

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. IV)**

Company Petition No. IB-2694/ND/2019

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

IN THE MATTER OF:

GUPSHUP TECHNOLOGY INDIA PVT. LTD.

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

EXCLUSIFE TECHNOSOFT PVT.LTD.

...RESPONDENT/ CORPORATE DEBTOR

ORDER PRONOUNCED ON: 01.09.2020

CORAM:

DR. DEEPTI MUKESH

HON'BLE MEMBER (JUDICIAL)

SHRI. HEMANT KUMAR SARANGI

HON'BLE MEMBER (TECHNICAL)

IB/2694/ND/2019

Gupshup Technology India Pvt. Ltd. Vs. Exclusife Technosoft Pvt. Ltd.

MEMO OF PARTIES

GUPSHUP TECHNOLOGY INDIA PVT. LTD.

Registered office:

Unit No.1st Floor, Silver Metropolis,
Western Express Highway, Goregaon (East), Mumbai
Maharashtra 400063 IN

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

EXCLUSIFE TECHNOSOFT PVT.LTD.

Registered office:

B-1/307, Sunrise Apartments,
Sector 13, North West
Delhi -110085

...RESPONDENT/ CORPORATE DEBTOR

FOR THE APPLICANT :Mr. Vinod Kumar Chaurasia, Adv.

**FOR THE RESPONDENT :Mr. Nakul Sachdeva,
Ms. Damandeep S. Bhalla, Advs**

ORDER

Per-Dr. Deepti Mukesh, Member (J)

1. The Present Application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), 2016 (for brevity 'the Rules') by Gupshup Technology Pvt. Ltd. (for brevity 'Applicant') through Ms. Nahida Shaikh, being the Assistant Director – Finance, of the applicant, duly authorized vide Board Resolution dated 10th April 2017, with a prayer to initiate the Corporate Insolvency process against Exclusife Technosoft Pvt. Ltd. (for brevity 'Corporate Debtor').
2. The Applicant is a private limited company incorporated on 05.01.2005 under the provision of Companies Act, 1956 bearing CIN No.U72100MH2005PTC150425 and having its registered office at Unit No.1st Floor, Silver Metropolis, Western Express Highway, Goregaon (East), Mumbai Maharashtra 400063. The applicant is involved in the business of providing consultancy services on types and configuration of hardware with or without associated software application.
3. The Corporate Debtor is a private limited Company incorporated on 06.12.2012 under Companies Act, 1956 bearing CIN No.U74110DL2012PYC245779 and having its registered office at b-1/307, Sunrise Apartments Sector-13, Rohini North West Delhi 110085. The corporate debtor is in the business of providing marketing strategies and business solutions to its clients.
4. The applicant submits that on 10th March 2017, a service agreement inclusive of statement of service and determination of price, effective from 1st February 2017, was signed between the parties. The copy of agreement dated 10.03.2017 has been annexed. As per the agreement the applicant provided text based SMS Push services for India to the corporate debtor.
5. The applicant submits that monthly invoices were raised against which the corporate debtor made regular payment till July 2018 and handed over post dated cheques of Rs. 85,04,730/- against part payment of the outstanding dues. The applicant

submits that the respondent defaulted in payment from August 2018, while services were still being provided to them by the applicant.

6. The applicant submits that the applicant has been providing services to the satisfaction of the respondent and no complaints regarding the services rendered by the applicant or about the invoices was ever raised by the corporate debtor during the years of service i.e. between the years 2016-2019. The applicant submits that as per the terms of the Service Agreement dated 10th march 2017

"Clause 4.2 if that the corporate debtor has any complaint, it has to be raised within 15 days of receiving of invoices."

7. The applicant submits that both the parties met on 21st January 2019, to arrive at mutual understanding with respect to the payment of outstanding dues after August 2018.

a) The applicant proposed a plan wherein the corporate debtor shall honor the dishonored cheque of Rs.9,22,062/- dated 14.11.2018 immediately and pay the outstanding sum of 1 Crore within 6 months. The proposed plan was not accepted by the corporate debtor.

b) The corporate debtor offered a plan wherein the corporate debtor shall honor the dishonored cheque of Rs.9,22,062/- dated 14.11.2018 immediately and pay the outstanding sum of 1crore within 25 months, from January 2019 through an equal installment of Rs.4,00,000/- each. The said plan was rejected by the applicant.

The minutes of the meeting dated 21.01.2019 has been shared by the corporate debtor to the applicant vide email dated 22.01.2019 and the same had been annexed.

8. Thereafter, vide email dated 23.01.2019, the corporate debtor proposed a payment plan of 20 months, wherein the corporate debtor shall honor the dishonored cheque of Rs.9,22,062/- dated 14.11.2018 immediately and pay the outstanding sum of 1 crore within 20 months, from February 2019 through an equal installment of

Rs.5,00,000/- each. The said plan vide email dated 23.01.2019 was not accepted by the applicant.

9. The applicant submits that, during this period the post dated cheques for the period of Nov 2018 - Jan 2019 issued by the corporate debtor were presented for encashment by the applicant, which were dishonored and returned vide bank memo dated 28.01.2019 with the reason "*payment stopped by drawer*". The copies of said cheques with bank memos are annexed.
10. Further, vide email dated 29.01.2019, the corporate debtor proposed a plan of 10 months, wherein the corporate debtor shall pay the applicant Rs. 15 Lacs in the month of Feb & March 2019 and thereafter, Rs 11 Lacs per month till Nov 2019 to clear the outstanding dues. The said plan was also put down by the applicant.
11. The applicant submits that the even after that the post dated cheques for the period of Feb 2019 issued by the corporate debtor were presented for encashment by the applicant, which were dishonored and returned with bank memo "*payment stopped by drawer*". The copies of said cheques with bank memos are annexed. The applicant vide email dated 30.01.2019 sent a reminder to clear the outstanding dues but nothing was coming from the corporate debtor. However, the corporate debtor started raising frivolous complaints thereafter.
12. The applicant issued a demand notice dated 22.04.2019, under Section 8 of the code calling upon the corporate debtor to pay the total outstanding amount of Rs.1,21,45,201/- . The corporate debtor sent a reply to the said notice on 13.05.2019, wherein the corporate debtor raised a dispute with regards to the breach of the service agreement, quality of services provided and the amount of total outstanding due in favour of the applicant.
13. The Applicant filed the present Application under section 9 of IBC, 2016 and served the copy of this application which was duly served upon the Corporate Debtor as per service affidavit. As per Form V, the total debt outstanding is 1,21,45,201/- the said

amount includes the principal amount of Rs. 1,11,65,990/- plus interest Rs.9,79,211/-.

14. The corporate debtor filed reply and raised the following objections:

- a) The main objection raised by the corporate debtor is that there exists a pre-existing dispute with regard to the alleged debt and there exists no cause of action with regards present application.
- b) It is further submitted that since the notice of dispute in reply to the Section 8 notice of the applicant, has been communicated to applicant, the application does not deserve to be admitted in view of the dispute raised by the corporate debtor.
- c) The corporate debtor submits that as per the emails dated 15.11.2018 and 05.02.2019 annexed along with the application, it is apparent that a dispute with regard breach of contract existed much prior to the receipt of Demand Notice dated 22.04.2019. Further, the amount claimed herein has also been disputed vide email exchanged between the parties during September 2018 to November 2018. The said emails have been annexed. The amount claimed by the applicant has been disputed, as the terms of the contract has been altered by the applicant unilaterally, without any consultation with the corporate debtor as per Clause 18, of the service agreement.

15. The applicant filed rejoinder wherein the applicant has denied all contentions of the corporate debtor and averred as follows:

- a) That the corporate debtor had issued cheques against corresponding invoices, which got dishonored. The corporate debtor also offered to settle the amount of Rs. 1,11,51,174/- vide various payment plans proposed in the meeting dated 21.01.2019 and email conversation thereafter. This in itself is an admission of liability on part of the corporate debtor.
- b) It is further submitted that the corporate debtor was intimated regarding the revision in rates i.e. 10.50 paise per message and GST additionally through

email dated 03.05.2018 (which has been annexed). The corporate debtor made payment as per the revised rates in the month of June and July 2018.

c) The applicant submits that the email communication of the clients annexed by the corporate debtor, wherein dispute has been raised stands resolved vide email dated 15.11.2018 sent by the applicant to the client.

16. Perused the documents and considered the submissions made. On perusal of the minutes of meeting dated 21.01.2019, email dated 23.01.2019 and 29.01.2019, we find that the corporate debtor has acknowledged the debt becoming due to the applicant time and again. The trails of emails describing the efforts made by the parties to reach the settlement for payment of dues, the corporate debtor issuing post dated cheques to the applicant for payment of the said debt confirms that the operational debt exists. The corporate debtor has tried to take shelter of the emails, where the difference of opinion had occurred, but it is further seen that thereafter also the amount had remained payable to the applicant as agreed by the corporate debtor. Therefore, it is clearly established that the default has occurred after the debt was admitted by the corporate debtor. The Hon'ble Supreme Court in "**Innovative Industries Ltd. Vs. ICICI Bank and Ors. – (2018) 1 SCC 407**" observed and held as follows: -

"The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an installment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. The moment the adjudicating authority is

satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

Hence, the present case is fit to be admitted.

17. The Hon'ble Supreme Court in "**Mobilox Innovative Private Limited vs. Kirusa Software Private Limited**", has very categorically described the dispute to be considered as a ground for rejecting or admitting the application :

"It is clear , therefore that once the Operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility . It is clear that such notice must bring to the notice of operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which required 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."

In present case it can be concluded that even though a dispute has been raised by the corporate debtor, but it is spurious and unable to categorize as genuine dispute as clarified by the Hon'ble Supreme Court in Mobilox Case. Hence, contention of the corporate debtor, of a pre existing dispute to reject the applicant is not acceptable specially when the corporate debtor has admitted the dues and agreed to repay by offering various plans from time to time.

18. The date of default is 15th September 2018 and the present application is filed on 15th October 2019. Hence the application is filed within the time and not barred by limitation.
19. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.
20. The Applicant has filed an affidavit in compliance of section 9(3)(b) which is placed on record.
21. The present application is filed on the Performa prescribed under Rule 6 of the Insolvency and Bankruptcy Code, 2016 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 r/w Section 9 of the code and is complete. The applicant is entitled to claim its dues, establishing the default in payment of the operational debt. Hence, the application is admitted.
22. As a consequence of application being admitted and IRP name suggested by the applicant, this Bench hereby appoints Mr. Ashok Kriplani, having email id: ashok.kriplani1956@gmail.com, mobile no. 9013358210 and registration no. IBBI/IPA-003/IP-N00009/2016-17/10071 as the Interim Resolution Professional, subject to the condition that no disciplinary proceedings are pending against him. The IRP has filed registration certificate and consent Form-2 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule 2016 and made disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016.
23. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come into force.

24. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Ashok Kriplani, to meet out the expenses and perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the applicant.
25. A copy of the order shall be communicated to the Applicant and the Corporate Debtor, as well as to the above named IRP, intimating him about the said appointment, by the Registry. Applicant is also directed to provide a copy of the complete paper book with a copy of this order to the IRP. In addition, a copy of said order shall also be forwarded to IBBI for its records and to ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

SD/-

(HEMANT KUMAR SARANGI)

MEMBER (T)

SD/-

(DR. DEEPTI MUKESH)

MEMBER (J)