

**NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH (Court– II)  
KOLKATA**

**C.P. (IB)/888/KB/2019**

*A petition 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:*

**Sarco Equipments Private Limited**, a company within the meaning of Companies Act, 2013 having CIN: U29120WB1992PTC054613 and having its registered office at 10/1 Princep Street, Kolkata WB 700072 IN

..... *Financial Creditor*

*-versus-*

**NEPS Technologies Private Limited**, a company within the meaning of Companies Act, 2013 having CIN U74999WB2016PTC215509 and having its registered office at Premises No. 22, Ground Floor, Sector- B, Metropolitan Co-operative Housing Society Limited, Kolkata- 700105.

..... *Corporate Debtor*

**Date of Hearing:** 15<sup>th</sup> November, 2022

**Date of Pronouncement of the order:** 28<sup>th</sup> November 2022

**Coram:**

**Shri Rohit Kapoor, Member (Judicial)**

**Shri Balraj Joshi, Member (Technical)**

**Appearances (via video conferencing/physical):**

*For the Operational Creditor:*

Mr. Ayan Dutta Adv.

Mr. Abhishek Sikdar, Adv.

*For the Corporate Debtor:*

Mr.S.K. Bhadury, Adv.

Mr. Chandan Mondal, Adv.

**ORDER**

***Rohit Kapoor, Member (Judicial):***

1. This Court convened through hybrid mode.
2. This is a Company Petition under section 9 of the Insolvency and Bankruptcy Code, 2016 (herein after referred as “the Code”) by **Sarco Equipments Private Limited**, hereinafter referred to as “*Financial Creditor*” seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **NEPS Technologies Private Limited**, hereinafter referred to as “*Corporate Debtor*”.
3. The Corporate Debtor is a private limited company incorporated on 25.04.2016. The authorized share-capital of the company ₹15,00,000/- and the paid-up share capital of the company is ₹14,00,000/-. The total amount claimed to be in default by the Operational Creditor, is ₹16,23,716/- including interest @18% per annum.
4. Part – I of this petition contains particulars of the Operational Creditor. Part- II of this petition contains the particulars of the Corporate Debtor. No Interim Resolution Professional has been proposed under Part – III of the petition. Part – IV of this petition provides the particular of Operational Debt and Part -V of this petition contains the particulars of the Documentations, Record and Evidence of Default.
5. The Operational Creditor has relied on the various documents in support of its claims, including:
  - a) Emails dated 05.05.2018 and 07.05.2018 sent to Operational Creditor by the Corporate Debtor for acceptance of business terms, annexed as Exhibit “C”;
  - b) Purchase orders issued by Corporate Debtor, annexed as Exhibit “D”;
  - c) Tax invoices raised upon the Corporate Debtor, annexed as Exhibit “F”;

- d) Emails exchanged between Operational Creditor and Corporate Debtor, annexed as Exhibit "G";
- e) Demand Notice in Form 3, along with postal receipts and article tracking reports, annexed as Exhibit "K";
- f) Reply to the Demand Notice dated 16.02.2019 received from Corporate Debtor, annexed as Exhibit "M";

**6. Submissions on behalf of the Operational Creditor:**

- 6.1 The Operational Creditor imported goods from overseas exporters, duly pre-selected by the Corporate Debtor and against proforma invoices given by the Corporate Debtor. The Operational Creditor raised invoices upon the Corporate Debtor by adding 7% profit for goods imported by air and 10% profit for goods imported by sea.
- 6.2 The Operational Creditor gave 45 days of credit and 01 week of grace period to the Corporate Debtor. The Corporate Debtor issued postdated cheques for due dates of invoices within 15 days of receipt of Invoices.
- 6.3 It was decided that in case of delay of payment, Corporate Debtor would pay interest @18% per annum. Initially the said terms were decided mutually and the subsequently the same were reaffirmed and confirmed by the Corporate Debtor by its emails dated 05/05/2018 and 07/05/2018, the copies whereof are collectively annexed herewith and marked as Exhibit "C".
- 6.4 Accordingly, the Operational Creditor supplied computer peripheral products in terms of several purchase orders placed by the Corporate Debtor, after importing the same from overseas exporters as pre-selected by the Corporate Debtor. So, the goods were supplied, against which several Tax Invoices were raised by Operational Creditor for which part payments were made on ad-hoc basis.
- 6.5 The last payment was received between the period of 04/04/2018 to 08/12/2018 but after which no further payment was received. Further, the Corporate Debtor has unconditionally accepted its liability to pay-off the

- balance due amount with interest by its emails dated 05/05/2018 and 07/05/2018.
- 6.6 In the emails exchanged between the Operational Creditor and the Corporate Debtor, the Corporate Debtor has accepted its fault in making the payment in time. The copies of Emails exchanged between Operational Creditor and Corporate Debtor are collectively annexed herewith and marked as Exhibit "G".
- 6.7 For non-receipt of payments as per terms and conditions agreed between the parties, the Operational Creditor was forced to present the six post-dated cheques that were with them as because the Corporate Debtor was allowed a window of 45 days of credit period from the date of the invoice to pay off the due amount which they failed and neglected to do. The cheques on being presented to the banker of the Corporate Debtor were dishonored due to "Insufficient Funds".
- 6.8 For the said Tax Invoices, the balance payment was not made to the Operational Creditor, the entire balance amount which is amounting to Rs. 14,62,647/- along with an interest @18% per annum which is as per the invoices raised for the goods supplied which is amounting to Rs. 1,61,069/- . So, the total amount payable along with interest is Rs.16,23,716/-. The ledger sheets pertaining to the period from 01/04/2017 to 11/02/2019 also reflect the said amount to be due.
- 6.9 The initial amount of Rs.1,03,488/- fell due on 04/05/2018, gradually increased to Rs.14, 62,647/- and the same is due from 17/08/2018. Several reminders were sent to the Corporate Debtor regarding the amount to be paid but the reminder letters went unanswered.
- 6.10 Accordingly, on 11/02/2019, a Demand Notice under Form 3 of the Code was sent to the Corporate Debtor asking for the outstanding payment and it was replied back on 16/02/2019, thereby raising false and frivolous disputes.

**7 Submissions on behalf of the Corporate Debtor:**

- 7.1 The instant petition filed by the Operational Creditor is not maintainable before this tribunal as there is a *bona fide* dispute between the parties and the alleged claim of the operational creditor is not admitted by the company.
- 7.2 The petitioner herein cannot be termed as Operational Creditor as it was appointed as an agent of the company. Further, the company is not at all liable to for the alleged remuneration of the petitioner as the said petitioner company is guilty of mischief.
- 7.3 The petitioner company is carrying on business as contract manufacturer and import of networking and Telecoms Broad Brand product and for such other business and as per customer's demand the company imports designs.
- 7.4 The Corporate Debtor appointed the petitioner as an agent, whereby the petitioner was required to do work on behalf of for the Corporate Debtor following various terms and conditions. It was decided that the petitioner would bill the material to NEPS @ 7% against purchase order and that in case of non-payment of invoice amount within grace period, the petitioner would charge interest @ 18% per annum from due date.
- 7.5 It was specifically agreed that the petitioner company would procure and import the goods from the overseas exporters selected by the company and the petitioner company had no role to play for choice of overseas exporter. The petitioner stipulated to receive 7% commission upon the invoice price on the goods imported by air and 10% on goods imported by seal.
- 7.6 The business started in the year 2016 but after sometime the petitioner company started irregular supply and overcharging the commission. The applicant company also failed to provide warranty and abruptly stopped supply without any specific reasons.
- 7.7 The petitioner company indulged in illegal activities and lured some employees of the company and started behind the back dealings with the customers of the Corporate Debtor, in league with the treacherous employees of the Company. The petitioner company was successful in the

same due to which the company suffered huge losses and upon being intimated about such ground realities and losses suffered by the company, the petitioner company dragged it's feet and returned the cheques issued by the defendant company in favour of the applicant company which stood dishonoured.

7.8 That aforesaid acts of the applicant company are misconduct by an agent and as such that the applicant company is not entitled any remuneration.

**8 Analysis and Findings:**

8.1 Heard the Ld. Counsel for the Operational Creditor and the Ld. Counsel for the Corporate Debtor and perused the records.

8.2 While deciding a petition under section 9 of the Code, the Adjudicating Authority has to be satisfied that after the delivery of the demand notice under section 8 of the Code, the Operational Creditor has not received any notice of dispute or that there is no record of dispute in the information utility. In case, the Operational Creditor has been notified of any such pre-existing dispute, then the Adjudicating Authority ought to reject such a petition.

8.3 In regard to issue of pre- existing disputes, we would further like to refer to the decision of the Hon'ble Supreme Court in the matter of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited***<sup>1</sup> wherein it was held that:

*“The scheme of Section 7 stands in contrast with the scheme Under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a*

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<sup>1</sup> Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (21.09.2017 - SC) : MANU/SC/1196/2017

*suit or arbitration proceedings, which is preexisting - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.” (Para 29)*

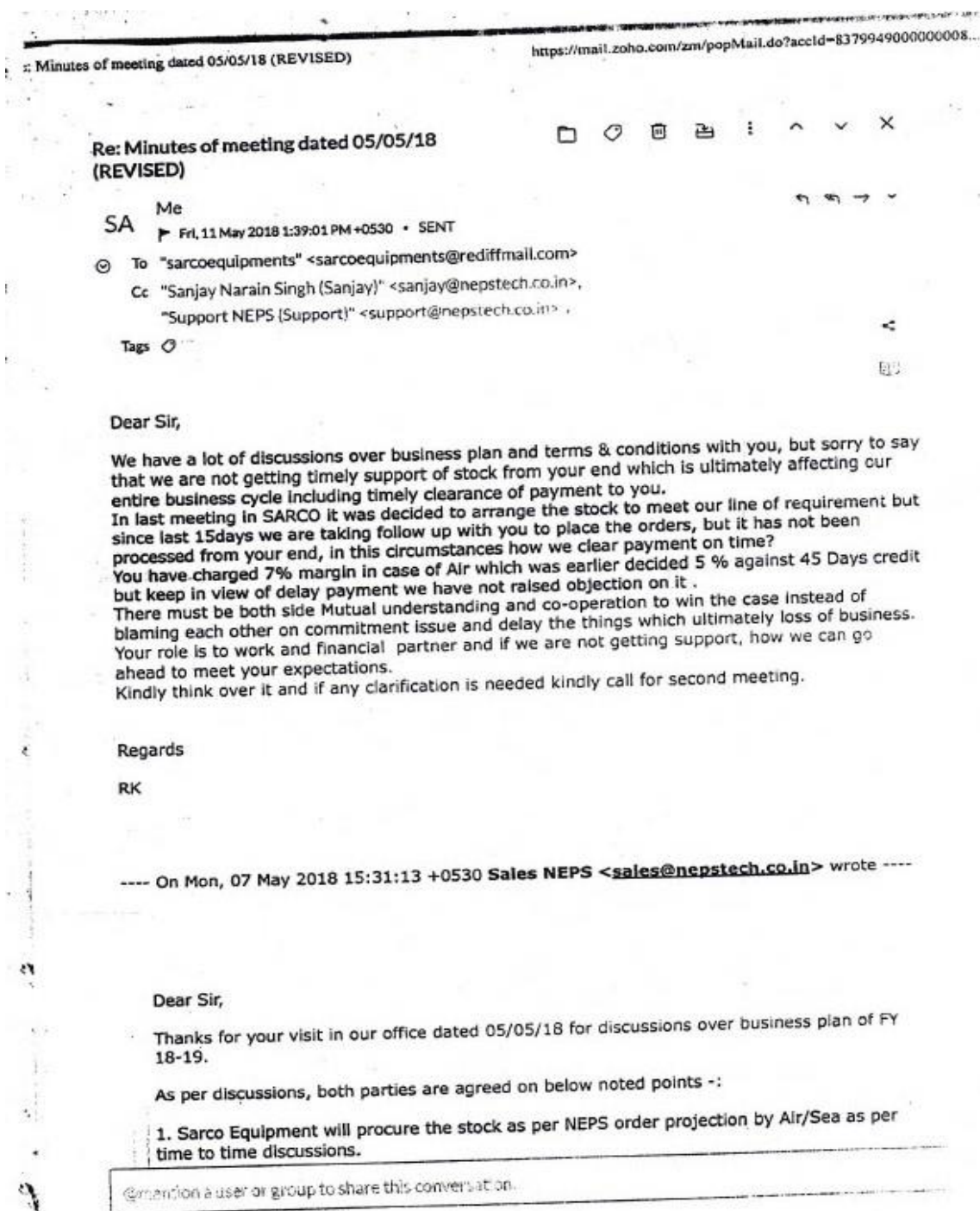
The Apex Court, in ***Mobilox Innovations Private Limited*** (*Supra*) further held that:

*“...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.” (Para 40)*

8.4 In the instant petition, records before us indicate that there were pre-existing disputes between the parties. The demand notice in Form 3 of the Code was sent on 11.02.2019. The reply to the same was sent on 16.02.2019, in which the Corporate Debtor notified the Operational Creditor of the dispute regarding the overcharging of commissions as well as the stopping of the supply by the petitioner abruptly.

8.5 The Corporate debtor also communicated its contention regarding the overcharging of commission to the Operational Creditor *vide* its email dated 11.05.2018. Further, *vide* email dated 26.09.2018, the Corporate Debtor also communicated to the Operational Creditor the dispute regarding defective products and the unavailability of service support from the Operational Creditor and its adverse effect on the business of the Corporate

Debtor. The emails dated 11.05.2018 and 26.09.2018 have been extracted hereinafter:



In the National Company Law Tribunal,  
Kolkata Bench (Court- II)

APC Systems and Products Pvt. Ltd. vs. Macmet India Ltd.  
C.P (IB) 888/KB/2019

Re: STATEMENT OF ACCOUNT FOR F.Y.18-19 UP TO 18/09/18 <https://mail.zoho.com/zm/popMail.do?accId=8379949000000008...>

Re: STATEMENT OF ACCOUNT FOR FY.18-19 UP  
TO 18/09/18

SA Me

Wed, 26 Sep 2018 9:02:07 AM +0530 • SENT

To "SARCO EQUIPMENTS" <sarcoequipments@rediffmail.com>  
Cc "NESP HO" <nespplc@gmail.com>, "Support NEPS Support" <support@nepstech.co.in>,  
"Sanjay Narain Singh Sanjay" <sanjay@nepstech.co.in>

Tags

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Dear Sir,

As discussed time to time during personal meetings that statement of account is not correct and amount has been overcharged in several invoices.  
Further, we have also informed that several times that your supplied units are defective and we are not getting any service support either from OEM or your end, due to this issue our whole payment is blocked in market which is affecting our entire business.  
We are trying to collect the defective units from customer end to return back the same to you.  
In meantime, you are requested to return back all our issued cheques and we will issue the fresh cheques of balance amount after returning back the defective units.  
You will be sole responsible for return of any cheque in bank without giving prior information in writing.

Regards

Account department  
Neps Technologies Private Limited.

----- On Tue, 18 Sep 2018 17:16:11 +0530 SARCO EQUIPMENTS  
<sarcoequipments@rediffmail.com> wrote -----

Dear Sir,  
PLEASE SEE THE ATTACH FILE.

Thanks and regard,  
FOR SARCO EQUIPMENTS PVT LTD

K.C.SARKAR  
DIRECTOR

Click here to create a user or group to share this conversation.

- 8.6 From the aforementioned emails as well as the reply to the demand notice, it is clear that multiple pre-existing disputes exist between the parties and that the Operational Creditor had notice of the same. Further, this Adjudicating Authority is satisfied that the said pre-existing disputes are not mere feeble arguments and and that they deserve to be adjudicated by a Court of competent authority by leading evidence. As

such, in presence of said pre-existing disputes, the instant petition is not maintainable and is accordingly *rejected*.

8.7 Consequently, **C.P.(IB) No. 888/KB/2019** shall stand *dismissed*. Needless to say, the Operational Creditor is free to pursue its remedies under any other law, and the dismissal of the present petition shall not stand in the way of such pursuit of remedies.

8.8 The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

8.9 Certified Copy of this order may be issues, if applied for, upon compliance of all requisite formalities.

**Balraj Joshi**  
Member (Technical)

**Rohit Kapoor**  
Member (Judicial)

**Signed on this, the 28<sup>th</sup> day of November, 2022**

SM[LRA]