

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH, KERALA**

TIBA/1/KOB/2019

**(IBA No. 74/2019 of Chennai Bench)**

*(Under Rule 6 of the Insolvency and Bankruptcy (Application to  
Adjudicating Authority) Rules, 2016)*

Order delivered on: 13.09.2019.

Coram:

**Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)**

**Hon'ble Mr. Veera Brahma Rao Arekapudi, Member (Technical)**

In the matter of:

V-Con Integrated Solutions Private Limited  
Having its registered office at  
Plot No.F-141 Phase 8B, Industrial Area,  
Mohali, Punjab-160055.

..... **Applicant**

Versus

Achariya Techno Solutions (India) Pvt.Ltd.  
Having its registered office at  
TC-26/1340(1), Latha Bhawan,  
Panavila Road, General Post,  
Thiruvananthapuram, Kerala-695001

..... **Corporate Debtor**

For applicant  
Corporate Debtor

... Adv. Yashuvaradhan for Adv.Gowthamkumar  
... No representation



This petition has been filed by, V CON INTEGRATED SOLUTIONS PRIVATE

LIMITED, Operational Creditor under Section 9 of the Insolvency and Bankruptcy

Code, 2016 (for short to be referred hereinafter as the Code) for initiating insolvency

**ORDER**

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resolution process against the respondent-corporate debtor, a company registered under the Companies Act, 1956. The corporate debtor was incorporated on 06.08.2010 under the Companies Act, 1956 and continues now its existence with CIN No. U72200KL2010PTC026507 and has its registered office at Thiruvananthapuram, in the State of Kerala and therefore, the matter falls within the territorial jurisdiction of this Tribunal.

2. The petitioner (Operational Creditor) is involved in the business of providing Technical platform/Connectivity for sending bulk SMS (Bulk Messaging gateway Solution) and other Value-added services by virtue of valid registration with TRAI and is registered as a telemarketer.

3. The Operational creditor had entered into a Service Agreement dated 19.11.2016 for providing bulk messaging gateway Solution Services to the Corporate Debtor. And the consideration for rendering the services was determined based on the agreement they have entered attached with this Petition. And in the Agreement the corporate debtor assured and agreed to pay the Invoices raised by the Operational Creditor within 15 days from the date of submission of the Invoice.

4. Under this agreement, Corporate Debtor has failed to discharge his liability and defaulted in paying a sum of Rs.67,37,600/- (Rupees sixty-seven Lakh Thirty-Seven Thousand Six Hundred only). For this the operational Creditor has issued various Invoices raising the respective dues but the Corporate Debtor has failed to pay the aforesaid sum.

5. Therefore on 13-03-2018, a demand Notice as in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016



demanding payment of Rs. 67,37,600/- (Rupees sixty-seven Lakh Thirty-Seven Thousand Six Hundred only) was sent to the Corporate Debtor at its registered office. However, the Corporate Debtor has not replied to the same. The Corporate Debtor has further acknowledged the payments to be made to the Operational Creditor in various emails. The Corporate Debtor also admitted the debt and requested for further time to repay.

6. And further stated that the debt amount is not barred by Law of limitation and demand was raised within the time period stipulated under the Law.

7. Learned Counsel appearing on behalf of the Respondent ( Corporate debtor) submitted that, The Corporate Debtor is a private company named "M/s Achariya Techno Solutions India Private Limited ", incorporated under the provisions of the Companies, 1956 in the year 2010 having its registered office at T.C 26/1340(1), 1<sup>st</sup> Floor, Panavilla, Trivandrum.

8. The Corporate Debtor was paying the service charges regularly and an amount of Rs.88,88,382/- Eighty-eight Lakhs Eight Thousand Three Hundred and Eighty-Two Rupees Only) was paid to Operational Creditor. The Corporate Debtor is not a chronic defaulter and he is paying the services even though the service of the Operational Creditor substandard. Due to some financial crisis and disputes regarding the services of the Operational Creditor, the corporate debtor was not able to settle the dues.

9. On 15.02.2018 the managing director of the Corporate Debtor received a call from Mr. Sasi from Kerala from Mobile no. 94447210803 who introduced himself as CPM Local area secretary, Sasthamangalam, Kerala state and informed the non-payment of the dues with respect to the services rendered by the Operational Creditor.



Upon enquiry it is understood that the political party influence the police and to get the operational debtor arrested and settle the dues in an illegal way.

10. On 25-02-2018 the Managing director (Corporate Debtor) received a call from the Museum Police Station regarding the complaint filed by the Operational Creditor for non-payment of bill. And on 27.03.2019 a police official visited the Corporate debtor's office and conducted an Inquiry. It is learnt that the authorised agent of Operational Creditor filed a complaint against the corporate debtor and pressurising the police arrest and harass to pay the dues.

11. The operational creditor was, using their political connection to settle a civil dispute with the help of the Police. With no other remedy the Managing Director of the Corporate Debtor filed bail Application, B.A. No. 3090/2018, before the Hon'ble High Court of Kerala and when the matter was taken up for consideration the SHO had informed that the matter is Civil in Nature so that the Crime is not Registered.

12. It is further submitted that the Operational creditor has colluded with some of the rivals of the corporate debtor in filing complaints in different states to bring the Company down. On 2.07.2018 the Corporate debtor received a notice from Mohali Police station u/s 160 Cr.Pc with a direction to appear before him in connection with a complaint filed by the operational creditor, regarding a complaint u/s 420 IPC.

13. Therefore, the Corporate Debtor has filed a petition under Section 482 of the Code of Criminal Procedure, 1973 before the Hon'ble Punjab and Haryana High court to quash the Criminal Proceedings and received an Interim Order on 27.09.2018 preventing the police not to take a coercive action against the Managing director of the Corporate Debtor till further orders.



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14. Due to the coercive actions of the operational Creditor, the Credibility of the Company is lost and potential clients of the Corporate debtor started parting away from us and the head office of the company was shut down. At this juncture the operational creditor initiated the Insolvency Proceedings when they were very well aware of the fact that the Company went to Bankruptcy and will not be in a position to conduct all the cases and they cannot even realize the dues from the company assets. Therefore, the Corporate debtor is not having enough assets to pay off its debts.

15. It is also submitted that the corporate debtor will be initiating civil proceedings against the company for damages and also for breach of contract. Because the service agreement dated 19.11.2016 clause 25 stated that " this agreement shall be governed by the laws of India and subject to clause 26, the court of Mohali in Punjab shall have exclusive jurisdiction over matters relating to arising from this agreement", and this clause again stated that " the parties agree that any controversy, claim or dispute arising out of or in relation to interpretation application of effects with this agreement which cannot be resolved amicably and shall be conclusively resolved by arbitration under Indian Arbitration and Conciliation Act 1996.

16. And finally, the Counsel for the corporate debtor submits that the vexatious criminal case initiated by the Operational Creditor against the Corporate debtor in multiple states, resulted in the complete shutdown of the office and business activities of the corporate debtor. Since there is a serious dispute regarding the payment and services rendered by the operational creditor the Insolvency petition filed by the Operational creditor will not sustain and the same may be dismissed.

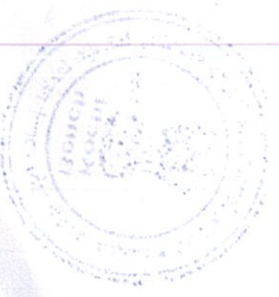
17. We have heard both the parties and also perused whole the case records including documents and Photostat copy appended with the case records. It appeared



from the records that the Operational Creditor and the Corporate Debtor has entered into a Service agreement on 19.11.2016 for providing Technical platform/Connectivity for sending bulk SMS (Bulk Messaging gateway Solution) and other Value-added services by virtue of valid registration with TRAI and is registered as a telemarketer.

18. On Perusal of the record it appears that vide invoice dated 04.10.2017 the applicant charge 23,35,918.07/- ( Twenty Three Lakh Thirty Five Thousand Nine Hundred Eighteen & Paise), and vide invoice dated 05.06.2017 the applicant charges Rs.27,29,131.56/- (Twenty Seven Lakh Twenty Nine Thousand One Hundred and Thirty One & Paise) Similarly invoice no: 13.07.2017 the applicant charge Rs 23,51,841.30/- Twenty three Lakh fifty one thousand eighty Hundred Forty One & Paise Thirty Only). Accordingly, the total amount is INR 67,37,600/- (Rupees sixty-seven lakhs thirty-seven thousand six hundred only) charges from the Corporate Debtor for service provided as per the Service Agreement.

19. It appears from the record that the Operational Creditor has given reminder to Corporate Debtor requesting to pay towards aforesaid invoices on 26.09.2017, but there was no response from the latter. Thereafter the Operational Creditor issued demand notice demanding the Payment as stated above under IBC 2016 and the postal acknowledgement clearly proves that on 20.03.2018 the Notice was received by the Corporate Debtor. Further the debt was acknowledged by the corporate Debtor through e-mail communication on 21.04. 2018.Later on 24.04.2018 the Corporate Debtor vide letter dated 24.04.2018 requested 10 months' time to repay the debt citing various reasons such as the financial Instability.



20. It also appears that the Corporate Debtor nowhere challenged the service provided by the Operational Creditor, upon which the Operational Creditor has filed this case.

21. There is no material shown by the Corporate Debtor that the amount claimed by the Operational Creditor is nothing but concocted.

22. Learned Counsel for Corporate Debtor submitted in the arguments that the Operational Creditor has colluded with some of the rivals of the Corporate Debtor in filing Complaints in different stage to bring the Company down. It also stated that the Operational Creditor has approached Mohali Police station to register an F I R on the basis of the same complaint of they filed before Museum Thiruvananthapuram earlier. It is also submitted that the Managing Director of Corporate Debtor Received a notice on 02.07.2018 from the office in charge of the Police station U/s 160 CrPc directed to appear based on the complaint filed by the Operational Creditor. It is also submitted that Operational Creditor in collusion with some rival of the Creditor filed against the Managing Director U/s 420 of IPC.

23. The Law well settled that the severity of the consequences that follows the initiation of Insolvency proceedings against the company, it is important to safe guard against the exploitive use of the code as debt recovery mechanism. Thus, if any Operational Debt is disputed the Operational Creditor cannot invoke the provisions the court although the existence of dispute is not a relevant consideration in the case of "Financial debt". Sec 5 (A) 6 define "dispute" as includes a suit or Arbitration Proceeding relating to –

- (a) The existence of the amount of the debt
- (b) The quality of goods and services



(c) The breach of representation or warranty;

This led to ambiguity as whether a debt can be said to be disputed in situation where there is no suit or Arbitration or other legal proceedings are pending, even though the factual situation may demonstrate there exist a dispute relating to such Operational Debt.

In "*Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC Online SC 353*", provided clarity on the issue, the Hon'ble Supreme Court held that,

(a) "default" in repayment of a debt was a condition precedent on the basis of which insolvency resolution could be triggered.

As discussed above, in case of an application by financial creditor the existence of dispute is immaterial. With respect to an Operational debt, however the process cannot be initiated in cases where the debt is disputed. Relying on the Legislation intent behind the Provisions the court clarified that the word "dispute" was to be given the widest interpretation. The use of Phrase "and" in section 8 (2) (a) "Corporate Debtor" to bring to the notice of the Operational Creditor, the existence of a dispute, and record of pendency of any suit or arbitral proceedings would also be sufficient for the debt to be regarded as a disputed one.

24. In the Instant case as stated above the Corporate Debtor nowhere disputed or challenged about the charged amount of debt, which is debt to operational creditor. Merely filing a criminal case or FI R before a police station be stated to that "dispute" U/s 5 (a) 6 of Insolvency and Bankruptcy Code 2016. Therefore the arguments of the

Learned Counsel for Corporate Debtor stated about the Pre- existence of dispute is not within the 5 (a) 6 of Insolvency and Bankruptcy Code.



25. This is an application under section 9 of IBC Code. In an application under section 9, it is always open to Corporate Debtor to point out a pre-existing dispute under Section 8 (1).

26. In “*Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– 2017 1 SCC Online SC 353*”, the Hon’ble Supreme Court held 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 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 6 Company Appeal (AT) (Insolvency) No. 703 of 2018 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 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. ....”***

In the said case, the Hon'ble Supreme Court held as to what are the facts to be examined by the Adjudicating Authority while examining an application under Section 9, which is as follows:

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

- (i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act)
- (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.”



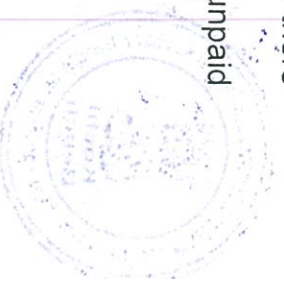
From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs. 1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any 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', the application under Section 9 cannot be rejected and is required to be admitted.

27. It appears after perusal of all case record.

- i. The operational debt due to pay exceeds Rs 1 Lakh
- ii. The documentary Evidence Furnished with appropriate source 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.

28.. It also appears that there is no lacking of any of aforesaid condition to reject the application. The apparent philosophy underlying the IBC is that Companies which are not able to function on commercial basis must be liquidated. In other words, Corporate Darwinism ensures survival of the fittest.

29. Since all the aforesaid condition are fulfilled in the instant case, we find application submitted by operational Creditor is Complete in all respects and there is no defect pointed out by Corporate Debtor. It is also proved that payment of unpaid



operational debt has not been made under such circumstances by the Corporate debtor.

30. In view of the above, the instant petition deserves to be admitted. The petition, therefore, is admitted and the 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.

31.. It is further directed that the services to the corporate-debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

The moratorium shall however not apply to such transactions as may be notified



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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.
- c) That this Bench at this moment appoints **Mr. Aravindakshan Nair.R.** having registration No. IBB/IPA-003/IP-N00027/2017-18/10187 as Interim Resolution Professional to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
- d) IRP cost will be borne by the Operational Creditor.
- e) The registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional.

Dated this the 13<sup>th</sup> day of September, 2019

Sd/-  
(Veera Brahma Rao Arekapudi)  
Member (Technical)

Sd/-  
(Ashok Kumar Borah)  
Member (Judicial)

CERTIFIED TO BE TRUE COPY

  
Deputy Registrar  
National Company Law Tribunal  
Kochi Bench



To

1. Advocate Mr. Gowtham Kumar, Old No.183A, New No.20A, Luz Avenue, 5<sup>th</sup> street, Mylapore, Chennai-600 004. (**Counsel for applicant**)
2. Achariya Techno Solutions (India) Pvt.Ltd. having its registered office at TC-26/1340(1), Latha Bhawan, Panavila Road, General Post Office, Thiruvananthapuram, Kerala-695001. (**Corporate Debtor**)
3. Mr. Aravindakshan Nair.R, Ashadha (Kuttara), Karthikappally Taluk, Cheruthana :PO, Alleppey Diistrict-690517. (**Interim Resolution Professional**).



Memorandum no: TIBA/1/KOB/19/472

DATED: 16/9/19

18/09/2019 Juggal D  
Tribunal of National Company Law  
Kochi Bench

