NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.175 of 2023

(Arising out of Order dated 28.11.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad, Division Bench, Court-1 in IA/422(AHM)2022 in CP(IB) 14 of 2018)

IN THE MATTER OF:

Wind World (India) Limited
Through Mr. Shailen Shah, Resolution Professional
2nd Floor, Lodha Excelus,
Apollo Mills Compound, N M Joshi Marg,
Mahalakshmi, Mumbai 400011 ... Appellant

Versus

1. Indian Renewable Energy
Development Agency Limited
India Habitat Centre, East Court, Core 4A,
1st Floor Lodhi Road, New Delhi 110003.

2. Wind World (India) Infrastructure Private Limited
Enercon Tower, Plot No. 9-A, Veera Industrial Estate
Veera Desai Road, Andheri (West)
Mumbai 400053 ... Respondents

Present:

For Appellant : Mr. Sumant Batra and Ms. Nidhi Yadav, Advocates. Ms. Neha Naik and Mr. S. Laskari Advocates

For Respondent : Mr. Nakul Sachdiva, Mr. Karundeep Singh and Mr. Abhinandan Sharma, Advocates for Respondent No. 1.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by Corporate Debtor through its Resolution Professional ("**RP**") has been filed challenging order dated 28.11.2022 passed by National

Company Law Tribunal, Ahmedabad, Division Bench, Court-1 rejecting IA No.422/2022 filed by the RP praying for quashing the invitation of Expression of Interest ("**EoI**") dated 25.04.2022 issued by Respondent No.1 – Financial Creditor.

2. Brief facts necessary to be noticed for deciding the Appeal are:

(i) The Appellant (hereinafter referred to as the "**Corporate Debtor**"), holding Company of Respondent No.2 – Wind World (India) Infrastructure Pvt. Ltd. Wind World (India) Infrastructure Pvt. Ltd., which was earlier known as (Enercon India Infrastructure Pvt. Ltd.) proposed to construct and operate power switchyard ("the Facility) required for pooling of power to be generated by Enercon India Limited ("**EIL**") existing and/or proposed wind energy projects for the purpose of maintenance and operating power switch yards, the Facility Agreement was entered dated 28.12.2007 between the Corporate Debtor and Respondent No.2. The Corporate Debtor subject to terms and conditions of the Agreement was authorised to use, operate and maintain the facility.

(ii) Respondent No.2, a subsidiary of the Corporate Debtor constructed the substations and switch yards, on which the

Corporate Debtor was allowed to operate. The Facility Agreement was modified from time-to-time upto the year 2016.

(iii) Respondent No.2 entered into a Loan Agreement with Respondent No.1. Under the first Loan Agreement, Respondent No.1 sanctioned loan of Rs.90 Crores. Under the second Loan Agreement, another Rs.90 crores loan was sanctioned.

(iv) Under the Facility Agreement, the Corporate Debtor was liable to pay facility usage charges to Respondent No.2, a subsidiary Company. Respondent No.1 and Respondent No.2 entered into Hypothecation Agreement and created charge in favour of Respondent No.1 over the substations and other assets on 05.07.2012 and 19.12.2023. A Conditional Deed of Assignment dated 23.12.2013 was also executed by Respondent No.2 and Respondent No.1 assigning all rights of Respondent No.2 in favour of lender, i.e. Respondent No.1.

(v) On an Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**IBC**"), Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor commenced by order dated 20.02.2018. Respondent No.2 having committed default in repayment of loan, the account of Respondent No.2 was declared NPA on 31.03.2018

by Respondent No.1 and Respondent No.1 issued Notice under Section 13, sub-section (2) of the SARFAESI Act, 2002 dated 12.05.2021 and 13.06.2021 against Respondent No.2 and commenced action under the SARFAESI Act. Respondent No.1 issued an EoI on 25.04.2022 seeking new operation and management contractors for the Facility of Respondent No.2.

(vi) The Corporate Debtor aggrieved by EoI Notice dated 25.04.2022 issued by Respondent No.1, filed an IA No.422 of 2022 before the Adjudicating Authority. A detailed reply was filed by Respondent No.1 in IA No.422 of 2022. The Adjudicating Authority rejected the submission of the Corporate Debtor that EoI dated 25.04.2022 is hit by Section 14 of the IBC in view of the commencement of CIRP against the Corporate Debtor. It was held by the Adjudicating Authority that Corporate Debtor does not have any ownership of the Facility and had merely rights to operate, maintain and use the Facility. Aggrieved by the above order, this Appeal has been filed.

3. We have heard Shri Sumant Batra, learned Counsel appearing for the Appellant and Shri Nakul Sachdeva, learned Counsel appearing for Respondent No.1.

4. Shri Sumant Batra, learned Counsel appearing for the Appellant submits that the Appellant being handed over the Facility for use, operate and maintain by Respondent No.2, as per Facility Agreement entered into between parties, EoI issued by Respondent No.1 to appoint another entity for operation and maintenance, is in violation of Section 14 (1) (d) of the IBC. The Corporate Debtor is in occupation of Facility. It is submitted that Respondent No.1 has right over the assets, which are its security interest, but cannot call for fresh EoI under the Facility Use Agreement, under the SARFAESI Act. It is submitted that Facility Use Agreement is subsisting and cannot be terminated during the moratorium. The Deed of Assignment entered into with Respondent No.1 and Respondent No.2 is contrary to the Facility Use Agreement. The Facility is in occupation of the Appellant and its use is essential to keep the Appellant as a going concern. The Corporate Debtor has to recover substantial amounts from Respondent No.2.

5. Shri Nakul Sachdeva, learned Counsel appearing for Respondent No.1 refuting the submission of learned Counsel for the Appellant submits that measures adopted by Respondent No.1 are not in contravention of Section 14 of the IBC. Section 14(1)(d) is not applicable in the instant case. It is submitted that Respondent No.1 is neither the owner nor lessor of the property. It is submitted that it is Respondent No.2, who is owner and in possession of substations and switchyards and has handing over the facility for use, operate and maintenance by the Appellant/ Corporate Debtor, cannot

be said to be in occupation for the purpose of Section 14. The Corporate Debtor was liable to pay Facility usage charges under the Facility Agreement, which has not been paid by the Corporate Debtor to Respondent No.1 and dues of more than Rs.170 crores are to be paid as on date. On account of non-payment of facility use charges, Respondent No.2 has not been able to service the loan, leading to event of default. When the event of default has taken place, Respondent No.1 has proceeded under SARFAESI Act, 2002 against Respondent No.2. Respondent No.2 having not service the Loan Agreement, Respondent No.1 has every right to proceed and take action. It is submitted that an IA was filed by the Appellant for staying the SARFAESI proceedings in the present Appeal, being IA No.2243 of 2023, which IA was disposed of by this Tribunal on 25.05.2023 refusing to stay SARFAESI proceedings against Respondent No.2. It is submitted that EoI for selection of new operation and maintenance contractor does not amount to any breach of Section 14(1)(d) of the IBC. There is no error in the Assignment Agreement executed by Respondent no.2 in favour of Respondent No.1.

6. We have considered the submissions of learned Counsel for the parties and have perused the record.

7. The Facility Agreement, which was entered between Corporate Debtor and Respondent No.2 dated 28.12.2007 has been brought on the record. It is relevant to notice certain clauses of the Facility Agreement. Clause 2.1 'Right

to use Facility'; Clause 2.2 – 'EIL's obligation' (the Corporate Debtor obligation) are as follows:

"**2.1 Right to use the Facility**

Subject to and in accordance with the terms and conditions set forth in this Agreement, EIIPL hereby grants EIL and authorises EIL to use operate and maintain the Facility. For this purpose, EIIPL hereby agrees to handover the Facility to EIL.

2.2 <u>EIL's obligation</u>

a. EIL shall, in all events throughout the term of the Agreement use, operate and maintain the Facility and pay the EIIPL Facility Use Charges.

b. EIL shall obtain all Applicable Permits including clearances relating to environmental matters that are required in connection with operating the Facility under any Applicable Laws.

c. After handing over the Facility by EIIPL to EIL for use thereof, EIL shall operate and maintain the Facility on its own account throughout the term of this Agreement for evacuation of power in accordance with the guidelines provided by the Contractors, technical characteristics of the Facility, good industry practice and all Applicable Laws. EIL shall pay EIPL the Facility Use Charges as per the rates stated hereunder.

d. Notwithstanding the handing over of Facility by EIIPL to EIL for operating, maintaining and using for generating the power, the ownership of the Facility shall remain solely with EIIPL, and except for mere

right to operate, maintain and use the Facility EIL will have no right whatsoever in the Facility.

e. Ensure that all such steps shall be taken as are necessary to ensure that the title to the Facility are not abrogated, seized tampered or jeopardized and the title to the Facility are fully protected in the name of EIIPL.

f. Not do or omit to do any act which may result in seizure and/or confiscation of the Facility by the Central or State Government or Local Authority or any Public Officer or Authority under any law for the time being in force."

8. Clause 2.4 deals with 'Facility Use Charges', which was required to be paid by the Corporate Debtor to Respondent No.2, is as follows:

"**2.4 FACILITY USE CHARGES**

EIL shall pay EIIPL a fixed Facility Usage Charge @ Rs.4.30 Lakh per Mega Watt of installed Capacity i.e. Rs.25.70 Crore per annum on monthly basis on 7th of every month (the Facility Usage Charges). EIL shall ensure that the Installed Capacity in any month shall not be lesser than 597.60 MW."

9. Clause 8.6 deals with 'Assignment', which is as follows:

"**8.6 Assignment.**

Neither Party shall assign or part with any of its rights or obligations under this Agreement to any third party, without the prior approval in writing of the other Party. Notwithstanding the foregoing, for the purpose of financing the Facility, EIIPL may assign or create security over its

rights & interests under or pursuant to a) this agreement and b) any agreement related to the Facility in favour of the Lender. The Lender or their nominees shall not be prevented or impeded by EIL from enforcing any other security created by EIIPL over the Facility in favour of the Lender in terms of the Financing Documents.

EIL agrees and undertakes to enter into such agreements and/or documents with the Lender to give effect to assignment by EIIPL in favour of the Lender."

10. The Facility Agreement was amended from time to time. A Facility Usage Agreement dated 12.08.2013 has been brought on record, entered between Corporate Debtor and Respondent No.2, which also oblige payment of facility usage charges by Corporate Debtor. Facility Usage Agreement dated 12.08.2013 clearly mandates that the Corporate Debtor shall operate, maintain and use the Facility, but Corporate Debtor shall have no right whatsoever in the ownership of the Facility. Clause 2.2 (d) of the Facility Usage Agreement is as follows:

"2.2 (d) Notwithstanding that WWIL will be operating, maintaining and using the Facility, the ownership of the Facility shall remain solely with WWIIPL, and except for the right to operate, maintain and use the Facility, WWIL will have no right whatsoever in the ownership of the Facility."

11. There is no dispute between the parties that Respondent No.2, the subsidiary of the Corporate Debtor, entered into two Loan Agreements of Rs.90 crores each and Hypothecation Deed was also entered. An Agreement

was executed by appointing Corporate Debtor to operate, maintain and use the power switch yards/ substations/ grids etc. The Assignment Agreement was also executed by Respondent No.2, styled as Conditional Deed of Assignment of Project Agreements.

12. The EoI dated 25.04.2022, which was issued by Respondent No.1 for appointment of operation and maintenance contractor for carrying out operation and maintenance of switchyards (substations) was challenged by RP of the Appellant before the Adjudicating Authority by filing IA No.422 of 2022. Respondent No.1 in its reply has brought on record that in the CIRP of the Corporate Debtor, the RP brought an agenda for consideration as to whether the payment of dues to be made to Respondent No.2 of facility usage charges, where a decision could not be taken for payment of usage charges and Respondent No.1, who is also Member of the CoC, objected and submitted that Respondent No.1 is entitled for receiving the payment. It is submitted that action under the SARFAESI Act was initiated by Respondent No.1 against Respondent No.2 as per the rights conferred on it by way of Loan Agreement, Hypothecation Agreement and Conditional Deed of Assignment. The Appellant filed an Application in this Appeal praying for injuncting Respondent No.1 from proceeding with SARFAESI Act, which Application was decided by this Tribunal by order dated 25.05.2023, refusing to stay the SARFAESI proceedings. Order dated 25.05.2023 is as follows:

"**25.05.2023: <u>I.A. No. 2243 of 2023</u>**

The Applicant is seeking a direction that Respondent No. 1 not to take action under Section 13(4) if SARFAECI Act in pursuance to the Notice dated 25.04.2023.

2. The case of the Appellant is that under the contract dated 21.12.2007 he is operating the facility.

3. Learned Counsel for the Respondent submits that action under Section 13(4) of SARFAECI Act is not against the Appellant and is against the Subsidiary and Section 13(4) cannot be interjected by the Appellant.

4. After considering the submission of the Counsel of the parties, we are of the view that action under Section 13(4) of SARFAECI Act in pursuance of the notice dated 25.04.2023 is not restrained by this Tribunal, however, operating contract be not interfered with by taking action under Section 13(4) SARFAECI Act.

5. Let Reply Affidavit be filed by Respondents within two weeks.

7. This order is without prejudice to any right of the Respondent.

List this appeal itself 'For Hearing' on **18th July, 2023.**"

13. The main submission, which has been advanced by learned Counsel for the Appellant is that EoI issued by Respondent No.1 violates Section 14(1)(d) of the IBC. Section 14(1)(d) of the IBC is as follows:

"14.(1) (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central

> Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;"

14. The learned Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in ***Rajendra K. Bhutta vs. Maharashtra Housing and Area Development Authority and Anr. – (2020) 13 SCC 208***. The Hon'ble Supreme Court in the aforesaid judgment in paragraphs 14, 15 and 18 has laid down following:

> "**14.** A bare reading of Section 14(1)(d) of the Code would make it clear that it does not deal with any of the assets or legal right or beneficial interest in such assets of the corporate debtor. For this reason, any reference to Sections 18 and 36, as was made by NCLT, becomes wholly unnecessary in deciding the scope of Section 14(1)(d), which stands on a separate footing. Under Section 14(1)(d) what is referred to is the "recovery of any property". The "property" in this case consists of land, admeasuring 47 ac, together with structures thereon that had to be demolished. "Recovery" would necessarily go with what was parted by the corporate debtor, and for this one has to go to the next expression contained in the said sub-section.
>
> **15.** One thing is clear that "owner or lessor" qua "property" is then to be read with the expression "occupied or in the possession of". One manner of reading this clause is to state that whether recovery is sought by an owner or lessor, the property should either be occupied by or be in the possession of the corporate debtor. The

difficulty with this interpretation is that a "lessor" would not normally seek recovery of property "occupied by" a tenant — having leased the property, a transfer of property has taken place in favour of a tenant, "possession" of which would then have to be recovered. This is where the Latin maxim reddendo singula singulis comes in. In an earlier judgment of this Court in Board of Revenue v. Arthur Paul Benthall [Board of Revenue v. Arthur Paul Benthall, (1955) 2 SCR 842 : AIR 1956 SC 35] , this Court dealt with two different expressions used in Sections 5 and 6 of the Stamp Act, 1899, and held : (SCR p. 846 : AIR p. 38, para 4)

> "4. We are unable to accept the contention that the word "matter" in Section 5 was intended to convey the same meaning as the word "description" in Section 6. In its popular sense, the expression "distinct matters" would connote something different from distinct "categories". Two transactions might be of the same description, but all the same, they might be distinct.
>
> If A sells Black-acre to X and mortgages White-acre to Y, the transactions fall under different categories, and they are also distinct matters. But if A mortgages Black-acre to X and mortgages White-acre to Y, the two transactions fall under the same category, but they would certainly be distinct matters.
>
> If the intention of the legislature was that the expression "distinct matters" in Section 5 should be understood not in its popular sense but narrowly as meaning different categories in the Schedule, nothing would have been easier than to say so. When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the expression "distinct

matters" in Section 5 and "descriptions" in Section 6 have different connotations."

18. Regard being had to the aforesaid authorities, it is clear that when recovery of property is to be made by an owner under Section 14(1)(d), such recovery would be of property that is "occupied by" a corporate debtor."

15. The learned Counsel for the Appellant has further relied on paragraphs 19 and 21 of the above judgment of the Hon'ble Supreme Court, which are as follows:

"**19.** The expression "occupied" has been the subject-matter of decision in a number of judgments in different contexts. Thus, in Industrial Supplies (P) Ltd. v. Union of India [Industrial Supplies (P) Ltd. v. Union of India, (1980) 4 SCC 341] , this Court was faced with the following question : (SCC pp. 344-45, para 2)

"2. The appeals raise a question of far-reaching importance, namely, whether a raising contractor of a coal mine is an owner within the meaning of sub-section (1) of Section 4 of the Coking Coal Mines (Nationalisation) Act, 1972 (hereinafter referred to as "the Nationalisation Act"); and if so, whether the fixed assets like machinery, plants, equipment and other properties installed or brought in by such a raising contractor vest in the Central Government. They also give rise to a subsidiary question, namely, whether subsidy receivable from the erstwhile Coal Board established under Section 4 of the Coal Mines (Conservation, Safety and Development) Act, 1952 up to the specified date, from a fund known as Conservation and Safety Fund, by such raising contractor prior to the appointed day, can be realised by the Central Government by virtue of their powers under sub-

section (3) of Section 22 of the Nationalisation Act, to the exclusion of all other persons including such contractor and applied under sub-section (4) of Section 22 towards the discharge of the liabilities of the coking coal mine, which could not be discharged by the appointed day."

21. Likewise, in Dunlop (India) Ltd. v. A.A. Rahna [Dunlop (India) Ltd. v. A.A. Rahna, (2011) 5 SCC 778 : (2011) 3 SCC (Civ) 148] , this Court was concerned with Section 11(4)(v) of the Kerala Buildings (Lease and Rent Control) Act, 1965 which was set out in para 19 of the judgment as follows : (SCC p. 794)

"11. (4)(v) if the tenant ceases to occupy the building continuously for six months without reasonable cause."

Coming to the word "occupy" in the said section, this Court then held : (Dunlop India Ltd. case [Dunlop (India) Ltd. v. A.A. Rahna, (2011) 5 SCC 778 : (2011) 3 SCC (Civ) 148] , SCC pp. 794-95 & 799-800, paras 21, 25 & 29-30)

"21. The word "occupy" used in Section 11(4)(v) is not synonymous with legal possession in technical sense. It means actual possession of the tenanted building or use thereof for the purpose for which it is let out. If the building is let out for residential purpose and the tenant is shown to be continuously absent from the building for six months, the court may presume that he has ceased to occupy the building or abandoned it. If the building is let out for business or commercial purpose, complete cessation of the business/commercial activity may give rise to a presumption that the tenant has ceased to occupy the premises. In either case, legal possession of the building by the tenant will, by itself, be not sufficient for refusing an order of eviction unless the tenant proves that there was a reasonable cause for his having ceased to occupy the building.

* * *

25. The Court highlighted the distinction between the terms "possession" and "occupy" in the context of rent control legislation in the following words : (Ram Dass case [Ram Dass v. Davinder, (2004) 3 SCC 684] , SCC pp. 687-88, para 7)

> '7. The terms "possession" and "occupy" are in common parlance used interchangeably. However, in law, possession over a property may amount to holding it as an owner but to occupy is to keep possession of by being present in it. The rent control legislations are the outcome of paucity of accommodations. Most of the rent control legislations, in force in different States, expect the tenant to occupy the tenancy premises. If he himself ceases to occupy and parts with possession in favour of someone else, it provides a ground for eviction. Similarly, some legislations provide it as a ground of eviction if the tenant has just ceased to occupy the tenancy premises though he may have continued to retain possession thereof. The scheme of the Haryana Act is also to insist on the tenant remaining in occupation of the premises. Consistently with what has been mutually agreed upon, the tenant is expected to make useful use of the property and subject the tenancy premises to any permissible and useful activity by actually being there. To the landlord's plea of the tenant having ceased to occupy the premises it is no answer that the tenant has a right to possess the tenancy premises and he has continued in juridical possession thereof. The Act protects the tenants from eviction and enacts specifically the grounds on the availability whereof the tenant may be directed to be evicted. It is for the landlord to make out a ground for eviction. The burden of proof lies on him. However, the onus keeps shifting. Once the landlord has been able to show that the

tenancy premises were not being used for the purpose for which they were let out and the tenant has discontinued such activities in the tenancy premises as would have required the tenant's actually being in the premises, the ground for eviction is made out. The availability of a reasonable cause for ceasing to occupy the premises would obviously be within the knowledge and, at times, within the exclusive knowledge of the tenant. Once the premises have been shown by evidence to be not in occupation of the tenant, the pleading of the landlord that such non-user is without reasonable cause has the effect of putting the tenant on notice to plead and prove the availability of reasonable cause for ceasing to occupy the tenancy premises.'

* * *

29. In Ananthasubramania Iyer v. Sarada Amma [Ananthasubramania Iyer v. Sarada Amma, 1978 SCC OnLine Ker 57 : 1978 KLT 338] , the learned Single Judge of the Kerala High Court held : (SCC OnLine Ker para 6 : KLT pp. 339-40, para 3)

The physical absence of the tenant from the building for more than six months would raise a presumption that he had ceased to occupy the building and that he had abandoned it and that it was for the tenant to dislodge the presumption and establish that he had the intention to continue to occupy the tenanted premises.

30. The word "occupy" appearing in Section 11(4)(v) of the 1965 Act has been interpreted by the Kerala High Court in a large number of cases. In Mathai Antony v. Abraham [Mathai Antony v. Abraham, 2004 SCC OnLine Ker 307 : (2004) 3 KLT 169] , the Division Bench of the High Court referred to several judgments including the one of this Court in Ram Dass v. Davinder [Ram Dass v. Davinder, (2004) 3 SCC 684] and observed : (Mathai Antony

case [Mathai Antony v. Abraham, 2004 SCC OnLine Ker 307 : (2004) 3 KLT 169] , SCC OnLine Ker para 6)

> '6. The word "occupy" occurring in Section 11(4)(v) has got different meaning in different context. The meaning of the word "occupy" in the context of Section 11(4)(v) has to be understood in the light of the object and purpose of the Rent Control Act in mind. The rent control legislation is intended to give protection to the tenant, so that there will not be interference with the user of the tenanted premises during the currency of the tenancy. The landlord cannot disturb the possession and enjoyment of the tenanted premises. Legislature has guardedly used the expression "occupy" in Section 11(4)(v) instead of "possession". Occupy in certain context indicates mere physical presence, but in other context actual enjoyment. Occupation includes possession as its primary element, and also includes "enjoyment". The word "occupy" sometimes indicates legal possession in the technical sense; at other times mere physical presence. We have to examine the question whether mere "physical possession" would satisfy the word "occupy" within the meaning of Section 11(4)(v) of the Act. In our view, mere physical possession of premises would not satisfy the meaning of "occupation" under Section 11(4)(v). The word "possession" means holding of such possession, animus possidendi, which means, the intention to exclude other persons. The word "occupy" has to be given a meaning so as to hold that the tenant is actually using the premises and not mere physical presence or possession. A learned Single Judge of this Court in Padinjareyil Abbas v. Sankaran Namboodiri [Padinjareyil Abbas v. Sankaran Namboodiri, 1992 SCC OnLine Ker 316 : (1993) 1 KLT 76] took the view that the word "occupation" is used to denote the tenant's

> actual physical use of the building either by himself or through his agents or employees. The Division Bench of this Court of which one of us is a party (Radhakrishnan, J.), in Rajagopalan v. Gopalan [Rajagopalan v. Gopalan, (2004) 1 KLT (SN) 54] interpreting Section 11(4)(v) took the view that occupation in the context of Section 11(4) means only physical occupation, which requires further explanation. Occupation in the context of Section 11(4)(v) means actual user. If the landlord could establish that in a given case even if the tenant is in physical possession of the premises, the premises is not being used, that is a good ground for eviction under Section 11(4)(v) of the Act. Section 11(4) uses the words "put the landlord in possession" and not "occupation", but Section 11(4)(v) uses the words "the tenant ceases to occupy". In Section 11(4)(v) in the case of landlord the emphasis is on "possession" but in the case of tenant the emphasis is on "occupation". The word "occupy" has a distinct meaning so far as the Rent Act is concerned when pertains to tenant, that is, possession with user.'"
>
> (emphasis in original)"

16. The submission of learned Counsel for the Appellant is that the Appellant is in occupation of Facility, hence, any action to appoint another operating and maintenance contractor is in breach of Section 14(1)(d).

17. When we look into the Facility Use Agreement entered between Corporate Debtor and Respondent No.2, it is clear that the Appellant has been handed over the substations (switchyards) for operation and maintenance and there is a clear Agreement between the parties that notwithstanding the

Corporate Debtor operating, maintaining and usage of Facility, the ownership of the Facility shall remain solely with Respondent No.2. Except for the right to operate, maintain and use the Facility, the Corporate Debtor will have no right whatsoever in the ownership of the Facility. We have also extracted Clause 2.2.(d) of the Facility Agreement dated 12.08.2013. Furthermore, Clauses of Facility Agreement dated 28.12.2007 Clause 2.2. (d) provides as follows:

> "2.2.(d) Notwithstanding the handing over of Facility by EIIPL to EIL for operating, maintaining and using for generating the power, the ownership of the Facility shall remain solely with EIIPL, and except for mere right to operate, maintain and use the Facility EIL will have no right whatsoever in the Facility."

18. The learned Counsel for the Appellant has relied on Clause 2.1 of Facility Agreement dated 28.12.2007 to submit that Facility has been handed over to use, operate and maintain. Clause 2.1 is as follows:

> "**2.1 Right to use the Facility**
>
> Subject to and in accordance with the terms and conditions set forth in this Agreement, EIIPL hereby grants EIL and authorises EIL to use operate and maintain the Facility. For this purpose, EIIPL hereby agrees to handover the Facility to EIL."

19. There can be no dispute that Facility has been handed over to the Appellant for operation and maintenance. Further, Respondent No.2 was also

obliged to provide access to representative of the Corporate Debtor for operating and maintenance, but the mere fact that the Appellant has been permitted to use the Facility for operation and maintenance, cannot lead to conclusion that the Corporate Debtor is in occupation of the Facility and there is any breach of Section 14(1)(d). Section 14(1)(d) of the IBC prohibits recovery of any property by an owner or lessor, where such property is occupied and in possession of the Corporate Debtor. The present is not a recovery of the Facility by owner or lessor, who is Respondent No.2 herein. Further, the Facility is neither in occupation, nor in possession of the Corporate Debtor, since the Corporate Debtor has been appointed as operating and maintenance contractor. The Facility, which was constructed by Respondent No.2, the subsidiary of the Corporate Debtor and has been hypothecated and charged with the lender, i.e. Respondent No.1, it continues to be in possession and occupation of Respondent No.2, the subsidiary of the Corporate Debtor. The Adjudicating Authority has considered the various Clauses of the Facility Agreement and has rightly come to the conclusion that the EoI issued by Respondent No.1 to appoint another operating and maintenance contractor, cannot be interfered with.

20. The fact is not disputed that the Corporate Debtor is not paying the facility use charges and is trying to set off the same against the claim against Respondent No.2. It is due to the non-payment of facility use charges, Respondent No.2 is unable to service the debt, causing an event of default for

which Respondent No.1 has already initiated proceedings under the SARFAESI Act, 2002 against Respondent No.2.

21. In the facts of present case, we are of the view that no error has been committed by the Adjudicating Authority in rejecting the Application filed by the Appellant. We do not find any merit in the Appeal. The Appeal is dismissed. There shall be no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

12th August, 2024

Ashwani