

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)

C.P. (IB) No.67/BB/2021
Under Section 9 of the IBC, 2016
r/w Rule 6 of the I&B (AAA) Rules, 2016

In the matter of:

First Walkin Technologies Pvt., Ltd.,

#736, 4th Floor, Gupta House,
7th Cross, 3rd Block,
Koramangala Near BDA Complex,
Bengaluru – 5600034

... Petitioner/Operational Creditor

VERSUS

Coffee Day Global Limited

K.M Road,
Chikkmagalur – 577101
Karnataka

... Respondent/ Corporate Debtor

Order delivered on: 23rd June, 2022

Coram: 1. Hon'ble Shri Ajay Kumar Vatsavayi, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Present:

For the Petitioner : Shri Pramod K.Nair, Senior Counsel
Ms. Dhvani Nagesh

For the Respondent : Shri Manu Kulkarni with
Ms. Ishi Prakash
Shri Manoj Raikar

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The present petition is filed under Section 9 of the Insolvency and Bankruptcy Code, (hereinafter referred to as '**IBC'/Code**) 2016, read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by First Walkin Technologies Private Limited (hereinafter referred to as 'Petitioner/Operational Creditor'), with a prayer to initiate Corporate Insolvency Resolution Process (CIRP) against Coffee Day Global Limited (hereinafter referred as 'Respondent/Corporate Debtor').

2. The Corporate Debtor, namely, Coffee Day Global Limited is a Company incorporated on 06.12.1993 with CIN: U85110KA1993PLC015001 having its registered office at K.M Road, Chikmagalur – 577101, Karnataka. The Authorised Share Capital of the Respondent/Corporate Debtor is Rs.2,35,48,60,635/- and the Paid-Up Share Capital is Rs.19,15,00,000/-.
3. The amount claimed to be in default is Rs. 1,75,73,690/- (Rupees One Crore, Seventy Five Lakhs, Seventy Three Thousand, Six Hundred and Ninety only).
4. It is stated that the Corporate Debtor, Coffee Day Global Limited was intending to launch a digital application called the “CCD Mobile App” for its customers, and in this regard, had engaged the services of the Company known as Fourthlion Technologies Private Limited vide the Agreement for Digital Application Development Services dated 05.05.2016. On 4th June 2018, an Addendum was executed to the Digital Application Development Services Agreement dated 5th May 2016. This Addendum was however executed between the Corporate Debtor and the Operational Creditor First Walkin Technologies Pvt. Ltd., since the Operational Creditor is the assignee of the rights and liabilities of M/s. Fourthlion Technologies, Pvt. Ltd. under the Digital Application Development Services Agreement executed with the Corporate Debtor (“Agreements”). In terms thereof, the Operational Creditor rendered services to the Corporate Debtor as agreed and to its complete satisfaction.
5. For the services rendered under the Agreement, the Operational Creditor raised 12 invoices on the Corporate Debtor between 04.02.2019 to 10.02.2020 and also raised invoices for the work done between 16.03.2020 and 06.08.2020. The aggregate principal sum of this amount is Rs. 2,36,59,289/-. However, on account of mutual set offs, deductions and statutory restriction in Section 10A of the IBC, 2016 a principle sum of Rs. 1,75,73,690/- is due from the Corporate Debtor to the Operational Creditor.
6. The Corporate Debtor acknowledged its debt vide email communication on 19.03.2020 and 27.03.2020. However, no payment was forthcoming. The Operational Creditor was constrained in the first instance, to issue a legal notice dated 13.08.2020 to the Corporate Debtor demanding payment for a principal sum Rs.2,36,59,289/- for services rendered by the Operational Creditor and Rs.44,73,424/- for services rendered by Fourthlion Technologies Private limited.

- Sd-

7. Due to lack of response, the Operational Creditor issued a Demand notice on 4th September 2020 demanding payment for the unpaid operational debt, being a principal sum of Rs. 2,36,59,289/-. By way of response dated 3.10.2020, the Corporate Debtor disputed the amount on the grounds that since there was a suspension on the initiation of CIRP for any defaults arising on or after 25th March and hence the Operational Creditor cannot initiate any proceedings under the IBC. Pursuant to this, the Operational Creditor chose not to rely upon the demand notice and instead issued a final demand notice dated 5th March 2021 for the payment of a principal sum of Rs. 1,75,73,690/. More than 10 (ten) days elapsed after the receipt of Demand notice, but no reply to the same/notice of Dispute was issued by it to the Operational Creditor.
8. Thereafter, 26th March 2021 Counsel representing the Corporate Debtor issued notice of dispute in response to the Operational Creditor's Demand notice dated 5th March 2021. Upon the request of the Operational Creditor the supporting documents were subsequently shared by the Corporate Debtor. The Operational Creditor filed a detailed rejoinder on 3rd April 2021 in respect to the notice of dispute received from the Corporate Debtor.
9. The Petitioner/Operational Creditor in support of the C.P averments has enclosed the following documents among other documents, to the C.P:
- i. True Copy of the Agreement for Digital Application Development Services executed between the Corporate Debtor and Fourthlion Technologies Pvt. Ltd dated 05.05.2016.
 - ii. True copy of the Addendum dated 4.06.2018 to the Agreement for Digital Application Development Services executed between the Operational Creditor and Corporate Debtor
 - iii. True copies of the Invoices for the period between 04.02.2019 to 10.02.2020 against payment owing to the Operational Creditor from Corporate Debtor.
 - iv. Email Communications dated 19.03.2020 and 27.03.2020 in which the Corporate Debtor acknowledged that is liable to make payment to the Operational Creditor against the invoice.
 - v. True copy of the legal notice dated 13.08.2020 issued on behalf of the Operational Creditor to the Corporate Debtor.
 - vi. True copy of the demand notice dated 04.09.2020 issued by the Operational Creditor to the Corporate Debtor.
 - vii. True copy of the reply dated 03.10.2020 issued by the Corporate Debtor to the demand notice.
 - viii. True copy of the demand notice dated 05.03.2021 issued by email and speed post, with speed post receipt and proof of service.



-Sd-

- ix. True copy of the returned envelope and tracking demonstrating the Corporate Debtor refused to accept the Demand notice dated 05.03.2021;
- x. Print out of email dated 17.03.2021 in which counsel of the Operational Creditor addressed to the Group CFO of the Corporate Debtor;
- xi. Print Out of the email dated 22.03.2021 issued by the Counsel of the Corporate Debtor and of the response thereto issued on that very date by the Counsel of the Operational Creditor;
- xii. True copy of the notice of dispute dated 26.03.2021 issued on behalf of the corporate debtor.
- xiii. True copy of the rejoinder dated 03.04.2021 issued on behalf of the Operational Creditor;
- xiv. Printout of emails issued by the senior functionaries of the Corporate Debtor including its CEO, appreciating the services provided by the Operational Creditor and screen shot demonstrating that the CCD mobile application was rated very high in the Google play store;
- xv. Master Data of the Corporate Debtor depicting its financial status a/w Balance Sheet, P & L Account and Auditor's report of the Corporate Debtor.

10. The Corporate Debtor/Respondent while opposing the Company Petition has filed the reply/objections to the petition contending as follows:

- i. It is stated that Late Mr. V.G Siddhartha the founder and erstwhile chairman of the Respondent set out to revolutionise the cafe industry through adoption of and development of new technologies for better engagement with its customers. For this purpose, Late Mr. V.G Siddhartha conferred and consulted with several renowned names in the Bengaluru IT Industry, for developing and maintaining inter alia:
 - a) A consumer mobile application (CCD Mobile App) that offered payment facilities, loyalty points (beans) customers analytics and personalised offers;
 - b) Dashboards and reporting systems intended to give the Respondent a view of the ongoing activity in the cafes by its consumers/customers;
 - c) Internet of Things integration i.e., linking the CCD Mobile App for payments and in-app/in-store purchases, to enhance consumer experience.
- ii. Pursuant to the above discussions, the Respondent, the Petitioner and the Fourthlion Technologies Private Limited executed the Agreement for Digital Application Development Services dated 05.05.2016 for developing a consumer mobile application. In terms of the agreement,

Fourthlion was to develop a digital application, the CCD Mobile App to provide better customers experience as well as digital wallet that would enhance the customers' payment experience. Fourthlion was to develop the CCD Mobile App within 18 months from 01.01.2016 i.e., on or before 01.07.2017. The CCD Mobile App was to be developed for use on all operating systems including Android and iOS (Apple Operating system) with a distinct sources code for both operating systems.

- iii. After execution of the agreement, Fourthlion claimed to have assigned all its rights and interests under the agreement infavour of its subsidiary, the Petitioner. The Respondent does not have any knowledge or custody of the agreement/documents effecting such an assignment. However, at the request and insistence of Fourthlion that such assignment had taken place, the Respondent along with Fourthlion and the Petitioner executed the Amendatory Agreement dated 18.01.2017.
- iv. The Petitioner has suppressed the said Amendatory Agreement and as such has failed to demonstrate its locus standi to file this application. In terms of the Amendatory Agreement, the Petitioner become the Consultant or the service provider for the Statement of Work, the term of the Agreement was extended up till 31.03.2018 and the assignment of Fourthlion's right, interest and liabilities under the Agreement infavour of its i.e., the Petitioner with effect from October 2016 was duly recorded and the total development cost was revised to INR 14,00,00,000/- of which INR 10,50,000/- was payable to both the Petitioner and Fourthlion jointly, and the balance of INR 3,50,00,000/- was payable to other entities engaged in providing ancillary services.
- v. Further, for the purposes of performing the work as detailed in the agreements the Respondent also provided/delivered/handed over to the Petitioner confidential and sensitive information pertaining to
 - a) Customer database including, without limitation, all information pertaining to and/or collected, in any manner from Users of the CCD Mobile App or the Respondent's existing customers;
 - b) Proposed and present businesses of the Respondent;
 - c) Strategies and ideas with respect to marketing and business development;
 - d) Financial statements, published and unpublished, including budgets, reports etc.,
 - e) Marketing plans, forecasts,

-Sd-

- f) Price Lists, quotes;
 - g) Software programs;
 - h) Technical information and Information pertaining to the Respondents' associates, subsidiaries, group companies and representatives.
- vi. The above information was provided/delivered/handed over by the Respondent to the Petitioner on the understanding and under a legal obligation as recorded in the agreement that such information would be treated as confidential with utmost care and would not be disclosed or otherwise misused.
- vii. Pursuant to the execution of the Agreement and the Amendatory Agreement, the parties, vide multiple emails, set out the list of tasks to be performed by the Petitioner and the priority for the same. In terms of the above emails, Petitioner was to prioritise certain tasks including without limitation "Snack Vending" and "Google Analytics Integration". The Petitioner failed to make any substantial progress on the above tasks even as on 20.04.2017.
- viii. Despite being repeatedly called upon to perform the various tasks and provide updates as to the status of the same, the Petitioner failed and neglected to do so. Although agreed upon term/ timelines under the Agreement and Amendatory Agreement were set to expire imminently, the Petitioner miserably failed to perform its obligations under the Agreement. The Petitioner's failure to adhere to the agreed upon timelines is evident from the various emails exchanged between the parties. In addition to the Petitioner's failures, the Petitioner also failed to adhere to or service the Respondent's requirements. Various essential features required by the Respondent and agreed to by the Petitioner, were either omitted without informing the Respondent or were otherwise incomplete and rendered unusable. By way of illustration, some of the various shortcomings in the CCD Mobile app, on account of the Petitioner's failure to adhere to the Respondent's specification are set-out at Page 8, Para 6.3 of the reply filed by the Respondent.
- ix. In light of the Petitioner's failure to adhere to the mutually agreed upon timelines, the Respondent was left with no alternative but to grant additional time well beyond what was initially agreed upon for the completion of the services. In this regard, the parties executed the

-Sd-

Addendum to the Agreement dated 04.06.2018 by extending further period of 12 months from 01.04.2018 to 31.03.2019.

- x. In or around October 2018, considering the Petitioner's failure to develop and provide the CCD Mobile App in terms of the Agreement and the technological advances that has taken place since, 2016, when the services of the Petitioner and Fourthlion were engaged to October 2018, the parties mutually decided to pivot from the CCD Mobile App to a Progressive Web App i.e., an application software delivered through the web, built using common web technologies including HTML, CSS and Javascript.
- xi. Further stated that in terms, of the Addendum, the term of the Agreement was extended upto 31.03.2019. Thereafter, until termination of the agreements, the parties continued the arrangement under the terms and conditions of the Agreement on an ad-hoc basis. In light of the Petitioner's refusal to perform any services with respect to the development of the CCD Mobile App with effect from September 2019, the Respondent has only made payments in respect of maintenance and hosting of the CCD Mobile App, to which the Petitioner has not objected.
- xii. The Respondent has till date, paid approximately INR 22,32,51,791/- to the Petitioner and Fourthlion for development of the CCD Mobile App, of which approximately INR 15,35,02,891/- was paid to the Petitioner between 01.12.2016 to 30.09.2020.
- xiii. It is further stated that Petitioner was able to develop only half-baked and unusable mobile application, riddled with glitches and bugs which, unsurprisingly was poorly rated on Google Play Store and Apple App store. Despite agreeing to move to a Progress Web App and cure the deficiencies in the CCD Mobile App, the Petitioner failed to perform its obligations, and despite repeated opportunities to rectify its shortcomings and deficiencies the Respondent vide email dated 01.06.2020 was constrained to terminate all Agreements and all Scope of Work and arrangements arising out of or relating thereto.
- xiv. Due to termination of the Agreements as well as due to appalling state of the CCD Mobile App, the Respondent decided to have the same permanently removed from Google Play Store and Apple App Store at the earliest. In this regard the Respondent requested the Petitioner to identify users having balance beans in their respective accounts so that current users could be informed of CCD Mobile App's scheduled removal

and appropriate measure could be taken to compensate such users. Despite repeatedly being called upon to provide such details, the Petitioner failed and neglected to do so which severely affected the Corporate Debtor's market reputation and footfalls.

- xv. The Respondent was also constrained to approach third parties to setup and maintain the progressive web app thereby requiring the Respondent to incur an additional cost and resultant losses. The said facts clearly demonstrate the deficiency in the services rendered by the Petitioner and the dysfunctional application that was developed. The Petitioner and Fourthlion were focussed only on receiving payments and completely neglected the CCD Mobile App and the Progressive Web App including its functionality.
- xvi. Despite termination of the Agreements and arrangements between the parties, the Petitioner has illegally and contrary to the terms of the Agreements, refused to return the Respondent's Source Codes and valuable customer data contained in the CCD Mobile App and its Confidential Information. Further, the Petitioner cannot choose to rely on portions of the email that appear to suit its case while disregarding such portion that does not suit its claim. On a complete appreciation of the email dated 27.03.2020 it becomes clear that the Respondent has merely stated that there was a reconciliation conducted by both the parties in the context of negotiation and disputes. This is exactly the reason why in the email dated 27.03.2020, the Respondent stated that the figures contained therein are under negotiation/dispute. In this light the email dated 19.03.2020 and 27.03.2020 cannot be relied on to claim, especially since the last email in the trail expressly states that the figures, although reconciled are disputed. Unless put through the rigours of a civil trial, which is already afoot between the parties, the veracity or evidentiary value of the said emails cannot be adjudicated upon in summary proceedings under the IBC.
- xvii. It is further stated that aggrieved by the loss accrued owing to rendition of deficient services and illegal retention of source code and confidential information, the Respondent was constrained to file Com O.S 229/2021 on 16.03.2021 against the Petitioner and Fourthlion, presently pending before the Hon'ble Commercial Court, Bengaluru (CCH-88) seeking certain prayers. Along with the plaint, the Respondent filed two interlocutory applications I.A No. 01 & I.A No.02. The Hon'ble

Commercial Court was pleased to grant an ex-parte ad interim injunction on 17.03.2021 in terms of I.A Nos. 1 & 2. The order was brought to the Petitioner's notice vide summons dated 18.03.2021 which, admittedly, was received by it on 18.03.2021. Thereafter, the Petitioner entered appearance on 27.03.2021 and filed its objections to I.A No. 1 & 2 and its Written Statement raising therein several false, baseless and misleading defences and averments, including those raised in the application.

- xviii. In the order dated 07.08.2021 on I.A No. 1 & 2 the Learned Commercial Court recorded the contentions thus:

"... the main contention of the defendants is that when after the death of Siddarth, the then Chairman of the Plaintiff company, since they were in financial constraint and so many creditors moved the Hon'ble NCLT to declare the company as insolvent. The present suit is filed to show that a dispute is pending, so that the defendants will not being a position to get declaration regarding insolvency of plaintiff's company. According to learned counsel for the defendant, the present suit is used as a tool to escape from insolvency notice issued under Section 8 of IBC and to bring to the notice of the Hon'ble NCLT, that dispute is pending and therefore, the plaintiff company cannot be declared insolvent....Further, the cause of action of filing the suit as shown in para No.32 is that the despite, termination of the agreement the defendants shall failed to act in accordance with its obligation and fail to return/delivery/hand over all confidential information and source code contained in the CCD Mobile App and withholding confidential information and trying to arm twist the plaintiff etc., is only a created for the purpose of the present suit. Infact, having admitted the claim, having appreciated the service rendered by the defendants, conduct of the plaintiff has to be gathered from the entire client, which goes to the root of the case..."

- xix. After due deliberation the Ld. Commercial Court was pleased to grant interim order in terms of I.A No. 1& 2 and the Com. O.S 299/2021 is currently pending before the Ld. Commercial Court, Bengaluru and have been framed including those regarding the financial liabilities of the parties which are subject to trail and evidence of both the parties.
- xx. It is manifest from the above, the Petitioner is taking undue advantage of its own shortcomings which resulted in the termination of the Agreements and is now attempting to extort money from the Respondent by way of this application. The Petitioner's intention to ensure that the

- Sd -

source code that admittedly belongs to the CD is not returned duly. In the light of the above, the dispute truly exists in fact and is not spurious, hypothetical or illusory. The existence of a dispute is not only a plausible contention, and which requires further investigation, but is also one that is buttressed by the Petitioner's own admissions in its written statement and order of the Ld. Commercial court granting interim reliefs in terms of I.A No.1 & . As such the application is liable to be rejected.

- xxi. It is stated that the suspension of initiation of CIRP has been in operation since 25.03.2020 and was extended for the period of 3 months from 25.09.2020 vide Notification bearing S.O 3265 (E) dated 24.09.2020 issued by the MCA and thereafter for a further period of three months from 25.12.2020 vide Notification No. S.O 4638(E) dated 22.12.2020 issued by MCA. Due to same, the suspension of initiation of CIRP initiation of proceedings for alleged defaults u/s 8/9 of IBC is not maintainable and misplaced.
- xxii. It is stated that several invoices pertain to maintenance of the CCD Mobile App, the quality of which is disputed and sub-judice in Com OS 229/2021. The said invoices therefore cannot be made subject matter of this application and/or be subject to parallel proceedings before different fora. Moreover, the Petitioner suppressed and failed to file the plaint and written statement in Com O.S 229/2021 before this Hon'ble Tribunal and this act of suppression disentitles the Petitioner from any relief.
- xxiii. It is stated that in terms of the Agreements the total development costs were fixed at INR 20,00,00,000/- of which INR 16,00,00,000/- was payable to the Petitioner and Fourthlion, the Petitioner has, till date, made payments approximately INR 22,32,51,791/- infavour of the Petitioner and Fourthlion. The Petitioner and Fourthlion have on several occasions raised invoices on false pretexts thereby unjustly enriching themselves. Having paid amounts in excess of INR 16,00,00,000/- no further sums are either due or payable by the Respondent and any claims much less those alleged in this regard are false, vexatious and untenable.
- xxiv. The Respondent is a healthy going concern having monthly turnover of approximately INR 50 crore and over 7,000 employees across the

-Sd-

country. As such, there exists no reason whatsoever to subject the Respondent to CIRP. Even otherwise, the application under reply, albeit clothed as an application to initiate CIRP, is nothing but a means to recover sums allegedly due to the Petitioner.

11. The Respondent/Corporate Debtor also filed the additional statement of objection stating that the Petitioner filed an I.A in Com.O.S No. 229 of 2021 on 29.10.2021 Under Order XIV Rule 5 of the Code of Civil Procedure, 1908 seeking striking out/deletion of Issue No.6 framed by the Hon'ble Commercial Court. By order dated 14.01.2022 the Hon'ble Commercial Court dismissed the I.A and held the following:

"9.... When, the Defendants contends in para 12 of the written statement that despite several reminders from the defendants requesting for payment, the Plaintiff is due a sum of Rs.2,36,59,289/- and when, it is specific contention of the defendants about the amount due and when it is denied by Plaintiff by way of rejoinder or contention raised in the plain, then automatically, an issue would arise which requires consideration of the court to decide the liability of the Plaintiff by pay the amount. I find considerable force in the argument canvassed by learned counsel for the Plaintiff for the reason that when it is the specific case of the Plaintiff that the Defendant as have not rendered proper service regarding development of software and fact that when there is an admission of withholding of data belonging to the Plaintiff for payment of money due to the defendants, then issue No.6 would be more important and same cannot be deleted. How, it prejudices the case of the defendants before NCLT is not stated.

10....The second decision is in the case of M. Bayanna vs. K Gudiyappa and another reported in ILR 2000 Kar 3008, which directly deals with framing of issues and therefore, when we read the pleading of the both the parties, then issue No.6 would necessarily arise.

*.....
12.....So, when we read the above decisions along with the pleading of the parties, this court has rightly framed issue No.6 and there is nothing to delete the same. There are no merits in the application. Hence, I answer point No.1 in the Negative."*

These facts further amply demonstrate that disputes pertaining to the existence and extent of the alleged debt, the Petitioner/Respondent's liabilities/claims/counter-claims thereto, and issues regarding breaches of the conditions and warranties under the Agreements executed between the parties, are already subject matter of adjudication and trial in the commercial suit pending before the Hon'ble Commercial Court, Bengaluru.

12. The Respondent/Corporate Debtor has filed a List of Authorities as under:
- Mobilox Innovations Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353*

- ii. *K.Kishan v. Vijay Nirman Company Private Limited, (2018) 17 SCC 662*
- iii. *Kay Bouvet Engineering Limited v. Overseas Infrastructure Alliance (India) Private Limited (2021) 10 SCC 483*
- iv. *Brand Reality Services Limited v. Sir John Bakeries Private Limited, CA (AT) (Ins.) No. 958 of 2020 NCLAT Principal Bench.*

13. In response to the objections of Respondent, the Petitioner has filed its rejoinder inter alia stating as follows:

- i. It is stated that by way of emails dated 06.04.2017, it was specifically agreed between the parties that the Operational Creditor will provide a timeline for completion of the Snack Vending Machine task based on the priority list shared by the Corporate Debtor. The priority list was only shared with the Operational Creditor by the Corporate Debtor vide email dated 06.04.2017 and the tasks were commenced on an immediate basis by the Operational Creditor and were completed in accordance with the time schedules agreed to for these tasks. Infact, Mr. Rahul Shetty had issued an email dated 20.04.2017 informing the Corporate Debtor that substantial progress has been made regarding the Google analytics integration and the optimized feedback flow. Further, it is clarified that these items were worked on first by the Operational Creditor since the proactive specifications were received from the Corporate Debtor in respect of these two items.
- ii. Further, it is stated that the email dated 01.06.2020 issued by the Corporate Debtor's CEO on behalf of Corporate Debtor to the Operational Creditor make it clear that the Corporate Debtor terminated the agreements merely for convenience, and not for any defaults on the Operational Creditor's part. It is clear from the mail that the Corporate Debtor while being highly appreciative of the services was compelled to discontinue the arrangement because of its own constraints in particular shortage of funds at their end.
- iii. It is further stated that the Corporate Debtor conveniently filed a suit before the Commercial Court, Bengaluru Com. OS No. 229/2021 on 16.03.2021 a mere 11 days after the demand notice was issued by the Operational Creditor u/s 9 of the IBC on 5th March 2021. Infact, the filing of the suit pre-dates even the Corporate Debtor's response to the Demand notice. It is also stated that at no stage prior to the filing of the suit had the Corporate Debtor demanded repayment of the amount that

it now claims are payable from the Operational Creditor. It is therefore denied that the amount rightfully claimed by the Operational Creditor as an operation debt is under pre-existing dispute as alleged by the Corporate Debtor.

- iv. It is further submitted that the Corporate Debtor mischievously filed an application under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure in the suit and obtained an Interim Order on 17.03.2021. The Corporate Debtor conveniently suppressed the fact that the Operational Creditor has always been willing to return the source codes and other information that it has under the agreements as soon as the outstanding payments due to it are cleared by the Corporate Debtor. In view of the same, the Corporate Debtor defence that there was a pre-existing dispute is spurious, misleading and illusory.
- v. It is stated that the demand notice dated 5th March 2021 was issued to the Corporate Debtor only in relation to defaults on account of non-payment of invoices pertaining to the period prior to 25th March 2020.
- vi. It is further stated that the amounts alleged to be outstanding as per the table produced by the Operational at Annexure A2 to the application are based on the invoices raised by the Operational Creditor for providing services in relation to developing and maintain the CCD Mobile App. All these invoices have been accepted by the Corporate without demur. Further, senior officers of the Corporate Debtor have vide email dated 09.03.2020 and 27.03.2020 admitted and acknowledged that payments are due from them to the Operational Creditor. These are clear proof that there is an acknowledgement of debt by the Corporate Debtor that payments are pending to the Operational Creditor and its parent entity.
- vii. It is stated that several other creditors of the corporate Debtor have also approached the Hon'ble Tribunal seeking to initiate insolvency proceedings against the Corporate Debtor is evident from its financial statements. The Operational Creditor has exercised its statutory right u/9 of the IBC and in respect of due and acknowledged outstanding payment under 12 invoices raised on the Corporate Debtor between 04.02.2019 and 10.02.2020 for an amount of Rs. 1,75,73,690/-.

14. Heard Shri Pramod K.Nair, Learned Senior Counsel with Ms. Dhvani Nagesh Learned Counsel for the Petitioner and Shri Manu Kulkarni with Ms. Ishi

- sd -

Prakash Learned Counsel for the Respondent and have also perused the pleadings carefully and Judgements relied on.

15. The Hon'ble Supreme Court of India, in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*, (2017) 1 SCC Online SCC 353 observed as under:

"25. Therefore, the Adjudicating Authority, when examining an application u/s 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?*
- (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.

Apart from the above, the Adjudicating Authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application as the case may be, depending upon the factors mentioned in Section 9 (5) of the Act."

16. The instant C.P has been filed on 09.04.2021. The agreement for the Digital Application Development Services executed by the parties was on 05.05.2016 and the Addendum thereof was on 04.06.2018. The Annexure-A2, Statement of Accounts reflecting the amounts in default was consisting of various Invoices issued during the period from 04.02.2019 to 10.02.2020. The various email correspondences and the Annexure-A6 reconciliation statement dated 27.03.2020, where the amount was reconciled between the parties though the Respondent allegedly disputed the total debt amount, saved the limitation period and hence the instant C.P is held to be filed within the period of limitation.

17. The Petitioner while drawing our attention to Annexure -A6 dated 27.03.2020 i.e., the reconciliation of the due amount and to the emails thereon, submits that the debt and the default thereon are sufficiently proved and there was no pre-existing dispute between the parties. On the other hand, the Respondent

-Sd-

while drawing our attention to the very same Annexure-A6 reconciliation statement dated 27.03.2020 more particularly to the last sentence of the said Annexure-A6 which reads as “*This is under negotiation/Dispute*”, submits that there were disputes and the same were continued even after 27.03.2020. The Respondent further placed reliance on their reply dated 03.10.2020 (Annexure –A9) to the first and discarded demand notice dated 04.09.2020 of the Petitioner to substantiate the pre-existing dispute between the parties. The relevant para of the said Annexure –A9 dated 03.10.2020 reads as under:

“9. Without prejudice to the aforesaid, the alleged amount claimed by your client, as an operational debt, is under a pre-existing dispute between our client and your client. Even otherwise, our client unequivocally denies that any amount of whatsoever quantum is due or payable to your client. In fact, our Client has, in the past, pointed out several deficiencies in the alleged services provided by your client. This has led to disputes between the parties, which are alive and subsisting. These disputes have existed much prior to September 4, 2020 and are outline below:

9.1. Some of the invoices, upon which your client’s claims are based, were not accepted by our client. Emails evidencing the same as annexed herewith as Annexure A.

9.2. Our client has time and again raised issues regarding the deficient quality of the services provided by our client. These issues were also recorded in emails exchanged between the parties. Copies of these emails are annexed herewith Annexure-B.

9.3. Due the deficient services, our client had raised the issue with your client, and had arranged for a meeting on October 4, 2018, to review and suggest ways of improving the deficiencies in your client’s services. The minutes of this meeting evidence that there was a dispute regarding the quality of the services provided and your client had agreed to aggressively pursue a Progressively Web App to achieve the goals set by our client. However, your client has failed to do so, even till date. Copy of the said Minutes is annexed herewith as Annexure-C.

10. On several occasions, your client had agreed that its services were deficient, including the security loopholes which caused losses to our client. Your client has also refunded amounts to our client in this regard. Evidence of the same is annexed herewith as Annexure D. The effect of such deficiency was that the fee to be paid to your client was also reduced from September 2019 onwards, which your client readily acceded to.

11. In June 2020, our client decided to terminate the Services Agreement between your client and our client, due to repeated breaches and deficient quality of services and despite sufficient time being provided to your client to cure its breaches. Copy of the email relating to termination is annexed

herewith as Annexure E. The source code of the software belongs to our client. Our client is in the process of pursuing its legal remedy to ensure recovery of the source code thereunder.

12. It is evident that your client is taking undue advantage of its own shortcomings which resulted in the termination of the agreement and is now attempting to extort money from our client by issuing the present illegal Demand notice. By holding Our Client to ransom with the threat of initiation of corporate insolvency resolution process, Your client's intention is to ensure that the source code that belongs to our client is not returned duly. Such actions on part of your client are not only illegal but constitute various offences inter alia under the Indian Penal Code, 1860, and Information Technology Act, 2000. Our client reserves its right to initiate appropriate action against your client in this regard."

- 18.** It is the settled law that the relevant date for determining the existence of a dispute is the date of the demand notice issued under Section 8 of the IBC, 2016. In the instant case, the Petitioner at the first instance, issued Annexure-8 Demand Notice dated 04.09.2020 for which the Respondent/Corporate Debtor given a reply vide Annexure-A9 dated 03.10.2020, wherein categorically mentioned about the various disputes pending between the parties. Admittedly, the Petitioner having realized that Annexure-A8 demand notice dated 04.09.2020 was not in accordance with the facts and transactions occurred between the parties, issued a fresh Annexure-A10 notice dated 05.03.2021 again under Section 8 of the IBC, 2016. Further, admittedly the Petitioner in his final notice u/s 8 of the IBC, 2016, vide Annexure -A10 dated 05.03.2021 has specifically discarded the earlier demand notice dated 04.09.2020. As a result, the date of the valid Demand notice issued by the Petitioner was on 05.03.2021 (Annexure-A10) and the Respondent/Corporate Debtor is able to show that there were disputes between the parties vide Annexure-A6 dated 27.03.2020 i.e., even prior to the issuance of the discarded demand notice dated 04.09.2020 and also from the reply dated 03.10.2020 of the Respondent/Corporate Debtor which was much prior to the date of issuance of the demand notice dated 05.03.2021. Hence, we are of the view that the Respondent/Corporate Debtor able to show the existence of the dispute between the parties prior to the relevant date i.e., prior to 05.03.2021. Hence, this ground is held against the Petitioner.

-Sd-

19. In view of the above finding, there is no need to delve upon other issues.
20. In the circumstances and for the aforesaid reasons, the C.P bearing **CP (IB) No.67/BB/2021** is dismissed. However, it is made clear that this order shall not preclude the Petitioner from availing any other remedy in accordance with law.

- Sd -

(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

- Sd -

(AJAY KUMAR VATSAVAYI)
MEMBER (JUDICIAL)