

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER
SHRI ATUL CHATURVEDI,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 05/9/JPR/2022

(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:

VERTIV ENERGY PRIVATE LIMITED

...Operational Creditor/Applicant

Versus

CYFUTURE INDIA PRIVATE LIMITED

...Corporate Debtor/Respondent

MEMO OF PARTIES

M/S VERTIV ENERGY PRIVATE LIMITED

CIN: U74999MH1993PTC071079

R/o Plot No. C-20, Road No. 19,

Wagle Industrial Estate,

Thane-400604

...Applicant

VERSUS

M/S CYFUTURE INDIA PRIVATE LIMITED

CIN: U72200RJ2001PTC017138

R/o G1-227, 228 & H1 236-239

Export Promotion Industrial Park,

Sitapura, Jaipur-302002



...Respondent

For the Applicant : Abhinav Hansaria, Adv.
For the Respondent : Pawan Sharma, Adv.

Order Pronounced On:19.09.2023

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present application has been filed by M/s Vertiv Energy Private Limited through its authorised signatory Mr. Suresh Chandra Bansal ('Operational Creditor'/ 'Applicant'), seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Cyfuture India Private Limited ('Corporate Debtor'/ 'Respondent') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC' / 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules').
2. The Applicant, M/s Vertiv Energy Private Limited, is a private limited company engaged in the business of supplying power management and IT solutions. The registered office is at Plot No. C-20, Road No 19, Wagle Industrial Estate, Thane, Maharashtra-400604. The alleged default by the Corporate Debtor is for the non-payment of operational dues amounting to Rs. 3,47,91,544/- (Rupees Three Crore Forty-Seven Lakh Ninety-One




Thousand Five Hundred Forty-Four Only) along with interest payable @ 18% per annum.

3. The Corporate Debtor, M/s Cyfuture India Private Limited, is a private company incorporated under the Companies Act, 1956, on 13.08.2001, having CIN: U72200RJ2001PTC017138. The Respondent has its registered office at –G1-227, 228 & H1 236-239, Export Promotion Industrial Park, Sitapura, Jaipur, Rajasthan- 302002 and has an Authorised Share Capital of Rs. 5,00,00,000/- (Rupees Five Crore Only) and Paid-Up Share Capital of Rs. 2,50,02,040/- (Rupees Two Crore Fifty Lakh Two Thousand Forty Only).
4. The details of the transactions leading to the filing of this application averred by the Applicant *vide* Diary No. 140/2022 dated 18.01.2022 are as follows:
 - a. The Corporate Debtor approached the Applicant for supply, installation, and commissioning work at the tier-3 data centre of the Corporate Debtor in Raipur. Pursuant to the quotation submitted by the Applicant the Corporate Debtor issued two Purchase Orders ('PO'). The said purchase orders have certain payment terms as follows:
 - i. *10% of the amount was to be paid at the time of acceptance of PO by the Operational Creditor*



- ii. 30% on confirmation of delivery*
 - iii. 50% against delivery of machines*
 - iv. 10% within 30 days after successful commissioning testing and verification of credentials*
- b. The Applicant initially supplied fifteen (15) machines to the Corporate Debtor and completed the installation work in terms of the purchase order. Consequently, the invoices were raised by the Applicant for 90% of the total amount in respect of PO No. CFIPL/NSEZ/IDC/17-18/100 and decided to raise invoices of the remaining 10% of the total amount after the commissioning of installation of sixteen (16) machines.
- c. The Applicant has commissioned and installed another sixteen (16) machines. However, the Applicant has not carried out the complete work of the second lot since the Corporate Debtor neglected the payment of lawful debt. In due course, the Corporate Debtor agreed to clear the outstanding amount and paid only Rs. 50,00,000/- (Rupees Fifty Lakh Only).
- d. Thereafter, a notice dated 08.04.2019 for recovery of the unpaid operational debt amounting to Rs. 2,35,63,017/- (Rupees Two Crore Thirty-Five Lakh Sixty-Three Thousand Seventeen Only) together with an interest rate of 18% p.a. of Rs. 24,74,126/- (Rupees Twenty-Four Lakh Seventy-Four Thousand One Hundred Twenty-Six Only)



was sent to the Corporate Debtor. A copy of the Notice has been annexed in the Application as Annexure – A/9.

- e. The Corporate Debtor replied to the recovery notice *vide* letter dated 10.04.2019 and denied any liability averred in the said notice and stated that on top of it, the work has not been completed in the project which resulted in huge losses. In response to the letter dated 10.04.2019, the Applicant replied *vide* letter dated 24.05.2019 and pointed out that fifteen (15) machines have been installed in the last two years and the Corporate Debtor has not made payments towards the delivered machinery.
- f. In counter-response, the Corporate Debtor submitted that work on the site is not completed henceforth the purchase orders stand terminated.
- g. Thus, the Applicant issued a Demand Notice dated 16.07.2020 by speed post and through E-mail dated 18.07.2020 to the Corporate Debtor under Section 8(1) of the Code. Copy of the Demand Notice annexed as Annexure A/14 of the Petition.
- h. The Corporate Debtor has made a reply to the Demand Notice *via* speed post-dated 12.09.2020 wherein it is stated that the claim of the Applicant is in dispute on the account of deficiency and irregularities

towards the Purchase Order. Copy of reply to the demand notice annexed as Annexure A/15 of the Petition.

- i. The aforementioned details, as reflected in Part IV of the Application, are as follows:

Part IV

Particulars of Operational Debt

1.	Total Amount of Debt, Details of Transactions on account of which debt fell due, and the Date from which such debt fell due.	<p>Total amount of debt: Rs. 3,47,91,544/- (Rupees Three Crore Forty-Seven Lakh Ninety-One Thousand Five Hundred Forty-Four Only)</p> <p>The said amount is inclusive of Rs. 1,30,46,829/- (Rupees One Crore Thirty Lakh Forth Six Thousand Eight Hundred Twenty-Nine Only) being 18% interest on the principal amount</p>
2.	Amount claimed to be in default and the date on which the default occurred	<p>Amount Claimed to be in default: Rs. 3,47,91,544 /-#</p> <p>Total Principal Amount: Rs. 2,17,44,715/-</p> <p>Total Interest Due: Rs. 1,30,46,829/-*</p> <p>Date from which Debt fell Due: 27.08.2018</p>

* Calculated the Interest Amount @18% p.a. calculated as on 01.01.2022.

Computation of Amount to be claimed from Corporate Debtor is annexed at Annexure – A/16 of the application.




5. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply *vide* Dairy No. 1588/2022 dated 24.05.2022, stating as follows:

- a. The Respondent contended that the Applicant/Operational Creditor has not approached with clean hands and suppressed various material facts. There exists a pre-existence of the dispute between the parties.
- b. The Applicant approached the Corporate Debtor for supply, commissioning, and annual maintenance of Air Conditioner equipment at the Data Centre Site of the Corporate Debtor. As per the terms of the Purchase Order fifteen (15) machines were to be delivered on or before 31.12.2017 and another sixteen (16) machines were to be delivered and installed on or before 31.03.2018.
- c. In accordance with the terms of the Purchase Order the Applicant initially supplied fifteen (15) machines and later on supplied sixteen (16) machines. However, it is a matter of record that the second lot of machines are still lying and have not been installed by the Applicant.
- d. The Corporate Debtor further submitted that the Applicant grossly committed a breach of the terms of the Purchase Order such as failure in timely supply and commissioning of the work at site.



- e. The Corporate Debtor contends that there is an existence of a dispute under Section 5(6)(b) read with Section 8(2)(a) of the Code. It is pertinent to note the Corporate Debtor *vide* E-mails dated 23.07.2018, 01.10.2018, 16.11.2018 and reply to the recovery notice dated 10.04.2019 has informed the Applicant that there is a dispute between the parties concerning incomplete work commissioned by the Applicant on the work site of the Corporate Debtor. Copy of the E-mails and reply to notice are annexed as Annexure- A1, A2, A3, and A4 of the Reply respectively.
- f. It is pertinent to mention that the Corporate Debtor had also terminated the Purchase Order *vide* letter no. CYFT/NSEZ/18-19/019 dated 30.03.2019 in the view of sub-standards services and non-commissioning of the project within the stipulated time i.e., 31.01.2018 and 31.03.2018.
6. The Applicant filed its rejoinder *vide* Diary No. 258/2023 dated 30.01.2023 and has submitted that:
- a. The Applicant submitted that neither there was an electricity connection at the site nor there was a fully operational lift facility to move the machinery at the upper floors for the installation. The




Corporate Debtor was fully aware of such a situation at the work site however no curative measures have been taken.

b. It is denied that the commissioning of the work has been suspended. It is an admitted fact that the Applicant has installed fifteen (15) machines and thereafter the delivery of the second set of sixteen (16) machines, the Corporate Debtor failed to adhere to the payment terms of PO. Accordingly, the commissioning of the second set of machines was not done at the work site.

c. It is pertinent to note that the alleged dispute stated by the Corporate Debtor in its reply is not the subject matter of the present Application. It is further submitted that the emails relied upon by the Corporate Debtor to establish a pre-existing dispute are completely irrelevant and baseless. The Applicant has performed every obligation in terms of the PO.

7. The Applicant filed their written submission *vide* Diary No. 265/2023 dated 31.01.2023 whereby reiterated the same as mentioned in the Application.


8. The Corporate Debtor filed their written submission *vide* Diary No. 269/2023 dated 31.01.2023 whereby reiterated the same as mentioned in



their earlier written submission and additionally relied on the following judgments:


- I. *Mobilox Innovations Private Limited vs. Kirusa Software Pvt. Ltd. in Civil Appeal No. 9405/2017*
- II. *RK & Associates vs. Pranay Infrabuild Pvt. Ltd. in CP(IB) No. 285/9/JPR/2019, NCLT Jaipur Bench*

9. We have heard the Learned Counsels for the parties and perused the averments made in the application, reply, rejoinder, written submissions, and the documents enclosed with the application.
10. This Adjudicating Authority has perused all the relevant papers and found them in order. The Registered Office of the Respondent is situated in the state of Rajasthan. Therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this matter is not within the purview of Laws of Limitation, as the last payment was made by the Corporate Debtor on 27.08.2018, and the Application was filed before this Adjudicating Authority on 18.01.2022. However, in view of the emerging situation of the COVID-19 pandemic, the Hon'ble Supreme Court of India in *Suo Motu Writ Petition (Civil) No(s). 3/2020 in Re: cognizance for extension of Limitation, vide order dated 23.03.2020* the period of limitation has been extended. Hence, the period of three years from the last



payment had not been exhausted at the time of filing this Application. Therefore, the present Application has been filed within the prescribed period of limitation.

11. In the instant case, the Applicant sent a Demand Notice *via* registered post and e-mail on 16.07.2020 and 18.07.2020, respectively, to the Respondent in Insolvency and Bankruptcy Code, 2016 wherein the aggregate amount of Rs. 2,33,83,115/- (Rupees Two Crore Thirty-Three Lakh Eighty-Three Thousand One Hundred Fifteen Only) has been claimed. The Corporate Debtor replied to the said Demand Notice *vide* letter dated 12.09.2020 wherein disputing the demand and categorically mentioning that no debt is due on the Corporate Debtor.
12. We have closely gone through the facts of the case. As per Section 8(2)(a) of the Code, '*existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoices in relation to such dispute*' can interdict Section 9 proceedings under the Code. This section is restrictive in nature for filing an application under Section 9 of the Code i.e., if a valid existence of dispute or record of the pendency of a suit or arbitration proceedings which existed before the issuance of demand notice, is shared with the Creditor, within 10 days, it is



presumed that there exists a pre-existing dispute between the parties with respect to the goods or services supplied by the Creditor.

13. Furthermore, the Hon'ble Supreme Court of India, in the matter of '*Mobilox Innovative Private Limited v. Kirusa Software Private Limited, (Supra)*', held as follows:

“40. 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 the 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 requires 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.

However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”



14. The word ‘dispute’ as defined under Code includes a suit or arbitration proceedings relating to the existence of the amount of debt; the quality of goods or services; or the breach of a representation or warranty. It is true that the definition must fit under the parameters as defined under the code but at the same time it must stand on a test as laid down in the recent judgment of the Hon’ble Supreme Court in *M/S S.S. Engineers vs. Hindustan Petroleum Corporation Ltd. & Ors. in Supreme Court in Civil Appeal No. 4583 OF 2022* whereby the following has been held:

“31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor.

32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.”



15. In the present case the Corporate Debtor has disputed the claim of the Applicant on account of deficiency and irregularities towards the Purchase Orders *vide* e-mails dated 23.07.2018, 01.10.2018, 16.11.2018, and 10.04.2019 sent by the Corporate Debtor to the Applicant. Copy of the said E-mails is attached as Annexure-A1, A2, A3, and A4 of the Reply are reproduced below for ease of reference:

E-mail dated 23.07.2018 from Corporate Debtor to the Applicant:

“We are pushing our bank/ finance partner to release funds but due to unwanted delay/poor project execution, our line of credit is under question.

Even after so much of hard push to Vertiv team, project is delayed by 6 months and till date there is no final committed date on work completion.” (Sic.)

E-mail dated 01.10.2018 from Corporate Debtor to the Applicant:

“What to do with machines lying at site from last 10 months? For me they are of no use till the time they are commissioned.

DC1 machines are also not performing properly. I have already cleared 1 Cr based on your commitments but now no more payments till the time work is completed.” (Sic.)

E-mail dated 16.11.2018 from Corporate Debtor to the Applicant:

“Please do not expect any payment until the project is completed.


This delay was from Vertiv end which has costed us loss of client, business & credibility to finance partner.” (Sic.)

E-mail dated 10.14.2019 from Corporate Debtor to the Applicant:



“From last one year no one has visited at site to complete the work, let us know your plans of project competition because of your delay we already have faced huge losses. Almost all terms of accepted PO are violated by Vertiv. We expect a real answer with project completion road maps and deadlines.” (Sic.)


16. The above e-mail exchanged between the parties, much prior to the Demand Notice dated 16.07.2020 indicates that there was a pre-existing dispute between the parties regarding the claim made by the Operational Creditor. The aforesaid e-mails sent by the Corporate Debtor to the Operational Creditor clearly mentioned that there was non-commissioning of the Project. Thus, there is a dispute regarding the timely supply and commissioning of work at the site, prior to the date of the Section 8 notice, henceforth the dispute was pre-existing.
17. In the above reference, we need to notice the judgment of the Hon’ble Supreme Court in the context of the pre-existing dispute. The classic case on the subject is the judgment of the Hon’ble Supreme Court in *“Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (Supra)”*. The Hon’ble Supreme Court in the above case had occasion to interpret Section 8 and Section 9 of the IBC. It was laid down that the dispute must exist before the receipt of the Demand Notice or invoice.
18. Further in the judgment of the Hon’ble Supreme Court in *“Kay Bouvet Engineering Ltd. vs. Overseas Infrastructure Alliance (India) Pvt. Ltd.-*



(2021) 10 SCC 483”. The Hon’ble Supreme Court again reiterated and explained the principle laid down in *Mobilox* (supra). In para 21 again the law was reiterated in following words: -

“It is thus clear that once the “Operational Creditor” has filed an application which is otherwise complete, the adjudicating authority has to reject the application under Section 9(5)(ii)(d) of IBC, if a notice has been received by “Operational Creditor” or if there is a record of dispute in the information utility. What is required is that the notice by the “Corporate Debtor” must bring to the notice of “Operational Creditor” the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. All that the adjudicating authority is required to see at this stage is, whether there is a plausible contention which requires 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 a mere bluster. It has been held that however, at this stage, the Court is not required to be satisfied as to whether the defence is likely to succeed or not. The Court also cannot go into the merits of the dispute except to the extent indicated hereinabove. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has no other option but to reject the application.”

19. The correspondence between the parties herein clearly shows that a dispute had already arisen between the parties after the alleged goods were rendered supplied by the Applicant, which were not up to mark as mentioned by the Corporate Debtor. The exchange of e-mails between the parties is enough to show that there was a pre-existing dispute with respect to the goods supplied by the Applicant. Further, in view of the order of the



Hon'ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited*, we are not inclined to commence the CIRP of the Corporate Debtor.

20. In view of the foregoing, inter-alia pre-existing disputes between the parties, we have no option but to reject the prayer of the Operational Creditor to initiate proceedings under Section 9 of IBC.
21. Hence, the Application is Dismissed. The Order in the present matter is made in terms of Section 9 (5) (ii) of IBC, 2016, and based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority.
22. Accordingly, CP No. (IB) 05/9/JPR/2022 is dismissed.

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**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

-Sd-

**ATUL CHATURVEDI,
TECHNICAL MEMBER**