

**IN NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT- V**

C.P. 637/IB/MB/2020

Under Section 9 of the Insolvency and
Bankruptcy Code, 2016 read with Rule 6
of the Insolvency and Bankruptcy
(Application to Adjudication Authority)
Rule 2016)

In the matter of

B4U Broadband (India) Private Limited
Plot No. 114, Road No. 15, Next to SRL
Ranbaxy, MIDC, Andheri (East) Mumbai-
400093

..... Operational Creditor

Vs

Kyta Productions Private Limited

4th Floor, HDIL Towers, Anant
Kanekar, Bandra (East), Mumbai
400051

..... Corporate Debtor

Order Reserved On: 07.02.2023

Order Pronounced On: 20.02.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Shri Prabhat Kumar, Member (Technical)

Appearances (via Videoconferencing)

For the Petitioner: Mr. Hridhay Khurana, Advocate

For the Corporate Debtor: None present

Per: Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The above Company Petition is filed by **B4U Broadband (India) Private Limited** hereinafter called as **Operational Creditor** seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against **Kyta Productions Private Limited** herein after referred to as **Corporate Debtor** by invoking the provisions of Section 9 Insolvency and Bankruptcy code (hereinafter called "**Code**") read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of Operational Debt of Rs.2,57,32,416 as principal amount and Rs. 5,58,358/- as interest amount aggregating to Rs. 2,62,90,774/-.

2. The case of the Petitioner/Operational Creditor is that Vishal Bhardwaj Films LLP (hereinafter referred to as VBLLP) entered into an agreement for the production of the film titled "Pataakha". As per the said agreement, all rights including the copyrights with regard to the said film were jointly held by the VBLLP and the Corporate Debtor. The Corporate Debtor further agreed to equally share its rights and responsibilities under the said agreement with the Operational Creditor. In this regard, the Operational Creditor entered into an agreement with the Corporate Debtor whereby the Operational Creditor agreed to invest 50% towards acquisition price of the film i.e. the sum of Rs. 7.5 crores plus applicable taxes. The Operational Creditor has complied with its obligation incorporated in the agreement and is entitled to receive its interest on investment and share of revenues as per the agreement executed between the parties. In this regard, the Corporate Debtor's representative namely Mr. Prabhakar Jain addressed an email to the Operational Creditor admitting that an amount of Rs. 1,60,11,086 plus applicable taxes was due and payable to the Operational Creditor under the Agreement. In the said letter dated 05.04.2019, the Corporate Debtor further agreed that the Operational Creditor, Corporate Debtor and VBLLP would discuss / decide about the quantum of dues payable to the Operational Creditor. It was also agreed that the pending dues of the Operational Creditor would be adjusted against the future project, which

was to be finalized on or before 05.10.2019. It was also agreed that in case, the future project was not finalized within 6 months, the Corporate Debtor would refund the pending dues of Rs. 1,60,11,086 plus applicable taxes to the Operational Creditor within 3 months after the expiry of the due date.

3. It is further claimed by the Operational Creditor that the Corporate Debtor failed to finalize the future project by the due date. As a result, the Operational Creditor through its letter dated 08.11.2019 called upon the Corporate Debtor to pay the amount of Rs. 1,60,11,086 plus taxes on or before 04.01.2020. Further reminder dated 19.12.2019 was also sent to the Corporate Debtor. Thereafter, the Operational Creditor again sent a notice calling upon the Corporate Debtor to make the payment of Rs. 1,60,11,086, with applicable taxes amounting to Rs. 2,57,32,416/- within 7 days of receipt of the notice. The Demand Notice under section 8 of the IBC Code was also delivered to the Corporate Debtor on 07.02.2020 but no payment has been made by the Corporate Debtor. Hence the Petition.
4. In this case, Mr. Prakhar Parekh, Advocate appeared on behalf of the Corporate Debtor on 21.02.2022 and sought time to file reply and he further requested two weeks' time to file reply. Time was granted to the Corporate Debtor and till date no reply has been filed on behalf of the Corporate Debtor. On 07.02.2023, when the matter was called, nobody was present on behalf of the Corporate Debtor. Under the circumstances, the respondent was proceeded against ex-parte.
5. We have heard the counsel for the Petitioner / Operational Creditor and gone through the records.
6. During the course of the arguments, the counsel for the Operational Creditor has pointed out that as per Clause 6 of the agreement dated 18.07.2018 (Exhibit A) which was executed between the parties, both the parties had agreed to spend a sum of Rs. 7.5 crores each towards the printing and advertising expenses for the theatrical release of the movie call "Pataakha". Accordingly, the Petitioner/ Operational Creditor invested money and rendered services to the Corporate Debtor with

regard to the release of the movie. It is further been pointed out that as per the terms and conditions of the contract, the Corporate Debtor had to share the revenues collected from the release of the film in consideration of the investment and services rendered by the Operational Creditor. The counsel for the Petitioner/ Operational Creditor has further referred to the letter dated 5th April 2019 (Exhibit B) whereby the parties agreed with the pending dues payable to the Operational Creditor by the Corporate Debtor in respect of the film 'Pataakha' which would be mutually discussed and finalised and in case the parties were unable to arrive at consensus about the exact quantum of the pending dues, the pending dues referred to an e-mail dated 7th March 2019 of Rs. 1,60,11,086/- shall be treated as due and payable by the Corporate Debtor. It was further stated in the letter (Exhibit B) that the parties agreed that the pending dues of the Petitioner would be adjusted against the future project and in case the future project was not finalised within six months, the Corporate Debtor would refund the pending dues without interest within six months. In this regard, it is further pointed out by the counsel for the Corporate Debtor that future project could not be finalised between the parties by the agreed due date and, therefore, the Petitioner sent letter dated 8th November 2019 (Exhibit C) again requesting the Corporate Debtor to make due payment of Rs. 1,60,11,086 with interest. Thereafter, reminder dated 19th December 2019 (Exhibit D) was also sent to the Corporate Debtor and another letter (Exhibit E) dated 22nd January 2020 was also sent requesting for payment of the due amount along with the GST, TDS amounting to Rs. 2,57,32,416/- and finally, the demand notice (Exhibit F) was also sent to the Corporate Debtor dated 6th February 2020 but the same was not responded to by the Corporate Debtor. The counsel for the Petitioner has further argued that no reply has been filed nor any defence has been raised nor any pre-existing dispute has been raised by the Corporate Debtor. In these circumstances, the petition under section 9 must be admitted and CIRP be initiated against the Corporate Debtor for non-

payment of the aforesaid dues payable on account of the operational debt.

7. We have thoughtfully considered the aforesaid contentions raised by the counsel for the Petitioner.
8. The Petitioner has filed an instant Petition under section 9 of the Code, on account of the default of payment of Operational Debt by the Corporate Debtor to the tune of Rs. 2,57,32,416/-. The claim of the Petitioner emanates from the contract/ agreement (Exhibit A) executed between the parties i.e. the Operational Creditor and the Corporate Debtor which was with regard to the certain rights in respect of the film titled "Pataakha". In order to ascertain as to whether or not the amount claimed in the Petition is covered under the definition of Operational debt, all the terms and conditions of the agreement (Exhibit A) has to be perused. Clause 2 of the agreement states that the Corporate Debtor had already entered into an agreement with M/s. VBLLP dated 16th May 2018 in the production of the film whereby all the rights including copyright with regard to the said film and all underlying works, derivatives etc were jointly to be held by the Corporate Debtor and VBLLP for acquisition price of Rs. 15 crores. Clause 2 of the agreement further provides that with consent of VBLLP, the Corporate Debtor has agreed to equally share its rights and responsibilities under this agreement dated 16th May 2018 with the Operational Creditor and this agreement was accordingly being executed between the Corporate Debtor and the Operational Creditor.
9. Clause 5 of the agreement further provides that out of the acquisition price of the film a sum of Rs. 7.5 crores plus taxes shall be paid by the Operational Creditor to the Corporate Debtor and 50% of the acquisition price would be attributed to the theatrical rights and 50% of the acquisition price would be attributed to the non-theatrical exploitation and distribution rights. As per clause 6, it was further agreed between the parties that the sum of Rs. 7.5 crores would be spent towards the printing and advertising expenses for the theatrical release of the movie in India and the Operational Creditor would pay its share of 50% of agreed printing and advertising expenses to the Corporate Debtor

10. Clause 11 of the agreement further provides that the Corporate Debtor would assign to the Operational Creditor 30% revenues share and 25% share in the copyright underlying works, derivatives rights in perpetuity along with the credits in the film. Clause 13 of the agreement further provides that the Operational Creditor, Corporate Debtor and VBLLP shall be entitled to the share the revenues as set out in clause 14 and clause 14 provides that the revenues of the film shall be recouped in the following manner:

- (i) Firstly, all expenses and costs towards the stamp duty, paid by the Kyta and B4U.
 - (ii) Secondly, towards the P&A Expenses, if any, actually incurred by Kyta and B4U, as set out in this Principal Terms;
 - (iii) Thirdly, towards recoupment of the Acquisition Price actually expended by Kyta and B4U;
 - (iv) Fourthly, towards Force Majure Over Budget (FM Over Budget) agreed in writing between Kyta and the Production Company and expended by each Party (i.e., VBLLP and Kyta) pursuant to Clause 4(8) of the VBLLP Agreement entered between Kyta and the Production Company, if any on a *pari passu* basis.
 - (v) Fifthly, towards cost of finance by Kyta and B4U computed at the rate of 12% (twelve percent) on the Acquisition Price on a reducing balance basis till the delivery of the Film after reducing any advances received
 - (vi) Sixth, any royalties paid to authors of underlying works and/or performers, by either Party i.e. B4U or Kyta pursuant to the provisions of the Copyright Act, 1957.
 - (vii) Thereafter, any share in profit to any artist, if any, as mutually agreed in writing in advance (for the sake of clarity, Parties agree and acknowledge that, Ms. Sanya Malhotra is committed a share of INR 5 Lakhs if the NBOC (as defined in the artist agreement) crosses INR 40 Crores and an additional sum of INR 5 Lakhs if the NBOC crosses INR 45 Crores);
 - (viii) Any amounts left thereafter i.e. the balance Surplus realization, shall be divided between Kyta, Production Company and B4U in the following ratio :-
 30% (Kyta): 30% (B4U): 40% (VBLLP i.e the Production Company) respectively in perpetuity.
2. All revenue receipts and any profit (being the "Surplus" as set out in sub clause 14 (1)(viii) above) shall be received in the Revenue Account of Kyta and shall be disbursed by Kyta to B4U and to the Production Company within a period of 15 days from the date on which such Surplus becomes due in accordance with the terms hereof subject to such amounts being actually being received by Kyta. For the sake of clarity, Kyta will disburse the Surplus upon the receipt of Revenue as applicable and occurrence of Surplus.

11. From perusal of the aforesaid terms and conditions as extracted from the agreement (Exhibit A), it emerges that the Corporate Debtor was in contract with the VBLLP with regard to the production and release of the film called "Pataakha". The Corporate Debtor with the consent of VBLLP further entered into an agreement with the Operational Creditor to perform its part of the contract with VBLLP, as can be made out from above referred terms and conditions of the contract between the Operational Creditor and the Corporate Debtor. The former was to make certain investments in the promotion and release of the film along with the Corporate Debtor and after the film was released, the revenue generated from the release of film were to be shared as defined in Revenue Share Clause (Clause No. 14 of the agreement exhibit A). Therefore, in our considered view, the Operational Creditor /Petitioner did not provide any services to the Corporate Debtor. Rather the Petitioner/ Operational Creditor made an investment in the movie and profits were to be shared between the parties after the release of the film. It is very settled that as per section 5(21) of the Insolvency Bankruptcy Code, 2016, 'Operational Debt' means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.
12. A plain reading of the aforesaid section 5(21) clearly reveals that the Operational Debt comes into being only when some service is provided or some goods were sold whereas in the instant case, none of the two requirements are being met. The Petitioner has not provided any services nor sold any goods to the Corporate Debtor. Therefore, the claim referred in the Petition cannot be equated with an Operational Debt on the basis of which the provision of Section 9 of the Code could be invoked. Rather it is evident from the terms and conditions of the Agreement that Petitioner made investment by the way of joint venture in the production and release of the movie titled "Pataakha" and the revenue generated from the release of the film was to be shared by all the stakeholders

including the Petitioner. Accordingly, in our considered view, the Petition under Section 9, which can be filed only in case of default of payment of the Operational Debt, is not maintainable.

13. As a result of the above discussion, the petition is dismissed being not-maintainable under section 9 of the Code.

Sd/-

**Prabhat Kumar
Member (Technical)**

Sd/-

**Kuldip Kumar Kareer
Member (Judicial)**