

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1**

C.P. (I.B) No.455/9/NCLT/AHM/2018

Coram: Hon'ble Mr. HARIHAR PRAKASH CHATURVEDI, MEMBER (JUDICIAL)
Hon'ble Mr. PRASANTA KUMAR MOHANTY, MEMBER (TECHNICAL)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF THE NATIONAL COMPANY LAW TRIBUNAL ,
AHMEDABAD BENCH ON 17.03.2020**

Name of the Company: Embee Software Pvt. Ltd.
V/s.
D.B Corp Ltd.

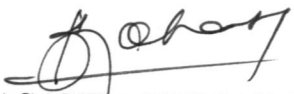
Section: Section 9 of the Insolvency and Bankruptcy Code

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.				
2.				

ORDER

The present matter is kept for pronouncement of order.

The order is pronounced in open Court vide separate sheet.


(PRASANTA KUMAR MOHANTY)
MEMBER (TECHNICAL)


(HARIHAR PRAKASH CHATURVEDI)
MEMBER (JUDICIAL)

Dated this the 17th day of March, 2020

**BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

C.P. (I.B.) No. 455/9/NCLT/AHM/2018

In the matter of:

EMBEE SOFTWARE PVT. LIMITED

Having its address at:

8, A.J.C. Bose Road, ,
2nd Floor, Circular Court,
Kolkata – 600 017

...Petitioner

Versus

D.B. Corp LIMITED

Having its Registered Office at:

Plot No. 280,
Sarkhej Gandhinagar Highway, Nr.
YMCA Club,
Makarba,
Ahmedabad – 380 051

.....Respondent

Order delivered on 17th March, 2020

**Coram: Hon'ble Mr. Harihar Prakash Chaturvedi, Member (Judicial)
Hon'ble Mr. Prasanta Kumar Mohanty, Member (Technical)**

Appearance:

Mr. Manish R. Bhatt, Sr. Advocate and Mr. Rohan Lavkumar,
Advocate for the Petitioner. Mr. Shashvata Skhukla i/b Mr. Rohan

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Lavkumar. Mr. Manu Saiwani and mr. Narender Tahiliani, Advocates for the Corporate Debtor.

[Per: Mr. Prasanta Kumar Mohanty, Member (Technical)]

1. The present Petition is filed on 28.08.2018 under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IB Code' for short) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('IB Rules' for short) for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor, D.B. Corp. Ltd. for the recovery of the unpaid Operational Debt due.

2. The Petitioner, Embee Software Pvt. Ltd., having its address at 8, A.J.C. Bose Road, 2nd Floor, Circular Court, Kolkata – 600 017 with a Company Identification Number (CIN) – U72200WB1992PTC055123 is an authorized reseller of the Microsoft Corporation, USA ("Microsoft USA"). The Petitioner obtains the licenses in favour of the purchaser from Microsoft USA and makes payment directly to Microsoft. This is irrespective and independent of any payment being received from the purchaser / end user, as there is no back-to-back payment arrangement amongst the three parties and in the event, the present Petitioner failed to make such payment to Microsoft USA,

it would (a) be held in breach of its contract with Microsoft USA, (b) be liable to pay hefty penalties to Microsoft USA and (c) jeopardize its relationship with Microsoft USA on which its entire business rests. The Petitioner supplies these licenses to a buyer/purchase (such as the Respondent) for consideration.

3. It is stated that as an independent and additional service which the purchaser pays for, the Petitioner also installs the said software and assists the purchasers in migrating to the new systems. It also provides a service contract for the said solution. Thus, a contract entered into between the petitioner and a purchaser would usually consist of (1) purchase of a Microsoft License which is an essence of sale of goods and (2) Service Contract to service the said contract.
4. It is further stated that by a Purchase Order dated 30th June, 2015 (Exhibit F of Page 44 of the petition), the Respondent had ordered 8,000 Microsoft office 365 Licenses for a sum of Rs. 50,43,975.00 (Rupees Fifty Lakhs Forty Three Thousand nine Hundred Seventy Five only). This fact is admitted and not disputed by the Respondent in its affidavit.
5. It is further stated that on 18th August, 2015, the petitioner raised an invoice upon the Respondent which contained the terms and conditions of the transaction

(Exhibit I at pg. 82 of the petition). The tax invoice clearly stipulates a total of 8,000 licenses for a total of Rs. 50,43,975.00 with service tax of Rs. 7,06,030.50 totalling to Rs. 57,50,005.50. The payment terms stipulate 50% payment within 30 days and the balance within 60 days of delivery of the license of Microsoft Office 365 Mailing Solution as mentioned in the tax invoice.

6. It is submitted that the Petitioner has entered into a tri-partite contract between Microsoft USA, the Petitioner and the Respondent as evident from Exhibit G and H to the petition. These licenses purchased by the Respondent were for a period of 3 years and each year for Rs. 50,43,975 and any order once placed cannot be cancelled for a period of 3 years. Even if the agreement is terminated by one of the parties, the existing enrolment continue for a period of 3 years. This is set out in the Enterprise Subscription Enrolment which has been duly signed by the Respondent and is annexed at Exhibit H, at page 52 of the Petition.
7. It is further submitted by the Petitioner that there have been no changes with respect to prices agreed between the parties. Therefore, there is neither any escalation in price nor variance between the price agreed and invoiced by the petitioner. The Respondent received the product and made the payment of Rs. 29,24,984.00 through RTGS being a part payment meaning thereby that the

Respondent had accepted the terms contained in the invoice dated 8th August, 2015.

8. It is submitted by the Petitioner that signing of all the agreements, the delivery of licenses as well as the part payment of the tax invoice is an admission on the part of the Respondent.
9. It is submitted by the Petitioner, that upon delivery of the aforesaid product, the Petitioner was entitled to receive full payment within a period of 60 days. **Thus, by October 10, 2015 the petitioner was entitled to the remainder amount of Rs. 29,24,963.00.**
10. It is submitted that Petitioner sent a **Demand Notice dated 15th March, 2017** to the Respondent. The aforesaid Demand Notice was received and replied by the Respondent on 6th April, 2017. In the aforesaid reply, the Respondent stated that after the installation of the licenses, **some serious issues related to slowness of the system and unresponsive mails cropped up** for few users which ultimately severely affected/obstructed the migration of all the users and in spite of various phone calls and emails to solve the aforesaid issues, no initiative was taken by the Petitioner. **The Respondent has referred its email dated 16.11.2015, 27.11.2015 and 30.11.2015.** And because of the unresponsiveness on the part of the Petitioner, the Respondent was compelled to

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revert back to the old environment and in fact had to roll back **2000 user ID's within the new set up** being set up by the Petitioner. Therefore, the Respondent had no option but to **cancel the Purchase Order** on the ground that none of the committed deliverables were met and **no support was extended for the resolution from the Petitioner's organisation.**

11. It is further submitted that vide email dated 20.01.2016, Mr. Neeraj Sharma from the Respondent's side communicated the Management's decision (i.e. Respondents) to **cancel the said Purchase Order** and called the Petitioner to refund the **advance amount of Rs. 29,24,984.00** paid by the Respondent.
12. It is further submitted by the Respondent that in response to mail dated 20.01.2016, the Petitioner **assured the Respondent** that Petitioner would take up these serious issues/hindrances in the working of the 0365 Mailing Solutions/Licenses with their Management internally and also with Microsoft. However, the same were neglected. Then again vide email dated 02.03.2016, Mr. Neeraj Sharma from Respondent's side was compelled to **explicitly cancel the said Purchase Order.**
13. It is further submitted that vide email dated 03.03.2016 through their representative Mr. Dilip Kumar Singh, the Petitioner requested the Respondent to review its decision

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and not to cancel the said Purchase Order and assured the Respondent that Mr. Rajiv, the Country Head of Microsoft **would meet** the Respondent between 7th to 10th March, 2016 to resolve the issues. The dispute continued till August, 2016 when on 31.08.2016, the Petitioner claimed payment of Rs. 71,61,641.00 allegedly outstanding with interest at 24%.

14. It is further submitted by the Respondent that **Clause 7 of the Terms and Conditions of the said purchase Order** provides for payment of balance amount **only against implementation/successful installation** of the licenses in the existing set up of the Respondent. Thus, the Respondent is under no obligation to make balance payment in case of Petitioner's failure to discharge their obligations in terms of the said Purchase Order and the Respondent has a right **to terminate the said Purchase Order** in the event of the blatant breach of the terms and obligations.
15. Now, the Petition is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 for the unpaid Operational Debt due of Rs.58,49,967.00 Rupees Fifty Eight Lakhs, Forty Nine Thousand, Nine Hundred and Sixty Seven Only and interest at the rate of 24% p.a. due up till 23rd August, 2018: INR 40,88,886.52 and further interest at the rate of

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24% p.a. from 23rd August, 2018 up till the date of payment/realisation.

16. The case was taken up by this Adjudicating Authority on 20.09.2018. The Petitioner was directed to serve the notice of date of hearing on Respondent along with the copy of the order under acknowledgement and file the proof of service. On 16.11.2018, none appeared on behalf of the Respondent. On 09.01.2019, the Respondent's lawyer appeared but failed to file objections and the matter was adjourned to 13.02.2019 and again on 13.02.2019, the Respondent's lawyer did not appear and the matter was adjourned to 08.04.2019. On 08.04.2019, at the request of the Respondent's lawyer, the matter was adjourned and listed for hearing on 21.06.2019 and again at the request of the Respondent's lawyer, the matter was adjourned to 14.08.2019 and again on 12.09.2019. On 12.09.2019, this Adjudicating Authority partly heard the arguments of the Respondent's lawyer. Once again, at the request of the Respondent's lawyer, the matter was adjourned to 23.10.2019 when the matter was reserved for pronouncement.

17. Observations:

17.1 This Adjudicating Authority has observed from the documents placed on record that there is series of

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correspondence between the Petitioner and the Respondent over the implementation of the Tripartite Agreement between the Petitioner, the Respondent and the Microsoft USA in respect of the disputes that **erupted during the installation of the Office 365 Licenses**. The emails referred here are dated 16.11.2015, 27.11.2015 and 30.11.2015.

17.2 The Respondent in reply to notice dated 15th March, 2017 received from the Petitioner replied in detail vide letter dated 6th April, 2017 in respect of the problems faced by the Petitioner in the installation of the Office 365 Licenses. It is also from the aforesaid from the correspondence placed on record that on more than two occasions, the Respondent has desired to cancel the Tripartite Agreement in view of the unresponsiveness attitude on the part of the Petitioner and the Respondent has to shift to old System.

17.3 On the other hand, it is the case of the Petitioner that Respondent does not have Essential System Requirements and Network Band Width and because of these reasons, the Office 365 Licenses are not working to the satisfaction of the Respondent.

17.4 It is also observed from the terms and conditions of the Purchase Order Clause 7 which provides for payment of balance amount against implementation.

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- 17.5 It is also observed from the records that payment of Rs. 29,24,963.00 made by the Respondent to the Petitioner was adjusted by the Petitioner, at the request of the Respondent, towards satisfaction of the Petitioner's earlier dues.
- 17.6 **The Demand Notice is issued on 15.03.2017. This application has been filed by the Petitioner on 28.08.2018 i.e. after 17 months.**
- 17.7 This Adjudicating Authority is not the right forum to examine and adjudicate as to which portion of the claims are admissible. The Adjudicating Authority will also not examine the merits of the dispute. There are **repeated complaints of the Respondent about non-functioning of the Office 365 Licenses** and counter complaints of the Petitioner regarding absence of Essential System Requirements in the organization of the Respondent. Thus, there is sufficient material to believe that disputes certainly exist in the facts of the present case regarding non-functioning of the System provided by the Petitioner.
- 17.8 In respect of the definition of "dispute" in the Code, Hon'ble Supreme Court has held that in the Mobilox Innovative Private Limited Vis Kirusa Software Private Limited **in civil appeal No. 9405 of 2017 vide order dated 21/09/2017 inter-alia that:**

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*“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. **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 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.”***

18. **Pre-existing dispute before the filing of this application is observed.**

ORDER

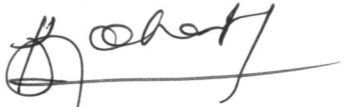
19. Considering the material, papers filed by the Petitioner on record, arguments of both counsels and the facts mentioned in Paras No. 17 to 18 **Existence of Dispute prior to issue of demand notice is established.**
- a) Accordingly, **the petition does not deserve admission.**



- b) Hence, this CP(IB) No.455 of **2018 is rejected.**
- c) We make it clear that any observations made in this order shall not be construed as an expression of **opinion on the merit of the dispute/controversy and the right of the applicant before any other forum shall not be prejudiced on account of dismissal of instant application.**

The present Petition is disposed of with the above Directions/Observations and orders as to no costs.

The Registry is directed to communicate this order to the petitioner and respondent by Register post/Speed post.



**(Prasanta Kumar Mohanty),
Adjudicating Authority
Member (Technical)**



**(Harihar Prakash Chaturvedi),
Adjudicating Authority
Member (Judicial)**