

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI**  
**BENCH-VI**

**IB-2107/(ND)/2019**

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

**In the matter of:**

**3G Gruppe Geotechnik Graz ZT GmbH,**

Having office at:

Triester Strasse 478a,  
8055 Seiersberg- Pirka,  
Austria

Through

Andreas Goricki

...Applicant/Operational Creditor

**Versus**

**Vayam Technologies Limited,**

Registered Office at:

Thapar House, 124 Janpath  
New Delhi -110001

...Respondent/Corporate Debtor

**Coram:**

**SHRI. P.S.N. PRASAD, Hon'ble Member (Judicial)**

**SHRI. RAHUL BHATNAGAR, Hon'ble Member (Technical)**

**Counsel for Applicant:** Advocate Achal Gupta, Kunal Juneja  
Nirmal Baskaran and Abhinav Sridhar

**Counsel for Respondent:** Advocate Shashwat Anand,  
Shashwat Parihar, Adya Singh, Dhruva Vig

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**ORDER**

**Per P.S.N. PRASAD, MEMBER (JUDICIAL)**

**Date:15.02.2022**

1. This is an application filed by the Applicant 3G Gruppe Geotechnik Graz ZT GmbH, through its Authorized Representative Mr. Andreas Goricki seeking to initiate corporate insolvency resolution process ("CIRP") under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code") of the Respondent M/s Vayam Technologies Ltd. for the alleged default on the part of the Respondent in clearing the debt for an amount of Rs 19,27,782/- (Indian Rupees Nineteen Lakh Twenty-Seven Thousand Seven Hundred and Eighty Two only) as alleged by the applicant, towards the services provided by the Applicant. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

- i. The Operational Creditor in Joint Venture ("3G-Vayamtech Joint Venture" or "JV") with the Corporate Debtor under "JV Agreement" dated 18.03.2011 agreed to jointly carry out the said project i.e., proof check consultancy services for the



construction of a highway tunnel across Rohtang Pass near Manali in Himachal Pradesh.

- ii. The Operational Creditor and the Corporate Debtor entered into an Addendum dated 12/8/2011 through which the Corporate Debtor was given authority to raise invoices on the client, on behalf of the JV.
- iii. The Corporate Debtor and the Operational Creditor agreed to share amongst them the payments received from the client in the ratio of 53:47, wherein, the Operational Creditor was entitled to a share of 53% out of total payments received from the client.
- iv. Operational Creditor opened a Current Account in the name of the JV with Axis bank, New Delhi Main Branch (JV Bank Account). For convenience in operating the JV Bank Account, it was further resolved that the officers of the Corporate Debtor shall be made the authorized signatories for the JV Bank account.



- v. Another Addendum was entered into between the Operational Creditor and the Corporate Debtor by which the payments which were received, from time to time from the client were received in the JV Bank account.
- vi. As per the understanding between the Operational Creditor and the Corporate Debtor, upon receipt of payments from the client into the JV Bank Account.
- vii. As per understanding between the Operational Creditor and the Corporate Debtor, the Corporate Debtor intimated the Operational Creditor of such receipt of payment. Thereafter the Operational Creditor raised invoices on the Corporate Debtor to collect its share of payments from the Corporate Debtor, in accordance with the terms of the JV agreement.
- viii. The Operational Creditor issued, three invoices to the Corporate Debtor which were duly paid by the Corporate Debtor.



- ix. Operational Creditor issued a fourth invoice to the Corporate Debtor on 3 May 2017 for an amount of Rupees 19,27,782/- which remains unpaid till date.
2. Consequent to the notice issued by this Tribunal, the Counsel for the Respondent filed its reply on behalf of the Respondent stating that:
- i. Corporate Debtor has initiated a commercial civil suit against the Operational Creditor as per the provisions of the Commercial Courts Act, 2015, which was filed on 23.05.2019 and was listed before mediation center wherein the Operational Creditor deliberately failed to appear before the mediator and as per the Commercial Courts Act 2015, the Corporate Debtor was constrained to initiate civil suit for recovery of Rs 50,68,399/- pending before Patiala House Court and the same were filed before filing of the present application.
- ii. From the above-mentioned civil suit, it is evident that there is a pre-existing dispute with respect to invoices raised against Corporate Debtor.



- iii. The Corporate Debtor has never received the invoices from the applicant, the invoices came as a surprise to the Corporate Debtor when the applicant sent the demand notice.
- iv. Corporate Debtor stated that JV agreement dated 18.03.2011 entered between the parties which the applicant is relying in the application, nowhere it was mentioned about the sharing ratio between the parties, therefore the question of 53:47 sharing does not arise and the amount raised in the invoices were disputed.
- v. The email dated 28.04.2017 sent by Bhupinder Kaur to the applicant in which mail have been forwarded regarding Employee Savings Plan Resources Utilisation along with attachment were not issued on behalf of the company as Ms. Bhupinder Kaur had resigned from the company from the post of manager in ESP on 21.07.2015 and was relieved from the services on 11.08.2015, therefore email dated 28.04.2017 has no significance.



3. It is to be noted that the invoices raised by the Operational Creditor were to the Joint Venture of the Operational Creditor and the Corporate Debtor and not individually to the Corporate Debtor.
4. The main defence of the Corporate Debtor is that there are pre existing disputes between parties and therefore the instant application is not maintainable. The Learned Counsel for the operational Creditor has stated the Commercial Civil suit initiated by the Corporate Debtor relates to some other project.
5. The term "dispute" has been inclusively defined in the Code in S.5(6) as under:
- "(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;"*
6. It has been judicially held that for the purposes of deciding maintainability of an application filed u/s 9 of the IB Code, it is not necessary or mandatory that a suit or arbitration



proceedings must have been filed. The existence of a dispute between parties as noticed from documents placed before the Adjudicating Authority will be sufficient to render an application u/s 9 as not maintainable.

7. This issue was settled by Hon'ble Supreme Court, in the case of Mobilox Innovative Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. in civil appeal No. 9405 of 2017 vide order dt. 21.09.2017 *wherein* it is held that:

*"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. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the*

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*purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties."*

8. Further, in their judgement *supra*—Hon'ble Supreme Court also laid down that the Adjudicating Authority is not required to delve deeper into the dispute to decide whether the Corporate Debtor is likely to succeed or not. If there exists a dispute, which is not a spurious one or just a feeble legal argument, the Adjudicating Authority is required to reject the application filed u/s 9 of the Code:

*"Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which required 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 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 given).

9. In the above background, when the facts of the instant case as discussed above are considered, it is observed that there has been no admission of operational debt by the respondent.
10. That irrespective of the Commercial Civil Suit initiated by the corporate debtor, a pre existing disputes exist with respect to the invoices issued against the Corporate Debtor. Corporate Debtor neither received the invoices and the invoices were time barred and secondly were never raised upon the Corporate Debtor.



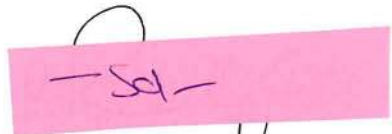
11. The invoice in question i.e. page 33 of the application is a time barred invoice subject of which states that it is the invoice for the deliveries for period 2013 for which the limitation expired on 31 December 2016 and the same was raised on 3 May 2017.
12. The invoice annexed dated 11 February 2014 claiming to be invoice for deliveries made for time period 2013 and the applicant himself admitted that this invoice is paid.
13. As discussed above the respondent has raised dispute with sufficient particulars. Hence, the amount of claim raised by the applicant clearly falls within the ambit of disputed claim. Section 9 (5) (ii) (d) of the Code provides that adjudicating authority shall reject the application if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. This Adjudicating Authority has also noted the pre-existence of dispute between parties in terms of the exchange of emails/correspondence referred to above. Hon'ble Apex Court has categorically laid down in Mobilox judgement

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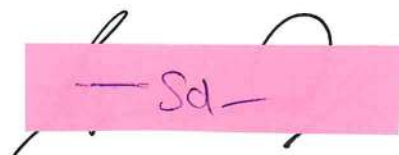
*supra* that if a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority must reject the application. Therefore, in our considered view, the instant application is not maintainable.

14. For the reasons stated above this petition fails and the same is hereby rejected by this Adjudicating Authority.

15. We make it clear that any observations made in this order shall not be construed as an expression of opinion on the merits of the controversy and the right of the Applicants before any other forum shall not be prejudiced on account of dismissal of instant application.



**(SH. RAHUL BHATNAGAR)**  
**MEMBER (TECHNICAL)**



**(SH. P.S.N. PRASAD)**  
**MEMBER (JUDICIAL)**