

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – II**

C.P.(IB)-4466(MB)/2019

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Hexacom Technologies Private Limited

Having Registered Office at: C-63/4, 1st Floor, Okhla Phase-II, New Delhi-110020.

.....Operational Creditor/Applicant

Vs

Globalone Technologies Private Limited

Having Registered Office at: A Wing, 1005, Kailash Business Park, Hiranandani Link Road, Vikroli West, Mumbai- 400079.

.....Corporate Debtor/Respondent

Order delivered on: 11.11.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Shri Shyam Babu Gautam

Appearances:

For the Operational Creditor : Mr. Himanshu Sachdeva, Advocate

For the Corporate Debtor : Mr. Anand Sahu, Advocate

ORDER**Per- Shyam Babu Gautam, Member Technical**

1. The Present Application is filed under section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by M/s Hexacom Technologies Private Limited (for brevity 'Operational Creditor') through its Authorised Representative, Mr. Ajit Kumar Shukla, who has been duly authorised vide board resolution dated 11.10.2019 for initiating Corporate Insolvency Resolution Process (CIRP) against M/s Globalone Technologies Private Limited (for brevity 'Corporate Debtor') for default in repaying an amount of **₹36,58,000** along with 18% interest p.a., as on 06.07.2018.
2. On reading the application and other material placed before this Bench, the Operational Creditor and the Corporate Debtor entered into a **"distribution agreement"** dated 06.08.2018. As per the agreement, the operational creditor was appointed as distributor for the GMeet range of video conferencing products for North India Region. Further, the Operational Creditor was

asked to maintain stocks for next week's order. Accordingly, the material worth Rs. 41.89 Lakhs were ordered and stocked by the Operational Creditor at his Delhi office.

Moreover, it was contractually agreed as per clause 4.2 of "*distribution agreement*", that ***if the Operational Creditor has non-moving inventory of Products in its stock then the Corporate Debtor agrees to replace the same with new and moving Products after reimbursement of interest cost @18% per annum from the date of billing to date of replacement of products/taking back of inventory.***

3. After signing of Agreement, only two orders were received. Moreover, out of two orders, one was placed by the Corporate Debtor itself, through its sister company, worth Rs. 5,58,000/-. Further, the Operational Creditor found that the Corporate Debtor had stopped communicating with them and were not responding to phone calls or mail communication. Operational Creditor was forced to send their representative at the Mumbai Office of Corporate Debtor and thereafter also wrote a mail to Corporate Debtor dated 30.11.2018 confirming that Corporate Debtor would get it billed by 25.12.2018 and the same was not honoured.

Subsequently, Operational Creditor issued a letter reminding Corporate Debtor about the pending dues on 07.01.2019, which was not replied by the Corporate Debtor. Further, the Operational Creditor has issued Section 8 demand

notice (Form 3) on 05.07.2019. However, the Corporate Debtor neither replied nor made payments towards the total unpaid debt.

4. The Corporate Debtor in its reply affidavit has taken the defense that the language of clause 4.2 of the Distribution Contract clearly evinces that the same is applicable only during the terms of the Distribution Contract, and that too in only event the “non-moving inventory” is exchanged in return for moving inventory. Further submitted that as per clause 3.3 of the Distribution Contract the title and risk had vested in the Operational Creditor from the time of shipping and acceptance of goods by the Operational creditor. Accordingly, it is only after the goods are returned to the Corporate Debtor and after due inspection of the same that the loss or damage thereto (if any) can be determined. From clause 3.3 it is clear that any loss or damage which occurs to goods while having been in possession of the Operational Creditor is liable to be borne by the Operational creditor. Thus, it is clear that until such goods are evaluated upon their return, the exact quantum that is to be paid to the Operational Creditor as per terms of clause 6.4 is not determined. Further submitted that the liability to make payment as per terms of clause 6.4 has not yet crystalized.

The Corporate Debtor has further submitted that the Operational creditor has in the Impugned Application made a malafide claim, seeking payment of sum of money which is

admittedly due to it from a separate legal entity, and seeking to enforce such claim against the Corporate Debtor. Further argued that the Corporate Debtor having independent Corporate and juristic existence is not liable to make payment in respect of any debts of third parties, unless an arrangement in the nature of guarantee or such has been extended by the Corporate Debtor to such third persons. The Corporate Debtor has also submitted that despite of bonafide attempt to return monies of the Operational Creditor as per terms of the Draft Settlement Agreement. The Operational Creditor has displayed its malafide intentions by refusing to accept the Draft Settlement Agreement and instead continues to press these proceedings to extract extortionate benefits from the Corporate Debtor.

5. The Corporate Debtor has further submitted that the claims and disputes between the parties cannot be adjudicated by this bench as the same are subject to the arbitration proceeding. In relation to this, the Corporate Debtor relied on clause 11.4 of the agreement, which states that **“11.4 Dispute – Any dispute arising between the parties shall in first place be resolved by mutual understanding between the two organisations. If no resolution is achieved within 60 (Sixty) days from its first escalation then the parties shall resort to resolution under the India Arbitration Act, 1996.”** Further, the Corporate Debtor has already dispatched its notice invoking

arbitration under section 21 of the Arbitration Act, on 15.03.2021. Hence, prayed that petition may be dismissed.

6. In response to this, the Operational Creditor also filed a written submission and submitted that it is well settled law that the admission by a party is the best evidence that opposite party can rely upon. Further mentioned that the Corporate Debtor has time and again admitted the debt which they are liable to pay and same is evident from the settlement offers Corporate Debtor has made to Operational creditor before this Tribunal which was also recorded by this Hon'ble Tribunal vide order dated 12.03.2020 and 02.03.2021.

The Operational Creditor has submitted that when the matter was taken up on 12.03.2020, the Corporate Debtor appeared and while accepting its liability issued a cheque, in favour of Operational Creditor for Rs. 10,00,000/- (Rupees Ten Lakh only) and sought some time to file consent terms, however, the said cheque was dishonoured. Accordingly, the Operational Creditor filed a complaint under section 138 of Negotiable Instruments Act, 1881 against the Corporate Debtor in Ld. Courts at Dwarka, New Delhi. It is pertinent to mention that the Corporate Debtor again while admitting its liability in the proceedings initiated against him under section 138 of Negotiable Instruments Act, 1881 paid the cheque amount and agreed to pay the balance amount to the Operational Creditor.

7. Moreover, in relation to arbitration clause, the Operational Creditor has submitted that the Corporate Debtor in order to unnecessarily delay the adjudication of present proceedings has filed an application under Section 8 of Arbitration and Conciliation Act, 1996. However, it is most respectfully stated that the Corporate Debtor on the date of issuance of Demand Notice dated 05.07.2019 under Section 8 of the Code has failed to invoke any arbitration clause or raise any dispute between the parties after receiving the demand notice under Section 8 of the Code.
8. Heard the submissions made by the Learned Counsel for both the parties and perused the material on record, we are of the view that the Corporate Debtor has admitted the debt which they are liable to pay and same is evident from the settlement offers Corporate Debtor has made to Operational creditor before this Tribunal, this by itself is also an admission of liability by the Corporate Debtor.

Moreover, the Operational Creditor filed a complaint under section 138 of Negotiable Instruments Act, 1881 against the Corporate Debtor in Ld. Courts at Dwarka, New Delhi. In relation to this, Hon'ble NCLAT in the matter of **Sudhi Sachdev Vs. APPL Industries Ltd. [Company Appeal (AT) (Insolvency) No. 623 of 2018**, held that *"... The pendency of the case under section 138/441 of Negotiable Instruments Act, 1881, even if accepted as recovery proceeding, it cannot be*

held to be a dispute pending before a court of law. Thereby we hold that the pendency of the Case under Section 138/141 of Negotiable Instruments Act, 1881 actually amounts to admission of debt and not an existence of dispute.”

Further, in view of **Mobilox Innovations Pvt. Ltd Vs. Kirusa Software (P) Limited [(2017)1SCC OnLine SC353]** wherein, Hon'ble Supreme Court has held that ***'existence of the dispute' and/or the suit or arbitration proceeding must be pre-existing.*** We are of the opinion that the Corporate Debtor on the date of issuance of Demand Notice dated 05.07.2019 under Section 8 of the Code has failed to invoke any arbitration clause or raise any dispute between the parties even after receiving the demand notice under Section 8 of the Code. The arbitration proceeding in the present case are not pre-existing, so it cannot be termed as dispute. The Petitioner has filed the present Petition before this Tribunal on 09.12.2019 and as such the Notification effected in increasing the threshold limit from Rupees One Lakh to Rupees One Crore as on and from 24.03.2020 does not apply to the present case. Under the said circumstances, since the debt and default on the part of the Corporate Debtor being proved without any dispute, we hereby admit this petition by appointing Mr. Shyamsunder Purshottamlal Dhanuka (Insolvency Professional) as IRP with a direction to the IRP to compute this claim by deducting the payments made by the Corporate Debtor during the pendency

of this Company Petition. The Petitioner shall pay the remuneration of the IRP as well as initial costs to the IRP until constitution of the Committee of Creditors, Accordingly this petition is **admitted** with the direction as follows:-

a. **The above Company Petition (IB) 4466(MB)/2019 is hereby allowed** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against M/s Globalone Technologies Private Limited.

b. This Bench hereby appoints Mr. Shyamsunder Purshottamlal Dhanuka, having Registration No: IBBI/IPA-002/IP-N01104/2021-2022/13641, E-mail: sdhanuka@yahoo.com, as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

c. The Operational Creditor shall deposit an amount of Rs. 2 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

d. That this Bench hereby prohibits 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, transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

g. That the order of moratorium shall have effect from the date of pronouncement 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.

h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

9. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

Sd/-

JUSTICE P.N. DESHMUKH
(MEMBER JUDICIAL)

Arpan, LRA