

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1**

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
07-02-2022 AT 10:30 A.M. THROUGH VIDEO CONFERENCE.

CP(IB) No.61/9/HDB/2020
U/s 9 of IBC, 2016

IN THE MATTER OF:

Airhub Technologies Pvt Ltd

...Operational Creditor

Vs

Netxcell Ltd


...Corporate Debtor


C O R A M :-

**DR. VENKATA RAMAKRISHNA BADARINATHI NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. VEERA BRAHMA RAO AREKAPUDI, HON'BLE MEMBER (TECHNICAL)**

ORDER

Orders in CP (IB) No.61/9/HDB/2020 pronounced vide separate sheets. In the result the CP is allowed and the Corporate Debtor is admitted into Corporate Insolvency Resolution Process (CIRP).


MEMBER (I)


MEMBER (J)

Srinivas

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-1**

CP (IB) No. 61/9/HDB/2020

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of

M/s. Airhub Technologies Private Limited
Registered Office: Plot No.312,
Road No.-10C, Jubilee Hills,
Hyderabad-500 033,
Telangana.

... Operational Creditor

AND

M/s. Netxcell Limited
Block-D, 4th Floor, Wing-1,
Cyber Gateway, Hi-tech City,
Madhapur, Hyderabad-500 081,
Telangana.

... Corporate Debtor

Date of Order: 07.02.2022

Coram:

Hon'ble Dr. N.V.Ramakrishna Badarinath, Hon'ble Member (Judicial)

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

SP/

SP/

Appearance:

For Petitioner: Shri K.Purna Chandra Rao, Advocate.

For Respondent: Shri Gopala Krishna Prasad and other Advocates.

PER: BENCH

This is a petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 seeking initiation of Corporate Insolvency Resolution Process against M/s.Netxcell Limited, the Corporate Debtor herein, alleging that the Corporate Debtor failed to discharge the debt of an amount of Rs.1,88,55,869.00

1. The gist of the averments of the petition is:
 - i) The petitioner, herein after referred to as the operational creditor, during the course of its business has lent electronic telecom equipment/ hardware to the respondent/corporate debtor on hire besides extended its services. It is averred that the corporate debtor has been utilized the services extended by the operational creditor. The operational creditor has raised invoices for the services rendered from July to September, 2016 amounting to Rs.1,54,56,852.00.

- ii) It is further averred that the corporate debtor has acknowledged the dues payable to the operational creditor however broken the promise for payment of the dues. Copies of mails exchanged in this regard are filed as Annexure-4 of the petition. The petitioner in its written submission has mentioned the following email correspondence between the parties herein.

		outstanding payments very soon. Please co-operate with us. Regards ...Ramudu
17-05-2019 Page No.103	Email reply from Netxcell, Sr.General Manager (F&A) Mr. Ramudu to Airhub CEO Srinivas Babu	Dear Srinivas Babu garu , Due to Idea and Vodafone deal our payments in Idea holding since long time and we need recover almost 300 Lakhs. Please wait we will settle your payments very soon. Trust us we will settle all your payments ASAP. Regards ...Ramudu
21-06-2019 Page No.105	Email confirming the payment from Netxcell, Sr.General Manager (F&A) Mr. Ramudu	Dear Sir, As per our discussion in our office with your Anjaneyulu. We here by confirm you that, We will settle your payments before 5th of next month. Regards ...Ramudu.
25-06-2019	Email reply from Netxcell, Sr.General Manager (F&A) Mr. Ramudu to Airhub CEO Srinivas Babu	Dear Babu garu, We will pay next month two payments and March month balance bills . Regards ...Ramudu

		outstanding payments very soon. Please co-operate with us. Regards ...Ramudu
17-05-2019 Page No.103	Email reply from Netxcell, Sr.General Manager (F&A) Mr. Ramudu to Airhub CEO Srinivas Babu	Dear Srinivas Babu garu, Due to Idea and Vodafone deal our payments in Idea holding since long time and we need recover almost 300 Lakhs. Please wait we will settle your payments very soon. Trust us we will settle all your payments ASAP. Regards ...Ramudu
21-06-2019 Page No.105	Email confirming the payment from Netxcell, Sr.General Manager (F&A) Mr. Ramudu	Dear Sir, As per our discussion in our office with your Anjaneyulu. We here by confirm you that, We will settle your payments before 5th of next month. Regards ...Ramudu.
25-06-2019	Email reply from Netxcell, Sr.General Manager (F&A) Mr. Ramudu to Airhub CEO Srinivas Babu	Dear Babu garu, We will pay next month two payments and March month balance bills. Regards ...Ramudu

- iii) It is further averred that as the operational debt remained unpaid, the operational creditor issued demand notice on 26.11.2019 to the debtor, demanding the outstanding debt amount of Rs.1,54,56,852/-., which has been acknowledged by the corporate debtor. A copy of the demand notice has been filed Annexure-A6. It is stated that the corporate debtor replied on 04.12.2019 raising false and baseless pleas..

iv) Hence, the operational creditor filed this petition for initiation of CIRP against the corporate debtor under the provisions of the I&B Code.

2. The gist of the averments of the Counter is;

- i) The corporate debtor denied the averments made in the petition and stated that the present application is not maintainable on the ground that the contents raised by the operational creditor are incorrect.
- ii) It is averred that corporate debtor entered into an oral agreement with the operational creditor on 16.08.2014, agreeing to acquire voice boards on rental basis.
- iii) It is averred that Operational Creditor in the Demand notice has claimed dues since March 2018, even while the Operational Creditor vide email dated 01.09.2018 has acknowledged the receipt of payment up to May, 2018.
- iv) Further averred that though the operational creditor vide email dated 28.03.2019 stated that he could not continue the services from 31.03.2019, invoices were sent post termination of services.

- v) It is averred that petitioner had served notice on 14.11.2019 under Section 433 & 434 of Companies Act, for payment of amount Rs.1,54,56,852/- for a period from March 2018 to October 2019 to be paid within 21 days from date of notice. Subsequently respondent replied to it on 26.11.2019 denying the contents of the notice and requested to come to the respondent office for reconciliation.
- vi) The Operational Creditor even though provided 21 days' time period to reply to prior notice, sent Demand Notice dated 26.11.2019 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 stating that total amount of Rs. 1,54,56,852 (One Crore Fifty Four Lakhs Fifty Six Thousand and Eight Fifty Two Rupees only) is due from period from March 2018 to October 2019, whereas in the petition filed for initiation of CIRP (Corporate Insolvency Resolution Process) the total due amount mentioned is Rs. 1,88,55,869 (One Crore Eighty Eight Lakhs Fifty Five Thousand Eight Hundred and Sixty

Nine only) and the due date is from July, 2018 to November, 2019.

- vii) The Corporate Debtor received the Demand Notice dated 26.11.2019 on 03.12.2019 and replied on 04.12.2019 stating that there is dispute on the amount and the reply is well within period of 10 days as per Section 8(2) of the Code. The Operational Creditor upon receipt of the reply expressed their interest to settle the issue amicably vide email dated 11.12.2019 by holding a meeting. The Corporate Debtor vide email dated 13.12.2019 expressed their consent and offered their office location as venue for meeting dated on 18.12.2019. The Operational Creditor agreed to the venue of meeting and the date and further requested senior management of both the parties to be present vide email dated 14.12.2019.
- viii) The Operational Creditor remained absent at the said meeting and immediately served notice to Corporate Debtor under Section 9 of the Code, 2016, such act of Operational Creditor is Fraudulent as per Section 65 of the Code. It is

stated that in case of *Mobilox Innovations Private Limited v. Kirusa Software* the Hon'ble Supreme Court passed an order specifying that IBC is not intended to be substitute to a recovery forum and further laid down that whenever there is existence of dispute, the provisions of the Code cannot be invoked.

- ix) It is contended that the Corporate Debtor requested the Operational Creditor to revise the rates as per market rate and charge for the use products only who are in same line of business, the same was ignored by Operational Creditor.
- x) The Operational Creditor even after filing petition under Section 9 of the Code sent another email dated 07.02.2020 asking for an amount of Rs. 1,79,32,576 (Rupees One Crore Seventy Nine Lakhs Thirty Two Thousand and Five Seventy Six only) which contradicts the Demand Notice as well as the petition filed in this Hon'ble Tribunal.
- xi) Further corporate debtor has filed memo on 19.04.2021 stating that based on the directions of the Hon'ble Tribunal hardware (telephonic cards) were sent to the operational

creditor and the same is acknowledged by the employee of the operational creditor.

xii) The corporate debtor has placed reliance on the following rulings.

- Mobilox Innovations Private Limited Vs Kirusa Software Private Limited, Civil Appeal No.9405 of 2017, Supreme Court of India.
- K.Kishna V. Vijay Nirman Company Pvt Ltd, in Civil Appeal No.21825 of 2017, Supreme Court of India.
- M/s. Yash Technologies Private Limited vs. Base Corporation Limited, Company Appeal (AT) (Insolvency)No. 01 of 2019, NCLAT.
- Raymond Construction Co. Pvt Ltd vs Larsen & Turbo Ltd, Company Appeal (AT) (Insolvency) No. 668 of 2019, NCLAT.

3. The gist of the averments of the Rejoinder to the counter is;

It is stated that from May, 2016 the Operational Creditor has raised invoices on the Corporate Debtor, and the Corporate Debtor has settled the bills for usage of the hardware equipment and services of the Operational Creditor for period pertaining to May, 2016 to April, 2018.

Net amount due after TDS from the CD	TDS	Principal Amount (Gross) in Rs.	Interest @18% for the delayed period	Total Outstanding Amount (in Rupees)
(A)	(B)	(C) (A+B)	(D)	(E) (C+D)
1,54,56,852	14,31,125	1,68,87,977	19,67,892	1,88,55,869

- ii) For the period from May, 2018 to October, 2019 there was delay by Corporate Debtor in settling the dues for services rendered amounting to Rs. 1,54,56,852. Thereafter, several requests were being made by the Operational Creditor to Corporate Debtor for settling dues, however the Corporate Debtor failed to honour its commitment. The details are furnished below or reference.
- iii) The Operational Creditor has handed over the valuable imported sophisticated computer hardware equipment from China worth 5.63 Crores approx. and the Corporate Debtor is using the said equipment for its business operations and enjoying the revenues

being derived out of the said equipment. The Corporate Debtor has been utilising the hardware equipment for more than 4 years on the other hand is not bothered to settle the dues neither return the hardware equipment to Operational Creditor.

- iv) Therefore, for continued utilisation of the hardware equipment provided by the Operational Creditor, the Operational Creditor raised invoices. It is mention here that total invoice raised and unpaid till November, 2020 amounts to Rs. 2,61,84,816/- plus the interest amount at 18%.
- v) The Corporate Debtor while replying to notice under Section 8 of the Code first time raised issues and objections only to avoid the legitimate dues payable to Operational Creditor. Such mere objection is raised for the dispute and unrelated to clause (a) or (b) or (c) of sub section (6) of Section 5 of the Code. Moreover, the Corporate Debtor has raised objection only after receiving demand notice under Section 8 of the Code. The demand notice was issued on 26.11.2019, the Corporate Debtor admitted that he was in receipt of the notice on 03.12.2019, the reply stated to have been sent by Corporate Debtor in response to the demand notice was in

fact dispatched by post on 07.12.2019 and the said reply was not within the 10 days statutory period after receiving demand notice.

- vi) The operational creditor placed reliance on the following rulings.
- i. Mobilox Innovations Private Limited v. Kirusa Software Private Limited
 - ii. Innovative Industries Limited v. ICICI Bank¹,
 - iii. Smt. Savitamma v. Cicil Narona and another² in para 2 at page 1988,
 - iv. Amar Singh v. Union of India and Ors (2011) 7 SSC 69 at paras 21 and 28.

5. In the light of the contest as mentioned above, the following points are framed for consideration by this Adjudicating Authority:

Whether the documentary evidence furnished with application shows that the aforesaid debt is due and payable and has not yet been paid?

1. 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 demand notice of the unpaid operational debt in relation to such dispute?
-

1. We have heard Shri. K.Purna Chandra Rao , Ld. Counsel for the Petitioner and Shri. G.Gopala Krishna Prasad, Ld. Counsel for the respondent, perused the record, written submissions and the case law.

Point.

Whether the documentary evidence furnished with application shows that the aforesaid debt is due and payable and has not yet been paid?

2. At the very outset, we may state herein that in order to arrive at a just and proper finding on the points involved in the subject list, we feel it apt to rely on the following illuminating rulings of Hon'ble Supreme Court of India, on the legal aspects of sections 7 and 9 of I&B Code 2016;
 - (i). M/s Innoventive Industries Vs. ICICI Bank & another in Civil Appeal Nos.8337-8338 of 2017.
 - (ii) Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited,

(1) In re, M/s Innoventive Industries, supra, Hon'ble Supreme Court of India, 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 71 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 suit or arbitration proceedings, which is pre-existing – 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.”

“On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

(2). In *Inre, Mobilox Innovations Private Limited* (supra), Hon’ble Supreme Court of India, has held that;

“It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which “the existence of a dispute” alone is mentioned. Even otherwise, the word “and” occurring in Section 8(2)(a) must be read as “or” keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as “or”. If read as “and”, disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise.”

“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”

(3). In the same ruling, it has been also that,

“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.” (Emphasis is ours).

3. Since the corporate debtor has been contending that it has raised a dispute as to the ‘sum claimed as payable’ by the operational creditor, prior to the receipt of the demand notice from the operational creditor, and as the said contention has been denied out rightly by the operational creditor, it is imperative for us to ascertain, whether or not a dispute in relation to the alleged unpaid operational debt between the parties herein exists, prior to the receipt of the demand notice dated 17.09.2020 by the corporate debtor,? If so, whether the said dispute is not *spurious, hypothetical or illusory*?
4. Dispute is defined under Sub Clause 6 of Section 5 of I&B Code, as follows;

(6) “dispute” includes a suit or arbitration proceedings relating to— (a) the existence or the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty;”

5. Scope of enquiry;

Since *Mobilox*, supra, also sets the perfect parameters for an enquiry, in an application filed under section 9 of I&B Code, by the Adjudicating Authority, we profitably refer once again to the following para,

“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**” (Emphasis is ours).

6. In the above legal frame when the factual matrix of this case is examined, it is manifest from the pleadings and the oral and submissions, that the parties herein, have admitted that the applicant/operational creditor has been under contractual obligation with the respondent/corporate debtor to supply Electronic Voice Boards as per the terms of the oral agreement, by raising invoices and the respondent/corporate debtor shall make payment on receipt of the supplies as per the terms of the agreement.
7. Ld. Counsels for the Operational Creditor as well as Corporate Debtor in their endeavour to drive home their respective contentions have relied, on the e-mail correspondence, invoices,

etc, exchanged between the operational creditor and the corporate debtor.

8. It is needless to say that a pre-existing dispute even if found to have been raised by the corporate debtor before receipt of the demand notice, yet such dispute must truly exist in fact and the same shall not be spurious, hypothetical or illusionary. In the case on hand prior to the issuance of the Demand Notice admittedly a legal notice has been issued by the operational creditor to the corporate debtor, where under the operational creditor demanded the sum around Rs.1,54,56,852.00/-from the corporate debtor and the said notice has been served on 14.11.2019. In response to the said notice the corporate debtor had sent a reply wherein it had contended that sum claimed as payable is wrong and that reconciliation is required. This plea is reiterated in the reply to the demand notice issued by the operational creditor on 26.11.2019. The dispute raised was said to be in respect of the 'sum due'. However, it is not even stated that how the sum claimed is in correct. Here it may be stated that by the date of issuance of demand notice itself the supplies were completed and demand for payment has been raised and pending compliance by the corporate debtor.
9. In this back drop, the emails referred above from 17.05.2019 to 25.06.2019 by which time the supplies were already completed, when examined the same has goes to show that the corporate debtor during all the times admitted the debt and only sought time

for payment. Therefore, when the corporate debtor vide email dated 25.06.2019 had admitted the debt and prayed for two months' time for payment of bills, it is surprising to note that from the very same corporate debtor in its reply notice dated 26.11.2019 that the amount claimed is wrong, without placing any details as to how the sum demanded is wrong.

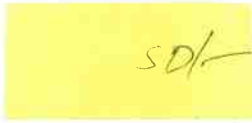
10. As already stated in Mobilox Innovations Private Limited (supra), Hon'ble Supreme Court of India, had clearly stated that the dispute raised before receipt of the demand notice by the corporate debtor must truly exist in fact and should not be spurious, hypothetical or illusory. The said test when applied to the case on hand we have no hesitation to conclude that the so-called plea of pre-existing dispute does not exist, besides the same is spurious, hypothetical or illusory.
11. Therefore in view of the discussion as above and taking into consideration the submissions made by learned counsel for both sides and on perusal of the record we are satisfied that it is the fit case to admit the Corporate debtor into CIRP. Accordingly petition is admitted.
12. Hence, we admit this Petition under Section 9 of IBC, 2016, and declaring moratorium for the purpose referred to in Section 14 of the Code, with following directions:-

- (A) Corporate debtor, M/s.Netxcell Limited, is admitted in CIRP under Section 9 of the I&B Code, 2016.
- (B) The 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 or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;
- (C) 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.
- (D) Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the

- condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.
- (E) 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.
- (F) That 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, whichever is earlier.
- (G) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.
- (H) That this Bench hereby appoints Shri Mr. Sreenivasa Rao Somisetty, having registration no. IBBI/IPA-001/IP-P02049/2020-2021/13210 with e-mail ssraocacs@gmail.com, and Mobile No: 8008189123, as Interim Resolution Professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code.
- (I) Proposed IRP filed Form-2 vide memo dated 11.10.2021. Authorisation for assignment is valid upto 13.10.2022. This

information is also available in IBBI Website. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore, the proposed IRP is fit to be appointed as IRP since the relevant provision is complied with.

- (J) The Registry of this Tribunal is directed to send a copy of this order to the Registrar of Companies, Hyderabad for marking appropriate remarks against the Corporate Debtor on website of Ministry of Corporate Affairs as being under CIRP.
- (K) The Operational Creditor is directed to communicate this order to the IRP appointed in this case.
- (L) Accordingly, this petition is admitted.



VEERA BRAHMA RAO AREKAPUDI
MEMBER TECHNICAL



DR. N.V.RAMAKRISHNA BADARINATH
MEMBER JUDICIAL

Pavani