

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

IB-986/(ND)/2020

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

JIL Information Technology Limited

Registered office at:
54, Basant Lok, Vasant Vihar,
New Delhi- 110057

...Applicant/Operational Creditor

Versus

Qi Network Enterprise Private Limited

Registered Office at:
409-410, Somdutt Chambers- II,
Bhikaji Cama Palace,
New Delhi -110066

...Respondent/Corporate Debtor

Coram:

SHRI. P.S.N. PRASAD, Hon'ble Member (Judicial)
DR. V.K. SUBBURAJ, Hon'ble Member (Technical)



Counsel for Applicant: Mr. Srinivas Kotni. Mr. Shantam Gorawara and Mr. Akshay Kumar, Advocates.

Counsel for Respondent: Ms. Purnima Maheshwari and Mr. Alok Gupta, Advocates.

ORDER

Per SH. P.S.N. PRASAD, MEMBER (JUDICIAL)

Date: 09.03.2021

1. This is an application filed by the Applicant JIL Information Technology Limited through its Authorized Representative Ms. Sunita Joshi seeking to initiate corporate insolvency resolution process ("CIRP") under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code") of the Respondent Qi Network Enterprises Private Limited for the alleged default on the part of the Respondent in clearing the debt of Rs. 97,73,307/- (Rupees Ninety-Seven Lakh Seventy-Three Thousand Three Hundred Seven only), as alleged by the applicant, towards the material supplied by the Applicant. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

- i. The applicant submits that on 18.02.2017, National Informatics Centre Services Inc. ("NICSI") received an

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order from the Indian Institute of Technology, Ropar ("IIT Ropar") and on that basis, NICS I issued a purchase order to the Respondent outsourcing all Optical Fibre and Data Cable delivery and installation work. Thereafter, the Respondent after receiving the purchase orders, outsourced the above-mentioned optical fibre and data cable delivery and installation work to the Applicant.

- ii. The applicant submits that it agreed to deliver the networking items at Indian Institute of Technology, Barapool Village, Ropar, Punjab as per the purchase orders received by the Respondent. The Applicant further submitted that it further agreed to do a final survey based on the designs provided by the OEMs and submit the bill of material and LAN drawings etc. as required and necessary in accordance with the terms and conditions provided in the Purchase Orders.
- iii. That in Lieu of supply of material and services the applicant raised 17 invoices aggregating to a total of Rs. 2,63,52,090/-. That after adjusting an amount



of Rs. 1,31,184/- towards TDS on 31.03.2017, an amount of Rs. 2,62,20,906/- was to be paid by the Respondent to the applicant.

- iv. The applicant stated in the application that some installation work had to be delayed due to the fact that the site at IIT Ropar was not ready hence, installation of material was difficult. The applicant further submits that the same had been discussed by NICSI through its General Manager, Ms. Arpita Burman in the meeting with Chairman, Construction Management Group (CMG) on 26.02.2018, Mr. Surendra Kesari and Mr. Sanjeev Jaitly were also present in this meeting as representatives of the Respondent. That in the said meeting, a decision was reached whereby it was decided that: (i) payments will be made on verification of all items supplied; (ii) all damaged optical fibre was to be repaired using existing inventory; and (iii) active and passive installation details were finalised. Thereafter, payments were released by NICSI to the Respondent.



- v. That the Respondent made payments of Rs. 1,24,21,990.00/- (Rupees One Crore Twenty-Four Lakh Twenty-One Thousand Nine Hundred and Ninety only) to the Applicant by 30.09.2017 leaving a balance amount of Rs. 1,37,98,916/- (Rupees One Crore Thirty-Seven Lakh Ninety-Eight Thousand Nine Hundred and Sixteen only) unpaid and due. That thereafter, Respondent sent a letter dated 28.02.2018 wherein it confirmed that Rs. 1,37,98,916/- (Rupees One Crore Thirty-Seven Lakh Ninety-Eight Thousand Nine Hundred and Sixteen only) remained payable to the Applicant.
- vi. The applicant submits that a credit note was issued in favour of the Respondent for the amount of Rs. 15,50,000/- on 07.05.2018. Thereafter, the Respondent made a further payment of Rs. 24,75,609/- to the Applicant on 14.05.2018, Hence, as alleged by the applicant the cumulative amount of operational debt due to be paid by the Respondent is Rs. 97,73,307/-.



- vii. The applicant stated that the Respondent sent a letter dated 18.07.2018 to the applicant and terminated the purchase orders.
- viii. That the applicant sent a Legal Notice dated 30.05.2019, in response to which it received a reply from the Respondent dated 25.06.2019, applicant further submitted that multiple requests were made to the Respondent regarding unpaid debt.
- ix. That applicant submits that a statutory Demand notice under section 8 of IBC, 2016 vide dated 15.01.2020 was delivered to the Respondent. It was further submitted by the applicant that a reply wrongly dated 15.01.2020 received by applicant on 20.01.2020 from the Respondent wherein, the Respondent stated the existence of dispute.

2. Consequent to the notice issued by this Tribunal, the Counsel for the Respondent filed its reply Affidavit on behalf of the Respondent stating that:

- i. The Respondent submitted that Purchase Orders were issued by National Informatics Centre Services



Inc. ("NICSI") to Respondent dated 18/02/2017, for supply, installation and testing of Local Area Network (LAN) which include supply of Optical Fibre Cable and Data Cable connectivity at 'IIT Ropar'. Thereafter, for completion of the said Purchase Orders the Respondent placed Purchase Orders bearing Nos. Qi/PO/JIU16-17/165,167,168,169, dated 22/02/2017 and Qi/PO/JIU16-17/189, dated 14/03/2017 i.e. '5 Purchase Orders (P.O's) on the Applicant as per the terms and conditions stated therein and not as per Purchase Orders placed on Respondent by NICSI.

- ii. The Respondent submits that the said 5 Purchase orders were different in Items/Materials to be delivered, their rates and quantities as well as co-related services i.e., testing, installation rates and quantities. That as per Clause 1 of the all the said '5 P.Os the work was to be completed by 24.03.2017 in all respects which was the essence of the contracts. That the amount of Rs. 2,62,20,906/- was the total value of the '5 P.Os and the same was

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payable if the entire contract was to be executed within time as per the Bill of Material and Bill of Services.

- iii. The Respondent states that he had paid the entire value of Bill of Materials delivered by the Applicant after adjusting the material which was delivered by them at site and levy of 6% penalty as per the said 5 Purchase Orders for not adhering to time schedule.
- iv. The Respondent submitted that for the testing/ installation of the work i.e., Items given in Annexure 2 of the '5 Purchase orders' the Applicant had not completed testing and installation of the deliveries as can be concluded from the e-mail correspondences from 26.02.2018 till 19.03.2018 between the applicant and Respondent. Hence, as result of the said breach of the terms and conditions, the Respondent terminated the said '5 Purchase Orders vide letter dated 18.07.2018.
- v. That the 5 Purchase Orders were terminated vide letter dated 18.07.2018 as the Applicant had not completed the entire work of supply, installation and



testing. The Respondent further submits that the stipulated time schedule for completion of work was delayed to the satisfaction of IIT Ropar (end buyer).

- vi. The Respondent stated that payment of Rs.1,24,21,990/- dated 29.09.2017 and Rs.24,75,609/- dated 14.05.2018 has been made to Applicant and a balance payment of Rs.6,79,400/- is payable to Applicant which was asked to be collected. That the applicant in the rejoinder notice 26.08.2019 stated that it would not settle for anything less than what was demanded and did not collect the same. The Respondent states that it is willing to pay the balance amount of Rs. 6,79,400/.

3. The Counsel for the Applicant has filed its written submissions in respect to the submissions made in the application:

- That the Supreme Court in ***Mobilox Innovations Private Limited VS. Kirusa Software Private Limited [PARA 24, 40 AND 45]***, wherein, it was held that the dispute raised should be pre-existing

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(i.e., it should exist before the receipt of the demand notice or invoice). That the dispute should be real and not a sham, frivolous, vexatious, spurious or a mere bluster.

- That the **Hon'ble NCLAT** in the case of **Gajendra Parihar Vs Devi Industrial Engineers and Ors** reported at MANURVL/0215/2020 (Para No. 5,6, 7,8,9 and 11 of the judgment) wherein it was held that the dispute should be a pre-existing dispute regarding the deficiency of goods or services and the dispute should be raised soon after the commencement of work. That such dispute should be raised on various occasions and it should be established through exchange of emails between the parties.

4. The counsel for the Respondent has filed its written submissions relying upon the following judgements in respect to the submissions made in the reply:

- That the Supreme Court in **Mobilox Innovations Private Limited VS. Kirusa Software Private**



Limited [PARA 25, 44, 45 AND 46]., wherein, it was held that the dispute raised should be pre-existing (i.e., it should exist before the receipt of the demand notice or invoice).

- That the **Hon'ble NCLAT** in the case of **Gajendra Parihar Vs Devi Industrial Engineers and Ors.** bearing AT No. 1370/2019 (Para No. 10 and I3 of the judgment).
- That the Hon'ble NCLAT in the case of **Kuntal Constructions P Ltd Vs Bharat Hotels Ltd bearing Company Appeal (AT) Insolvency No. 542/2020** relevant para 20 - where dispute existing prior to issuance of Sec.8 demand notice, hence the insolvency provisions cannot be invoked.

5. We have heard the Ld. Counsels for the Operational Creditor and Corporate debtor and perused the averments made in the application as well as the documents enclosed with the application.



6. On Perusal of Application as well as the documents enclosed, the Letter communications and Email Communication between the operational creditor and the Corporate Debtor clearly establishes the fact that there was pre-existing dispute between both the parties.
7. The fact that the Termination letter dated 18.07.2018, wherein the Corporate Debtor terminated the 5 Purchase Orders contract and requested the Operational Creditor to handover the site to Corporate Debtor owing to deficiency in services and non-performance of Contract as stated in the Termination letter dated 18.07.2018, along with that the Operational Creditor prior to the issuance of Statutory demand notice under section 8 of IBC, 2016 dated 15.01.2020, sent a legal notice dated 30.05.2019 in respect to recovery of its dues which was duly replied by the Corporate Debtor vide its reply dated 25.06.2019 stating that the amount claimed by the Operational Creditor is disputed owing to non- performance of 5 Purchase orders.
8. It is further pertinent to mention that the deficiency in services was raised by the Corporate Debtor in the Email Trail communication vide dated 01.02.2018, 21.05.2018,

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28.05.2018 and 14.06.2018 between the Operational creditor and Corporate Debtor. Secondly, the Termination Letter dated 18.07.2018, wherein the Corporate Debtor terminated the 5 Purchase orders owing to Non-performance of contract and finally the Legal Notice delivered dated 30.05.2019 clearly establishes the fact that there was pre-existence of Dispute between both the parties prior to the issuance of demand notice.

9. The Hon'ble Supreme Court In "***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC On Line SC 353***", analyzed the meaning of dispute with respect to Operational Creditors and observed:

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or

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invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.”

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?”

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

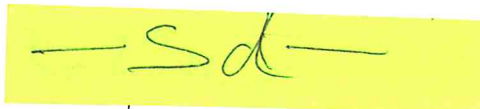
10. From the aforesaid decision, it is clear that the dispute must exist before the receipt of demand notice. Be that as it may, on appraisal of the arguments advanced by the Ld. Counsels, it emerges that there were disputes existing prior to the issuance of the Demand Notice.

11. For the reasons discussed above, since there is a pre-existing dispute between the parties, we have no option but

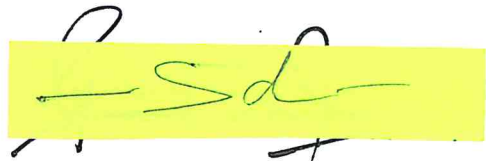


to reject the prayer of the Operational Creditor to initiate proceedings under Section 9 of IBC, 2016.

12. Accordingly, we hereby **dismiss** the present application.



(DR. V.K. SUBBURAJ)
MEMBER (TECHNICAL)



(SH. P.S.N. PRASAD)
MEMBER (JUDICIAL)

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