IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI

CP (IB) No.896/MB/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

ELIXIRAY CONSULTING PRIVATE LIMITED

[CIN: U74999MP2021PTC055555]

Registered Office: F. No. 420, Block-L

Signature Residency, Kolar Road

Bhopal – 462042.

…Operational Creditor

VERSUS

NEBLIO TECHNOLOGIES PRIVATE LIMITED

[U74999MH2018PTC304533]

Registered Office: 3RD FLOOR, Prudential Building

Hiranandani Gardens, Powai, Mumbai

Maharashatra-400076.

...Corporate Debtor

Pronounced : 23.01.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances : (Hybrid)

Operational Creditor: Adv. Dushyant Yadav

Corporate Debtor: Adv. Abhishek Adke a/w. Nimish Gavali

ORDER

[Per: SANJIV DUTT, MEMBER (TECHNICAL)]

1. Background

1.1 This Application bearing C.P.(IB) No.896/MB/2022 was filed by Elixiray Consulting Private Limited, the Operational Creditor on 01.07.2022 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of Neblio Technologies Private Limited, the Corporate Debtor.

1.2 The Operational Creditor is engaged in the business of providing business promotion, business process and other consulting services. The Corporate Debtor is engaged in the business of providing a tech platform for trading in virtual digital assets/ cryptocurrencies through its website and App named 'CoinDCX'.

1.3 The Corporate Debtor hired the services of the Operational Creditor for providing business promotion and other consulting services *vide* a Service Agreement dated 04.01.2022 executed with the Operational Creditor. The Operational Creditor started providing its services to the Corporate Debtor from January, 2022 and raised necessary invoices in respect thereof during the period from January, 2022 to March, 2022. An aggregate sum of Rs.1,40,07,265/- (One Crore Forty Lakhs Seven Thousand Two Hundred Sixty-Five Rupees) including principal debt of Rs.1,35,61,639/- and interest of Rs.4,45,626/- calculated @ 24% per annum became due from the Corporate

Debtor to the Operational Creditor on account of services rendered which remained unpaid despite reminders.

1.4 The Operational Creditor issued Demand Notice dated 18.05.2022 to the Corporate Debtor as required under Section 8 of the Code, but the Corporate Debtor failed to make payment of aforesaid amount of operational debt due and payable to the Operational Creditor. This led to the filing of the present Application by the Operational Creditor seeking initiation of CIRP in respect of the Corporate Debtor.

2. **Averments of the Operational Creditor**

2.1 The Operational Creditor submits that it entered into a Service Agreement with the Corporate Debtor on 04.01.2022 for providing services consisting of business-related processes. It is submitted that the Operational Creditor was required to promote the name of the Corporate Debtor company by getting its App "CoinDCX" downloaded by smartphone users in their respective smartphones. It is submitted that the Operational Creditor provided services to the Corporate Debtor as required from January, 2022 till March, 2022 and issued invoices for the same. It is stated that the invoice for January, 2022 was duly settled by the Corporate Debtor.

2.2 The Operational Creditor submits that it had raised Invoice No.EC/2021-22/09 dated 03.03.2022 for Rs.87,19,256/- against the services provided for the month of February, 2022 and Invoice No.EC/2022-23/04 dated 11.204.2022 for Rs.48,42,838/- for the services provided for the month of March, 2022 but the same have not been paid by the Corporate Debtor, despite various reminders. Thus, it is submitted that a principal sum of Rs.1,35,61,639/- together with interest of Rs.4,45,626/- calculated @ 24% P.A. has fallen due to the Operational Creditor towards provision of services to the Corporate Debtor during the months of February and March, 2022. The dates of default as mentioned in Part-IV of the Application are 03.03.2022 and 11.04.2022 being the dates of above invoices.

2.3 The Operational Creditor submits that as per the payment terms agreed under the Service Agreement, the invoice issued for each month was to be paid within 30 days. Despite numerous requests made through various communications to the Corporate Debtor regarding the unpaid invoices, it is submitted that these remained outstanding.

2.4 Thereafter, the Operational Creditor addressed a Demand Notice under Section 8 of the Code to the Corporate Debtor on 17.05.2022 which was delivered to the Corporate Debtor on 23.05.2022. The Demand Notice dated 17.05.2022 was also sent on registered email address of the Corporate Debtor on 18.05.2022. The Corporate Debtor responded to the said Demand Notice on 25.05.2022 but no payment was made by the Corporate Debtor till the date of filing of the present Application.

2.5 It is further submitted that the Corporate Debtor had deducted TDS on the invoice pertaining to the month of February, 2022 which was reflected in Form 26AS and that the said act of deduction of TDS amounts to admission of liability on the part of the Corporate Debtor. It is thus prayed that the present Application may be allowed and CIRP may be initiated in respect of the Corporate Debtor under Section 9 of the Code.

3. Contentions of Corporate Debtor

3.1 The Corporate Debtor in its Affidavit in Reply has denied all allegations and contentions of the Operational Creditor. It is submitted that the Corporate Debtor is a solvent company. It is engaged in the business of providing a tech platform for trading in cryptocurrencies through its website as well as crypto investment App called "coinDCX". It is stated that the Corporate Debtor currently has over one crore users who are using its platform.

3.2 The Corporate Debtor had entered into a Service Agreement with the Operational Creditor on 04.01.2022 with the objective to acquire new users/ clients and for each genuine on-boarding as detailed in the Agreement, the Corporate Debtor had agreed to pay consideration subject to the Operational Creditor fulfilling the terms as stipulated in the said Agreement.

3.3 A genuine dispute arose between the parties prior to the issuance of the statutory Demand Notice dated 17.05.2022 with respect to the services provided by the Operational Creditor under the Service Agreement dated 04.01.2022. It is contended that the data submitted by the Operational Creditor was found to be fraudulent and fabricated which was duly informed to the Operational Creditor vide email dated 08.03.2022.

3.4 The Operational Creditor has made false and incorrect statement in the Affidavit filed under Section 9(3)(b) of the Code. It is stated that the Operational Creditor has not mentioned in the said affidavit that *vide* e-mails dated 08.03.2022 and 18.04.2022, the Corporate Debtor had disputed the authenticity of the data submitted by the Operational Creditor. Despite this dispute, it is submitted that the Operational Creditor has preferred to file the present Application which clearly is an abuse of process of law.

3.5 In the month of February, 2022, the Corporate Debtor had received 11880 data from the Operational Creditor out of which, after verification, only 11368 data were found to be in order. However, it is contended that while using the data so provided, the Corporate Debtor found that the same was not correct.

Therefore, suspecting a possible fraud, the Corporate Debtor appointed an independent entity, namely, M/s Six Dee Netad Solutions Private Limited (hereafter referred to as "mFilterIt") to examine the authenticity of the data. Consequently, the Corporate Debtor *vide* email dated 08.03.2022 instructed the Operational Debtor to stop the work immediately and, hence, the Service Agreement stood terminated, as the Corporate Debtor was awaiting the analysis report. The Operational Creditor was again informed *vide* email dated 18.04.2022 that the data was being analysed. After analysing the data, mFilterIt *vide* email dated 25.05.2022 submitted the transaction report identifying the fraudulent data/ duplicate users.

3.6 The Corporate Debtor in its reply dated 25.05.2022 to the Demand Notice itself had raised the pre-existing dispute with regard to the wrongful billing of fraudulent data by the Operational Creditor. It was informed that the Corporate Debtor had found that there were fraudulent entries and, therefore, it was not obliged to pay the invoices raised by the Operational Creditor. It was also clarified that payment of invoices was subject to strict compliance with the terms of the agreement and that the Operational Creditor was under an obligation to ensure that no false, fake or fraud transactions, data points or duplicate entries were provided by its employees or promoters for the activities or campaigns undertaken by the Corporate Debtor. In other words, the Corporate Debtor submits that it is liable to pay only for the genuine data. It is pointed out that in its reply, the Corporate Debtor had clearly informed the Operational Creditor that after deducting the charges for fraudulent data, a sum of Rs.37,38,150/- was only payable for which the Operational Creditor was asked to send the revised invoice which it has failed to do so far. After verification of the data, a sum Rs.37,38,150/- is only payable on submission of the revised invoice as against Rs.1,40,07,265/- demanded by the

Operational Creditor along with credit note for the balance amount which is required for maintaining proper books of account and payment of due GST.

3.7 The Corporate Debtor strongly contends that the Operational Creditor has miserably failed to comply with the strict conditions related to the authenticity of the data as contained in Annexure A(II)(B) of the Service Agreement and, therefore, it is not entitled to the amount of Rs.1,40,07,265/- claimed by it.

3.8 It is contended that there was no agreement for payment of interest @24% P.A. and, therefore, demand of Rs.4,45,626/- towards interest is prima facie ill-founded, false, mala fide and is thus not maintainable.

3.9 The Corporate Debtor has relied on judgments of the Hon'ble Supreme Court of India in ***M/s. Invent Asset Securitisation and Reconstruction Pvt. Ltd. v. M/s. Girnar Fibres Ltd.*** (Civil Appeal No.3033 of 2022) and ***P. Mohanraj v. M/s. Shah Brothers Ispat Pvt. Ltd.*** (Civil Appeal No.10355 of 2018) wherein it has been held that the Code is a beneficial legislation which puts the Corporate Debtor back on its feet and that the Code is not at all meant to be used as a recovery legislation. Further, it is submitted that the rights of the users of Applicant's platform shall be adversely affected, in case the present Application is admitted under the Code.

4. Analysis and Findings

4.1 We have heard the Counsel for both the parties and duly considered the pleadings along with the materials available on record. It is well-settled that while examining an application under Section 9 of the Code, the Adjudicating Authority will have to determine:-

(i) Whether there is an 'operational debt' as defined exceeding the threshold limit under Section 4 of the Code;

(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

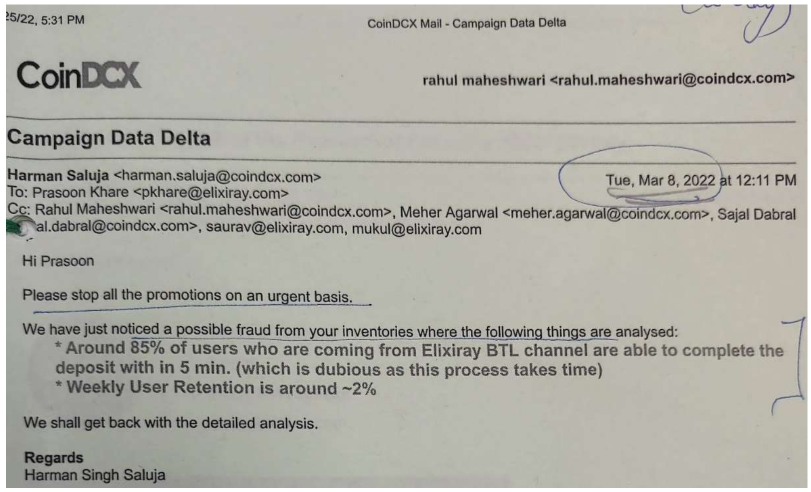
(iii) Whether there is existence of a dispute between the parties or the record of pendency of a suit or arbitration proceeding filed before the receipt of the Demand Notice of the unpaid operational debt in relation to such dispute?

If any of the aforesaid conditions is found to be lacking, the application would have to be rejected [***Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353***]. It is also a settled proposition of law that an application under Section 9 of the Code has to be mandatorily admitted if all the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) are satisfied.

4.2 It is well-established that an application under Section 9 of the Code requires strict proof of debt and default. The Operational Creditor has placed on record copies of the Service Agreement dated 04.01.2022, unpaid invoices and TDS Deduction certificate/ Form 26AS in support of its claim of operational debt. A perusal of the terms and conditions of the Service Agreement clearly reveals that the Corporate Debtor had engaged the Operational Creditor for the purpose of providing services consisting of business-related processes. The scope of work of the Operational creditor was specified in Annexure-A to the said Agreement. It has been clarified that the Operational Creditor was required to promote the business of the Corporate Debtor by getting its App "coinDCX" downloaded by smartphone users and thereby to assist in accelerating the acquisition of new clients and gaining market share. Every such download by a new user was referred to as a "New Activated Portfolio" or NAP between the parties.

4.3 It is observed from the record that the two invoices raised by the Operational Creditor on the Corporate Debtor for the months of February and March, 2022 are on account of the outstanding "payout for coinDCX NAPs". As per Annexure A to the Service Agreement, the Corporate Debtor had agreed to pay Rs.650/- (exclusive of applicable taxes) to the Operational Creditor for each App download followed by a transaction of Rs.100/- by the App user. Clause IV of the Agreement dealing with "Payment" makes it clear that the Corporate Debtor had agreed to pay the above fees "in consideration of the due and proper performance of the obligations" on part of the Operational Creditor. One of the "deliverables" from the Operational Creditor as per Annexure A(II)(B) was to "ensure" that "no false/fake/ fraud transactions, data points or duplicate entries are provided by its field employees and/ or promoters for the activities and/ or campaigns" to be undertaken by the Corporate Debtor. Thus, it is clearly borne out from the record that the payment for procuring NAPs/ new users was to be made by the Corporate Debtor subject to the fulfilment of the terms and conditions stipulated in the said Agreement by the Operational Creditor and that the Corporate Debtor was liable to pay only for the genuine NAPs/ new users acquired through the Operational Creditor.

4.4 The Corporate Debtor in its reply has submitted that a genuine dispute had arisen between the parties prior to the issuance of the statutory Demand Notice dated 17.05.2022 with regard to the services provided by the Operational Creditor. It is noticed that the data submitted by the Operational Creditor was suspected to be fabricated and fraudulent which was duly informed to the Operational Creditor *vide* email dated 08.03.2022 scanned copy of which is pasted below:-



25/22, 5:31 PM CoinDCX Mail - Campaign Data Delta

CoinDCX rahul maheshwari <rahul.maheshwari@coindcx.com>

Campaign Data Delta

Harman Saluja <harman.saluja@coindcx.com> Tue, Mar 8, 2022 at 12:11 PM
To: Prasoon Khare <pkhare@elixiray.com>
Cc: Rahul Maheshwari <rahul.maheshwari@coindcx.com>, Meher Agarwal <meher.agarwal@coindcx.com>, Sajal Dabral al.dabral@coindcx.com>, saurav@elixiray.com, mukul@elixiray.com

Hi Prasoon

Please stop all the promotions on an urgent basis.

We have just noticed a possible fraud from your inventories where the following things are analysed:
* Around 85% of users who are coming from Elixiray BTL channel are able to complete the deposit with in 5 min. (which is dubious as this process takes time)
* Weekly User Retention is around ~2%

We shall get back with the detailed analysis.

Regards
Harman Singh Saluja

Thus, it is observed that the Operational Creditor had been instructed to stop the work forthwith *vide* above email on 08.03.2022 itself, thereby effectively terminating the Agreement.

4.5 Thereafter, it is observed that the Corporate Debtor appointed an independent entity "mFilterIt" to examine the authenticity of the data and submit its report. In reply to the request made by the Operational Creditor for releasing the payment of February, 2022, the Corporate Debtor *vide* its email dated 18.04.2022 is seen to have informed the Operational Creditor that the outcome of detailed data analysis "to find out the user and traffic authenticity" was still awaited and that it was "trying to expedite things". It is noticed from the record that the report of "mFilterIt" was received on 25.05.2022 which revealed the following picture:-

Billing Month (A)	**Billed NAPs** (B)	**Fraud NAPs** (C)	**Billable NAPs** (D)=(B)-(C)
February, 2022	11368	6528	4840
March, 2022	2787	1876	911
Total	**14155**	**8404**	**5751**

An extract of the said report was shared with the Operational Creditor in a tabular form in para 3(iv) of the reply to the Demand Notice furnished by the Corporate Debtor *vide* letter dated 25.05.2022. Based on the gross figure of 5751 billable NAPs for the above two months, the total amount due to the Operational Creditor for supply of genuine data @Rs.650/- per NAP was worked out at Rs.37,38,150/- as against Rs.1,35,61,639/- claimed by it.

4.6 It is noticed from the record that the Operational Creditor has not made any attempt in the present Application to rebut or refute the findings of the said report of "mFilterIt" in regard to the fraudulent NAPs/ new users claimed by it. In its Affidavit under Section 9(3)(b) of the Code, the Operational Creditor admits a dispute between the parties in regard to the unpaid operational debt. Considering the above facts and circumstances, we find that the Corporate Debtor has made out a case of pre-existing dispute with the Operational Creditor that arose well before the receipt of the Demand Notice. It thus emerges that there is a real and genuine pre-existing dispute between the parties with regard to the Operational Creditor's claim of fraudulent data of NAPs/ new users. Such dispute is found to be duly supported by concrete and credible evidence which is not vexatious or frivolous and grounds for which are real and not spurious, illusory or hypothetical.

4.7 It is also seen from the record that there was no provision for charging of interest under the terms of the Service Agreement executed between the parties. In the absence of mutual agreement, the Operational Creditor's claim for interest from the Corporate Debtor is found to be untenable.

4.8 As regards the claim of the Operational Creditor that the Corporate Debtor had deducted TDS on the invoice for the month of February, 2022 which is reflected in the relevant Form 26AS, it is now well-settled that mere deduction of TDS by the corporate debtor is not enough to prove operational debt. TDS deduction does not imply acknowledgment of any liability as outstanding *qua* the operational creditor. Therefore, merely on the basis of TDS deducted by the Corporate Debtor, no liability for operational debt can be fastened on the Corporate Debtor.

4.9 It is well-established that the Code cannot be used as a recovery mechanism or as a substitute for debt enforcement procedures. In this connection, the Hon'ble Supreme Court in the case of ***M/s S. S. Engineers v. Hindustan Petroleum Corporation Ltd. 2022 SCC OnLine SC 1385*** has observed that 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.

4.10 In view of aforesaid discussion, it clearly emerges that the Operational Creditor has failed to establish the existence of a crystallised and undisputed operational debt exceeding the prescribed threshold limit under Section 4 of the Code due and payable by the Corporate Debtor but remaining unpaid which is the *sine qua non* for admission of an application under Section 9 of the Code. Rather, on careful perusal of the documentary evidence brought on record by the Corporate Debtor, it is found that the amount claimed to be in default under the two invoices in question is mainly on account of fraudulent data/ duplicate users for which the Corporate Debtor owes no liability to pay to the Operational Creditor under the terms of the Service Agreement. Further, the Corporate Debtor has been able to establish the existence of a genuine dispute with regard to the wrongful claim of fraudulent data of NAPs/ new users made by the Operational Creditor. In these circumstances, we are of the considered view that the present Application filed by the OperationalCreditor under Section 9 of the Code deserves to be dismissed.

ORDER

In view of foregoing analysis and findings, this Application bearing C.P.(IB) No.896/MB/ 2022 filed by Elixiray Consulting Private Limited, the Operational Creditor, under Section 9 of the Code read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP in respect of Neblio Technologies Private Limited, the Corporate Debtor is **rejected**.

However, the rejection of this Application shall not cause any prejudice to the right of the Applicant to pursue such other remedies as may be available in accordance with law.

SD/-	**SD/-**
SANJIV DUTT	**K. R. SAJI KUMAR**
MEMBER(TECHNICAL)	**MEMBER (JUDICIAL)**

deepa/JNK