. 1 crore. The Applicant has placed reliance on the Judgement dated 08.12.2020 passed by the Hon'ble NCLAT in Company Appeal (AT) (Ins.) No. 412 of 2020 titled **“Apya Capital Services Private Limited v Guardian Homes Private Limited”**. The Applicant has further added that against the said judgment a Civil Appeal No. 1813 of 2021 was filed before the Hon'ble Supreme Court of India, which was dismissed vide Order dated 01.07.2021 of the Hon'ble Apex Court.

16. Per contra, it is contended by the Respondent that it had vacated the Warehouses Premises, under the Agreement, in January 2021 only and the question of it availing any services and the Applicant provided those services thereafter does not arise.

17. However, the Applicant has denied this fact in its Rejoinder dated 31.10.2022 that the premises were vacated in the month of January 2021. The relevant averment of the Applicant in the Rejoinder to that effect is reproduced below:

“15. The contents of paragraph 29 of the reply affidavit are wrong and denied and those of the company petition reiterated. The allegation that the corporate debtor had moved out its inventory in the month of January 2021 on account of deficiency in service of the operational creditor is false to the knowledge of the corporate debtor and is absurd. Even assuming without admitting that there was any deficiency in service, admittedly, sub-clause (iii) of clause 11.4 of the agreement was never invoked and notice under clause 12.2.1(a) of the agreement was never given. It is denied that the invoices for warehousing charges from November 2020 till May 2021 are not due and payable. It is denied that the warehousing charges from February 2021 till May 2021 are not due and payable. It is denied that the warehouse had been vacated in the month of January 2021. It is submitted that various fixtures were dismantled in June 2021. Moreover, irrespective of whether the

goods were stored or not, fixed charges under the agreement dated 29.08.2019 were payable by the corporate debtor for the entire lock-in period.”

18. Therefore, at this stage, we would like to examine both parties' versions from the records available before us. While going through the documents, we find an email dated 05.01.2021, written by Mr. Anup Bhattacharya of the Applicant, which is reproduced below:

On Tue, Jan 5, 2021 at 6:16 PM Arup Bhattacharya (DHL Supply Chain) <arup.bhattacharya@dhl.com> wrote:

Dear all,

Please refer to our conference call yesterday.

We understand that your instruction regarding dispatch of substantial part of your stock from warehouse premises admeasuring 55,000 sq. ft. at Kirtimaan warehouse, Khasra No. 3/18, 23/1 & 23/2, Village Tajnagar, Tehsil Farrukhnagar, Jamalpur Farrukhnagar Road, District Gurugram, Pin Code – 122506 (Warehouse) to another location is a part of your normal business transaction and that you shall honour and pay all sums due and payable in terms of the Warehousing Services dated August 29, 2019 ("Agreement") irrespective of whether any stocks of yours are stored in the Warehouse or any associated services availed.

5/31/2021

Royal Enfield (A unit of Eicher Motors Ltd.) Mail - Re: Regarding Yesterday's call for Royal Enfield Fanukhnagar warehouse

We further got assurance from you that, notwithstanding whatever you had mentioned in the past whether in writing or otherwise, you intend to continue availing services based on terms of the Agreement and as an esteemed company shall continue to honour the same in letter and spirit.

You also mentioned that you shall get back to us at the earliest with your confirmation on the re-purposing and scope change addendum that we have shared with you on 8th December 20.

Kindly confirm by a return email that our aforesaid understanding is correct.

Best Regards

On perusal of the aforesaid e-mail, we observe that the Applicant was well aware that the Respondent was vacating their warehouse premises to another location as part of their normal business transaction. Further, in response to the aforesaid e-mail dated 05.01.2021 of the Applicant, the Respondent had sent the following e-mail on 12.01.2021:

5/31/2021

Royal Enfield (A unit of Eicher Motors Ltd.) Mail - Re: Regarding Yesterday's call for Royal Enfield Farukhnagar warehouse



Jayaprakash Gopalakrishna Pillai <jayaprakash.pillai@royalenfield.com>

Re: Regarding Yesterday's call for Royal Enfield Farukhnagar warehouse

1 message

Rakesh Sharma <rakeshsharma@royalenfield.com>

Tue, Jan 12, 2021 at 9:32 A

To: "Arup Bhattacharya (DHL Supply Chain)" <arup.bhattacharya@dhl.com>

Cc: S Venkatesan <sv@royalenfield.com>, Puneet Sood <puneet.sood@royalenfield.com>, Manhar Kapoor <manhar@eichermotors.com>, Owais Khurshid Makhdoomi <owais@royalenfield.com>, M G Madhu <mgmadhu@royalenfield.com>, "Abhishektiwari@royalenfield.com" <abhishektiwari@royalenfield.com>, Jayaprakash Gopalakrishna Pillai <jayaprakash.pillai@royalenfield.com>, "Tridiv Sethi (DHL Supply Chain)" <Tridiv.Sethi@dhl.com>, "Vijay Dhillon (DHL Supply Chain)" <Vijay.Dhillon@dhl.com>, "Naveen Sharma (DHL Supply Chain)" <Naveen.Sharma@dhl.com>, "Srinivas Iyer (DPDHL IN)" <srinivas.iyer@dhl.com>, "Arvind Iyer (DPDHL IN)" <Arvind.Iyer@dhl.com>, Kotteeswara S <kottees@royalenfield.com>

This is in response to your email dated 05 Jan 2020 on subject Gurgaon Warehouse Operation.

DHL is providing services to us at its warehouse at Farrukhnagar, Gurgaon pursuant to agreement dated 29 August 2019. While parties were, in good faith, negotiating terms of repurposing the services to make them suit the motorcycle and spares business, DHL has unilaterally blocked despatches of our inventory since 28 December 2020. This is causing us irreparably loss of sales, profit and goodwill. We have sent several emails and escalations over the past few days but these have been to no avail. This is a material breach of the agreement. Royal Enfield views this as a grave provocation that could potentially permanently vitiate the goodwill between the parties and severely hamper any business association going forward - which we otherwise intend to continue on mutually agreed reasonable terms as stated below.

Team RE (Royal Enfield) confirms followings:

1. RE to continue shifting Apparel and Accessory business unit material to other business locations as per need and any blockade if resorted to further by anyone, RE will proceed with legal options, as it itself is deemed as a breach of contract. The contract does not authorise anyone to hold back RE's Inventory.

2. RE had highlighted that the performance of DHL in the services rendered were not upto the expectations in spite of the fluctuations in the business dynamics which is part and parcel of any business. Notwithstanding such contentions on either side, RE has not stopped engaging the Warehouse operations during the past and has been making payments regularly during the past, in fact in an enhanced manner for added man power which are additional costs to RE. In fact RE went the extra distance to temporarily engage another 40000 Sq.Ft, rendered by the very same DHL for a temporary period and has been paying up nearly 8-10 Lacs every month for the past 8-9 months. In other words, RE had been more than fair to ensure business is carried out despite the deliverables not being on target. In such circumstances, resorting to blockades is the last thing which is expected from DHL. However, notwithstanding the above, to enable DHL to complete the Contract period, RE to continue exploring possible use of Warehouse in phased manner as per following plan:

2.1 RE will, in the first phase, explore warehouse usage for Finished Bike storage and dispatch to dealers.

<https://mail.google.com/mail/u/0/?ik=cf9091637b&view=pt&search=all&permthid=thread-f%3A1688050506119900442%7Cmsg-f%3A1688652089184734888&siml=msg-f%3A1688652089184734888&mb=1>

5/31/2021

Royal Enfield (A unit of Eicher Motors Ltd.) Mail - Re: Regarding Yesterday's call for Royal Enfield Farukhnagar warehouse

2.2 RE is very much concerned before committing any new business to DHL for using this warehouse given their behaviours of resorting to blockades and various business losses occurred during commencement phase of Apparel and Accessory and hence reserves the right to limit its usage of the warehouse for limited re-purposing only.

3. Commercial for Bike Business Units storage and dispatch to be set as per following template:

- 3.1 Warehouse rental as per earlier agreed cost structure
- 3.2 A total manpower of 12 resources to handle Bike Business unit load hence manpower cost to be changed as per new requirement,
- 3.3 Variable cost associated with 12 resources to be changed accordingly as per agreed price template in contract
- 3.4 Fixed Asset cost to be borne by RE either by buy back model or rental as per agreed terms in contract (Fixed Assets like Racks , lease connection, Camera, Loading Docks, Office etc)
- 3.5 Asset on rental model to be rezigged as per new requirement. For bikes there is no usage of stackers or forklift kind of MHE equipment. Two hand pallets are needed to handle helmet boxes to go along with Bikes. Only required MHE cost elements to be part of refreshed requirements

Please confirm above and schedule a call to discuss in detail in the later part of the running week.

We hope you will not let this matter escalate further and look forward to your immediate confirmation and cooperation.

Regards/
Rakesh Sharma
Head - Logistics
Royal Enfield (A Unit of Eicher Motors Ltd.)
Plot # A-19/1 , Sipco Industrial Growth Centre,
Oragadam Village, Kanchheepuram District
Tamil Nadu - 602 105
Mob: 9911100682

Thus, the aforesaid e-mail communications clearly indicate that the submission made by the Applicant in its Rejoinder that it had no knowledge of the Respondent vacating the premises is misplaced.

19. Thus, as revealed from the documents on record, the Warehouses Premises stood vacated by the Respondent in January 2021. What the Applicant has been claiming are the fixed charges for the subsequent period as per the Agreement. At the most, these claims of the Applicant could be in the form of damages on account of premature termination of the Agreement. In this context, we refer to the Judgement of the Hon'ble Supreme Court passed in the matter of **India vs Raman Iron Foundry (1974 AIR 1265, 1974 SCR (3) 556)**, wherein the following was held:

“..... A claim for unliquidated damages does not give rise to a debt until the liability is adjudicated upon and damages assessed by an adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach has is the right to sue for damages, and this is not an actionable claim...”

(Emphasis added)

Accordingly, the claim of damages can only be adjudicated by a Civil Court and will be outside the ambit of the Operational Debt.

20. In light of the discussion held above, we observe pre-existing disputes between the parties before the issuance of the Demand Notice. At this stage, we consider it worthwhile to refer to the Judgement of the

Hon'ble Supreme Court passed in the matter of **Mobilox Innovations Private Limited Vs Kirusa Software Private Limited in the CIVIL APPEAL NO. 9405 OF 2017:**

“40. ...Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

21. In the instant case, the correspondence on record prodigiously establishes severe disputes between the parties inter-se, with each party having claims/counter-claims against the other. The Respondent too has raised plausible contentions, which require further investigation.

22. In view of the above we conclude that there being pre-existing disputes between the parties, **the Application is dismissed.**

23. However, nothing expressed herein shall be construed as an opinion before any other forum to affect the rights of both parties to agitate the matter further.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(BACHU VENKAT BALARAM DAS)
MEMBER (J)