

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**KOCHI BENCH, KERALA**

**CP(IBC)/24(KOB)/2021**

(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)

Order delivered on 21.01.2022

Coram:

**Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)**  
**Hon'ble Mr. Shyam Babu Gautam, Member (Technical)**

M/s Nevaeh Technology Private Limited,  
DH-6/31, 02-362,  
Action Area ID, New Town,  
Rajarhat,  
Kolkatta – 700 156.

**... Applicant/Operational Creditor**

**Versus**

Kerala State Electronics Development Corporation Limited,  
Keltron House,  
Vellayambalam,  
Trivandrum – 695 033

**...Respondent/Corporate Debtor**

**Parties/Counsels Present (through video conference)**

For Petitioners ... Shri. Ratnano Banerji, Senior Advocate  
For Respondents ... Shri. E.K Nandakumar, Senior Advocate

**ORDER**

**Per: Ashok Kumar Borah, Member (J)**

1. The applicant initially filed CP No.39 of 2015 before the Hon'ble High Court of Kerala under Section 434(1) and 434(2) of the Companies Act,2013 for winding-up. Meanwhile, on 7<sup>th</sup> December 2016, the Central Government issued the Companies (Transfer of Pending Proceedings) Rules, 2016. As per Rule 5 of that Rules, pending winding-up proceedings could be transferred from the High Court to the NCLT. On 27<sup>th</sup> February 2020 as per the order of the Hon'ble High Court of Kerala the CP No.39 of 2015 was transferred to this Bench, which is numbered as TCP/15/KOB/2020. On 1<sup>st</sup> December 2020, the TCP/15/KOB/2020 was disposed of with a direction to convert it into IBA proceedings complying with the relevant Rules applicable under the I&B code,2016. Thereafter, this application was filed under Section 9 of I&B code,2016 read with Rule 6 of IB(AAA) Rules 2016 which was numbered as CP(IBC)24(KOB)2021. In the application, it is stated that Section 8 notice was issued under I&B Code,2016 on 19.01.2021.
2. The Applicant (Nevaeh Technology Private Limited) ('Operational Creditor' for short) has filed this Application against Kerala State Electronics Development Corporation Limited ('Corporate Debtor' for short) under Section 9 of the Insolvency and Bankruptcy Code, 2016 ["I&B Code" for short] read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("IB Rules" for short) with a request to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.
3. In the requisite Form, under the head "Particulars of Operational Debt" the total amount of Debt is stated to be ₹2,25,03,252.36/- (Rupees Two

Crores Twenty-Five Lakhs Three Thousand Two Hundred and Fifty-Two and paise Thirty-Six Only) inclusive of interest at the rate of 18% per annum till the date of filing of original winding up Petition.

**Submissions by the Operational Creditor:**

4. The Operational Creditor submitted that the Corporate Debtor around February 2009 approached the Operational Creditor through the HCL Info Systems Limited and Embee Software Pvt. Ltd stating that it was interested in the tender published by Kolkata Police for its data centre preparations and modernization of control rooms.
5. The Operational Creditor further stated that the Kolkatta Police requested maintenance support from the Operational Creditor from time to time. The support was rendered in good faith upon the instructions given by the Corporate Debtor and the assurance given by the Kolkata Police to sort out the payment problem of the Operational Creditor with the Corporate Debtor. Accordingly, with due acceptance and concurrence of the Corporate Debtor, the Operational Creditor carried out the job works both original schedule work and additional work at the requisition and instruction of Kolkata Police. Thus entire projects including the additional job works were completed by the Operational Creditor before 29.05.2013 and Kolkata Police issued a memo dated 29.05.2013 confirming that all works both original as well as additional works had been duly completed by the Operational Creditor.
6. The Operational Creditor further contended that privity of contract exists between Corporate Debtor and Operational Creditor. From time to time various payments were made by Corporate Debtor in respect of job executed by the Operational Creditor partly through HCL Info Systems

Limited and Embee Software Pvt Ltd and partly to the Operational Creditor. The last such payment of Rs.13,00,000/- (Rupees Thirteen Lakhs Only) was received by the Operational Creditor from the Corporate Debtor on 31.05.2013.

7. It is further stated that the Corporate Debtor has clearly admitted that the Operational Creditor is the 'Vendor' of the Corporate Debtor. This is evidenced from the e-mail dated 08.12.2014 addressed to the Operational Creditor and in the communication dated 31.12.2014 sent by the Corporate Debtor to the Kolkata Police.
8. Further the Operational Creditor has communicated to the Corporate Debtor through an e-mail dated 09.05.2012 the completion of the Data Centre Project and handing over the entire documentation to the Corporate Debtor. Repeated demands were made by the Operational Creditor to the Corporate Debtor to clear its outstanding dues. But the Corporate Debtor kept on assuring that the outstanding dues would be cleared soon. But they failed to do so. Hence, this application has been filed.

#### **Submissions by the Corporate Debtor:**

9. The Corporate Debtor by filing Counter/Reply submitted that the applicant has not supplied any 'goods' or provided any 'services' to the Respondent/Corporate Debtor. Respondent has not placed any purchase/work order for the supply of any goods or services on the Applicant. Further, there exists no contract/agreement between the Applicant and the Respondent, as evident from the averments and documents placed on record along with the application. Hence, there exists no debt which is payable by the Respondent/ Corporate Debtor.

10. It is further stated that the Applicant has suppressed the fact that the Applicant is a sub-contractor engaged by HCL Info Systems Ltd. There is no privity of contract between the Applicant and the Respondent. It is also stated that the Respondent had emerged as the successful bidder in the tender dated 20.01.2009 floated by the Kolkata police for the preparation of Data Centres and modernization of their control rooms. Thereafter, the work order dated 14.08.2009 was placed by Kolkata Police on the Respondent/ Corporate Debtor for the execution of the aforesaid works.
11. Subsequently, the Respondent issued a work order dated 30.09.2009 on HCL for an amount of Rs.300 Lakhs in furtherance of the works to be executed. Thereafter the HCL had duly implemented the works entrusted vide work order dated 30.09.2009 for which payment due in terms of the work order has also been duly released by the Respondent to HCL.
12. Further, the agreement between this Respondent and HCL was on a principal to principal basis and there is no question of any contractual relationship in the nature of an 'agency'. The Applicant's services were engaged by HCL and the claim with respect to deficiencies in payment ought to have been raised against the HCL. The Respondent is a third party to the arrangement between the Applicant and HCL and they are unaware of the nature/quantum of the works executed by the Applicant/Operational Creditor. The Respondent cannot be made liable for any deficiency in payment on the part of HCL towards the applicant. Hence, the Corporate Debtor sought dismissal of the Application for misjoinder as well as non-joinder of parties.
13. It is also stated that the Respondent never requested the Applicant to provide any documents, pricing, or such details to it at the time of the tender, nor has the Respondent received any such details. They have

denied that the Applicant had carried out the alleged job works at the requisition and instructions of Kolkata Police with the 'due acceptance and concurrence of the Corporate Debtor'. The Applicant itself admits that the alleged 'additional works, 'maintenance support' etc. were provided by the Applicant to the Kolkata Police on their request. Moreover, the Respondent did not issue any 'additional work order' to the Applicant. Hence, the Respondent cannot be mulcted with any liability arising out of the alleged non-payment for these alleged works that were supposedly done at the behest of the Kolkata Police and without the Respondent's knowledge or concurrence.

14. It is further contended that the memo dated 29.05.2013 issued by the Kolkata Police neither makes any reference to the Applicant nor makes any reference to any alleged additional work. The memo states about the original work order placed on HCL, and the said memo has been issued by the Kolkata Police to the Respondent, confirming the acceptance of the components as per the report of the technical experts for the Data Centres at Lalbazar PTS and Special Branch.
15. They have refuted the contention that Respondent has made payment to the Applicant partly through HCL Info Systems Limited and Embee Software Pvt Ltd and partly directly to the Applicant. The amount of Rs. 13,00,000/- released to the applicant is on account of a specific request made by HCL. The payment so made would not give rise to any contractual relationship between the applicant and the Respondent.
16. The Respondent further stated that the invoice dated 08.03.2011 issued by Mr. Pradeep Nair as the 'PO Ref' is a bogus invoice containing a series of concocted bills. Further, in the e-mail dated 08.03.2011 was sent by Mr.

P.K Datta in response to another e-mail dated 08.03.2011, there is no hint of any purchase order having been issued in favour of the Applicant.

17. It is further stated that the applicant referred to an e-mail dated 08.12.2014 and a letter dated 31.12.2014 claiming that the Respondent has admitted the Applicant as its vendor. This letter makes no reference to the purchase order or work order issued in favour of the Applicant for the execution of the alleged additional work. Moreover, the letter can be termed as a bonafide attempt on the part of the Respondent to sort out the alleged payment issues between the Applicant and the Kolkata Police. From the letter, it is clear stated that it has been issued by the Respondent in good faith, at the request of M/s. Nevaeh Technologies Pvt. Ltd. Therefore, that letter cannot be manipulated to create an illusion of a contractual relationship between the Applicant and the Respondent. Similarly, the e-mail only affirms the fact that the alleged additional work has been done by the Applicant at the behest of Kolkata Police and without the knowledge and concurrence of the Respondent.
18. It is further stated that in the memo dated 25.07.2014 issued by the Special Commissioner of Police, Kolkata, it is clear that the applicant had entered into a direct understanding with Kolkata Police and had executed the alleged additional works on their own volition without the knowledge or concurrence of Respondent. The HCL duly implemented the works entrusted for the payment terms due in terms of the work order had also been duly released by the Respondent to HCL.
19. Respondent further submitted that the Respondent is under no obligation to reply to the notice dated 03.10.2015 sent by the Applicant as there exists no privity of contract between the parties and no amounts are due to the Applicant from the Respondents. Moreover, the Applicant has not

produced the demand notice dated 19.01.2021 issued under Section 8 of the I&B Code,2016, and the reply dated 27.01.2021.

## **FINDINGS**

20. We have heard the learned Senior Counsel on either side through video conferencing and have thoroughly perused the documents placed on record by the Operational Creditor and the Corporate Debtor.
21. This Application was originally filed before the Hon'ble High Court of Kerala, which was transferred to this Tribunal. On the basis of the direction to convert and file an application under I&B Code, by this Tribunal, the Appellant has filed this CP(IB) for the aforesaid reliefs.
22. The applicant contented that they have raised total bills to the tune of Rs 4,25,28,652.68(Rupees Four Crore Twenty Five Lakhs Twenty Eight Thousand Six Hundred and Fifty-Two and Sixty-Eight Paisa Only) including the amount of Rs.2,77,12,736.95 (Rupees Two Crore Seventy-Seven Lakhs Twelve Thousand Seven Hundred and Thirty-Six and Ninety-Five Paisa only) for the original work order and Rs.1,48,15,915.68 (Rupees One Crore Forty-Eight Lakhs Fifteen Thousand Nine Hundred and Fifteen and Sixty Eight Paisa only) in respect of additional supplies made and works executed by them. This was with the direct approval of the Corporate Debtor in addition to the original work done as per the terms of the Contract. From time to time various payments were made by the Corporate Debtor in respect of the jobs executed, However, the entire payment Rs.1,48,15,915.68 (Rupees One Crore Forty-Eight Lakhs Fifteen Thousand Nine Hundred and Fifteen and Sixty-Eight paise only) pertaining to the additional work done has not been made to the Operational Creditor, which is still outstanding to the Applicant. The main

objection raised by the Corporate Debtor is that Applicant is a sub-contractor engaged by HCL Info Systems Ltd and that there is no privity of contract between the Applicant and the Respondent/Corporate Debtor.

23. Firstly, we have to examine whether the applicant and Respondent have any relationship as Operational Creditor and Corporate Debtor. The Applicant could not produce any document to establish that they have any contract between them to consider them as Operational Creditor and Corporate Debtor. Hence this Tribunal refers to the communication between the parties regarding the additional work orders, which is an e-mail sent by the Corporate Debtor to the Applicant on 08.03.2011, which reads as under: -

*"From: Pradeep Nair [[malto:pradeep2417@gmail.com](mailto:malto:pradeep2417@gmail.com)]  
Sent: Tuesday, March 08, 2011 2:26 PM  
To: Pradip Datta  
Subject: Re : LOI/PO FOR ADDITIONAL WORK AT KP DC*

*Dear Sir,*

*We had a meeting with KP officials today. Formal decision had been taken to give approval for additional Work. Details to be submitted immediately. We would start the process to release the PO once the file approval is obtained. Please wait a little more.*

*Rgds*

*Pradeep*

*On Tue, Mar 8, 2011 at 11:32 AM, Pradip Datta  
[Pradip.datta@nevaehtech.com](mailto:Pradip.datta@nevaehtech.com) wrote:*

*Dear Mr. Pradeep,*

*Now that TOTAL work done, including ALL ADDITIONAL WORK at Kolkata Police DC has been established, PLEASE RELEASE THE PURCHASE ORDER FOR ALL ADDITIONAL WORK DONE BY NEVAEH.*

*Kindly treat this as most urgent*

*P K Datta"*

24. On a reading of the above it is clear that in the year 2011 the Corporate Debtor had a meeting with the Kolkata Police for the approval of additional work order and the K.P agreed to issue the purchase order sooner. Regarding additional work order, another e-mail was sent by the Corporate Debtor to the Applicant on 08.12.2014, which reads as under: -

*"From: Pradeep Nair [mailto:pradeep2417@gmail.com]*

*Sent Monday, December 08, 2014, 12:30 PM*

*To: Tamal Sen Gupta*

*Subjects: Sub: Additional order for Datacenter*

*Dear Mr. Tamal*

*Due to commercial reasons, we are not in a position to discard/disown additional work done and accepted by KP. In case you wish, you may escalate the case to higher authorities of KELTRON for decision.*

*Kind rgds*

*R. Pradeep*

*General Manager*

*Security Systems Division*

*Kerala State Electronics Development Corporation Limited*

*Ernakulam, Trivandrum-695564*

*India"*

25. It is clear from the above letter that the Corporate Debtor is not rejecting the claim of applicant that the additional work was done by them, as they have stated that they are not in a position to discard/disown the additional work done which was accepted by the Kolkatta Police.
26. On 31.12.2014 the Corporate Debtor sent an e-mail communication to the Kolkata Police, which reads: -

"KMO-KOL/ GVTC/14-15/202

31.12.14

Commissioner of Police

18, Lalbazar Street

Kolkata - 700001.

Attn: Spl. Commissioner of Police-11

Sir,

Sub: Issue of Additional Work Order Data center Preparation Work-Regarding.

Ref: 1. Memo No:13593/FRC dt. 14.08.09

2. Memo No:12375/Mod+Enclo dt. 29.05.2013.

3.

As already communicated through our various letters on the above subject, our vendor M/s Neveah Technologies Pvt. Ltd. has informed us that they have been waiting for over 4 years to get their work order for regularization. Keltron has promised them that their pending dues shall be cleared after issuing a fresh work order based on the acceptance given by KP for additional work done. M/s Neveah Technologies Pvt. Ltd. has now informed us that being a SME they are not in a position to wait any more and that they will proceed against us legally. Under such circumstances, we once again request Kolkata Police to regularize the additional work and payment at the earliest

"Data Centre" is a separate project. We therefore request that work order for the additional work done for "Date centre" already accepted by us along with payment may be processed and released separately. This will help us to issue work order and payment to the vendor who carried out the facility preparation work. In good faith and ensure support in continued maintenance of the Data center.

Thanking You.

Yours Faithfully,

Sd/-

R.Pradeep

General Manager

Registered Office: Keltron House, Vellayambalam, Thiruvananthapuram 695 033."

27. It is clear from the aforesaid e-mail that in the year 2014 the Corporate Debtor requested the Kolkata Police to regularise the additional work and the payment. The Corporate Debtor agreed that the work order for Data Centre is separate work and therefore the additional work done by the Vendor (M/s. Nevaeh Technology Private Limited) for the Kolkata Police is to be considered as additional work and the payment be processed and released separately. They also agreed that they will issue a work order and payment to the vendor. It is also clear that in the e-mail

related to the additional work order the Corporate Debtor has not mentioned the name of M/s. HCL Info Systems Limited but they stated that M/s. Nevaeh Technology Private Limited is their vendor and that the vendor has done the work in good faith and ensures support in the continued maintenance of the Data Centre.

28. At this juncture, it is relevant to consider the definition of Operational Creditor under Section 5(20), and an Operational Debt as defined under Section 5(21) of IBC.

**Operational creditor:** refers to a person to whom an operational debt is owed and includes any person to whom such amount has been legally assigned or transferred for goods or services done by them. Vendors and suppliers, employees, government, etc. are examples of operational creditors.

**Operational Debt:** means debt incurred in exchange for the provision of goods or services (including employment) or debt in respect of the payment of dues arising under any law for the time being in force payable to the Central Govt., any State Govt. or any regulator.

29. The framers of the IBC had not intended to include within the expression of an 'operation debt' a debt other than financial debt. Therefore, an operational debt would be confined only to four categories as specified in Section 5(21) of the IBC like goods, services, employment, and Government dues. Operational Creditors are those whose liability from the entity comes from a transaction on operations. In this case, the debt owed to the Applicant arose for rendering additional work done by the applicant as a vendor on behalf of the Corporate Debtor.

30. On juxtaposing the definition of 'Operational Creditor' and 'Operational Debt' as included in IBC with the work relationship as is evidenced in the aforesaid e-mails sent by the Corporate Debtor to the Applicant and Kolkatta Police, we find that the Corporate Debtor admits the Applicant as a "vendor" who had carried out additional work to the Kolkatta Police for and on behalf of the Corporate Debtor. Thus it is clear that the 'Corporate Debtor' was conscious of the fact that the Operational Creditor is carrying out the additional work to the Kolkatta Police. This admission on the part of 'Corporate Debtor' stares at its face and there is no scope for taking a different view. The grounds raised by the Corporate Debtor to offset the triggering of Corporate Insolvency Resolution Process at the instance of Applicant by taking the plea of there being no privity of contract between the 'Operational Creditor' and the 'Corporate Debtor' falls flat and has to be dismissed as being absurd and repugnant to the admitted position with regard to the status and locus standi of the 'Operational Creditor'.
31. Here the additional work was executed by the Operational Creditor for the Kolkatta Police on behalf of the Corporate Debtor. The Corporate Debtor is not disputing that the work was not carried out by the Operational Creditor. Their only contention is that they have no agreement with the Operational Creditor for carrying out the work. The amount claimed by the Operational Creditor is also not disputed, but stated that they have already made all payments to M/s. HCL. This cannot be accepted. There is a debt owed by the Corporate Debtor to the Operational Creditor for the work done by them.
32. We proceed further to determine the admissibility of the application based on the landmark judgement of the Hon'ble Supreme Court in ***"Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC Online***

**SC 353**, wherein it is held that as to what are the facts to be examined by the Adjudicating Authority while examining an application under Section 9, which are as follows:

*(i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (Section 4 of the Code);*

*(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid; and*

*(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.”*

After perusal of case record, it is established that:

- i. The operational debt due to pay exceeds Rs 1 Lakh (Prior to amendment)
- ii. The documentary evidence furnished shows that the aforesaid debt is due and not paid till date.
- iii. There is no proof of existence of any earlier dispute between parties or arbitration proceedings filed before the Competent Authority.

33. In view of the above, the instant application filed by the Operational Creditor against **M/s. Kerala State Electronics Development Corporation Limited** (Corporate Debtor) deserves to be admitted.

34. The application, therefore, is ADMITTED and moratorium is declared for prohibiting all of the following in terms of Section 14(1) of the Code as amended: -

- a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b) Transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- 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.

35. It is further directed that the services to the Corporate Debtor if continuing, shall not be terminated or suspended or interrupted during the moratorium period. The moratorium shall however not apply to such transactions as may be notified by the Central Government in consultation with any financial regulator and to a surety in a contract of guarantee to a corporate debtor.

- a) The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or

passes an order for liquidation of Corporate Debtor under Section 33, as the case may be.

- b) That the public pronouncement of the Corporate Insolvency Resolution Process shall be made immediately as specified under Section 13 of IBC.

36. The Operational Creditor suggested the name of Ms. Midhuna K.C having Registration No. IBBI/IPA-002/IP-N00813/2019-2020/12741 for appointment as Interim Resolution Professional, in case the Application is admitted. However, on verification of the panel, the name of Ms. Midhuna K.C is not available in the panel of IP's for appointment as IRP for the Kochi Bench for the period 01.01.2022 to 30.06.2022. Hence, this Tribunal appoints **Mr. RAJENDRAN P. R.** Registration No. IBBI/IPA-001/IP-P-01748/2019-2020/12717 (Email:ekmagasti@gmail.com) having Office at **186/7, PADINJARE PARIPPIL, KULAYETTIKARA P.O, Ernakulam, Kerala,682315,** whose name appears in the panel of IP's for appointment as IRP for the Kochi Bench for the period 01.01.2022 to 30.06.2022, as the Interim Resolution Professional to carry out the functions as mentioned under the IBC. The fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The Insolvency Resolution Professional is directed to submit the copy of AFA (Authorization for Assignment) issued by the Insolvency Professional Agency within 2 days from the date of receipt of this order.

37. We direct the Operational Creditor to deposit a sum of Rs. 2 lakhs (Two Lakhs) with the Interim Resolution Professional namely **Mr. RAJENDRAN P. R.** within three days from the date of receipt of this order, in order to meet out the initial expenses to perform the duties assigned to the IRP in

accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016.

38. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor, and the Interim Resolution Professional.

39. Registry is also directed to send a copy of this Order to the Registrar of Companies, Kerala, for updating the Master Data of the Corporate Debtor. The Registrar of Companies shall send a compliance report in this regard to this Registry within seven days from the date of receipt of the order.

Dated the 21st day of January, 2022.

Sd/-

**(Shyam Babu Gautam)**  
**Member (Technical)**

Sd/-

**(Ashok Kumar Borah)**  
**Member (Judicial)**

LG