IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

AT NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 06 OF 2017

Kirusa Software Private Limited … Appellant/ Operational Creditor

Vs.

Mobilox Innovations Private Limited … Respondent/ Corporate Debtor

WRITTEN SUBMISSIONS ON BEHALF OF APPELLANT/ OPERATIONAL CREDITOR

Most Respectfully Showeth:

Principal submissions of the Appellant are the following:

I. Under Section 9(5)(ii)(d)[1], the Application of the Operational Creditor can be rejected, on the ground that the Notice of Dispute has been received by Operational Creditor, provided requirement of Section 8(2) is complied with.

II. The Notice of Dispute mentioned in Section 9(5)(ii)(d) refers to the notice under section 8(2), and in terms thereof, the Corporate Debtor is required to bring to the notice of the Operational Creditor either that the operational debt has been repaid or, under Section 8(2)(a), that:

> "*(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;..*"

The dispute for which the notice is contemplated under Section 8 (2) is defined under Section 5 (6) as under:

> *"(6) "dispute" includes a suit or arbitration proceedings relating to-*

[1] Reference to 'Section' in this written submissions, refer to Section of the Insolvency and Bankruptcy Code, 2016

(a) the existence of the amount of debt;

(b) The quality of goods or service; or

(c) the breach of a representation or warranty".

III. A plain reading of the aforesaid provisions make it clear that:

(a) In order to qualify as a 'dispute' under Section 5(6), the *dispute* must relate to (i) existence of the debt or (ii) quality of the goods or services or (iii) the breach of the representation or warranty with regard to such goods or services.

(b) In order to qualify as valid notice of dispute under Section 8(2)(a), such notice must state that there exists a dispute and the notice must be accompanied by record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoices[2] <u>in relation to such dispute</u>.

Given the wording of the Section 8(2)(a), there is no scope for reading 'or' in place of 'and' in Section 8(2)(a) for two reasons: first, the provision read as it is, is clear in its meaning and there is no ambiguity at all; and second, reading 'or' in place of 'and' will render the second part[3] of Section 8(2)(a) totally superfluous and redundant. Such a course is not permissible on settled principles of statutory interpretation.

IV. The requirement under Section 9(3)(c) that the Operational Creditor must submit a certificate of a financial institution (as defined in Section 3(14) including scheduled bank and public financial institutions and the like) has an inbuilt statutory safeguard preventing the operational creditor from bringing a non-existent or a baseless claim.

<u>Non-exercise of jurisdiction NCLT, Mumbai:</u>

---

[2] The invoice referred to in Section 8(2)(a) is the invoice demanding payment under Section 8(1);
[3] "*record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute*;.."

V. The NCLT was duty bound to examine jurisdictional facts before rejecting the application of the Operational Creditor under Section 9(5)(ii)(d). Such jurisdictional facts include:

(a) Whether a dispute raised by the corporate debtor qualify as a 'dispute' as defined under Section 5(6);
(b) Whether the notice of dispute given by the corporate debtor fulfil the condition stipulated in Section 8(2)(a); and
(c) At the least, whether or not the dispute raised is bonafide or of substance.

In the present case, NCLT acted mechanically and rejected the Application under Section 9(5)(ii)(d) without examining any of the aforesaid issues. On such examination, the Appellant submits, the NCLT would have found that (a) the defence raised by the Respondent, did not at all relate to any dispute in relation to services provided by the Operational Creditor; (b) condition for Notice of Dispute under Section 8(2) had not at all been fulfilled; and (c) the defence claiming a 'dispute' was totally bogus and entirely motivated to evade the liability. Such being the case, NCLT ought to have admitted the Petition instead of rejecting, as it did vide the Impugned Order. It is therefore, Appellant's submission that NCLT failed to exercise its jurisdiction vested under the Code.

Appellant now seeks leave to elaborate the aforesaid submissions and the relevant legal precedent in support thereof:

1. *Meaning of the term "dispute".*

1.1. Section 5(6) provides the definition of "*dispute*" which has been extracted hereunder:

> *"5 (6) "dispute" includes a suit or arbitration proceedings relating to—*
> *(a) the existence of the amount of debt;*
> *(b) the quality of goods or service; or*

(c) the breach of a representation or warranty"

1.2. In view of the above, it is clear that a "dispute" includes a suit or arbitration; however, it should be relation to the existence of the amount of a debt or the quality of goods of services or the breach of a representation or warranty in relation to the operational debt. Otherwise, it would lead to an anomalous situation, where the Corporate Debtor would attempt to wriggle away from its liability (for payment of outstanding operational debt) by merely raising a frivolous dispute, which does not even pertain to the operational debt.

1.3. In addition to the above, the Appellant submits that it is evident from the definition that in order to lead to rejection of a petition under Section 9(5)(ii)(d), it is mandatory that the "*notice of dispute*" given along with record of the pendency of a suit or arbitration proceedings or proceedings of like nature. This submission is further strengthened by the plain reading of the Section 8(2)(a) which reads as follows:

> *"8. Insolvency Resolution by operational creditor:…*
>
> *(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—*
>
> *(a) existence of a dispute, if any, <u>and</u> record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice <u>in relation to such dispute</u>"*

2. <u>*Reading "or" in place of "and" in Section 8 (2) (a) is not permissible.*</u>

2.1. The word "*and*" appearing after '*existence of a dispute, if any*,' and before '*record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice'*, clearly enunciates the intention of the

legislature to make the pendency of a suit or arbitration before the receipt of demand notice to be mandatorily included in a "*notice of dispute*" for the rejection of an application under the Code. It is a well settled principle of law that the word "*and*" is to be read conjunctively and not disjunctively. Unless the literal interpretation of the word '*and'* leads to an absurdity, it is the duty of the court to accord the literal meaning to '*and'* (i.e. conjunctive) for the interpretation of statutes. G.P. Singh, in his Authoritative Commentary on the Principles of Statutory Interpretation (12th Edition) has relied on the following observations of Scrutton, L.J.: "*You do sometimes read 'or' as 'and' in a statute. But you do not do it unless you are obliged because 'or' does not mean generally mean 'and' and 'and' does not generally mean 'or'"*. It is, therefore, a well settled principle of law that one does not substitute "and" for "or" and vice-versa unless it leads to an absurdity in the statute. The reading of "or" as "and" or vice-versa is not to be resorted to unless some other part of the same statute or the clear intention of it requires that to be done.

2.2. *In Municipal Corporation of Delhi* v. *Tek Chand Bhatia;* [(1980) 1 SCC 158, (relevant paras 8 to 11)], the Hon'ble Supreme Court interpreted 'and' and 'or' and relied on *Maxwell*, *Interpretation of Statutes* and stated, "*it has been accepted that 'to carry out the intention of the legislature, it is occasionally found necessary to read the conjunctions "or" and "and" one for the other'. The word 'or' is normally disjunctive and 'and' is normally conjunctive, but at times they are read as vice versa*". (Copy enclosed as **Annexure A**).

2.3. Reading 'or' in place of 'and' in Section 8 will lead to absurd result, as the second part of Section 8(2) would be rendered superfluous and redundant by such reading of the provision. To illustrate the point, if 'and' is replaced with 'or' in Section 8 (2) (a) the Section would reads as:

"*(a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;..*"

In such scenario, it would lead to two possible situations:

(i) If there is a dispute: Since the second part of Section 8(2)(a) (as reworded above) requiring furnishing of pendency of suit or arbitration proceeding is in the alternative since it follows 'or', the Corporate Debtor need not provide any record of suit or other legal proceedings, in which case the second part, becomes redundant.

(ii) If there is no dispute: If there is no dispute, there is no question of the alternative provision in Section 8(2)(a) (as reworded above) following 'or' requiring furnishing of record of suit or arbitration coming into play. As such it was and will remain redundant. It is settled principle of interpretation that an interpretation cannot render any portion of the statute, redundant.

As is evident from the above, replacement of 'and' with 'or' renders the second part of section 8(2)(a) totally superfluous. It is settled law that Legislature does not waste its breath and if it chooses to use certain words, such words must be given effect to.

In *M. Satyanarayana* v. *State of Karnataka and Anr*.; [(1986) 2 SCC 512, (relevant paras 5 and 6)], the Hon'ble Supreme Court, while interpreting Rule 4 under Karnataka Medical Colleges (Selection of Candidates for Admission) Rules, 1984, had held that "*if the expression 'and' in Clause (a) is read independently then there was no need for him to suffer at all and mere participation would be enough to make him a political sufferer. That would defeat the rationale behind the rule. It would, therefore, frustrate the intention and purpose of the legislature. The expression 'and' in these circumstances cannot be read disjunctively. It is not possible to hold that Sub-clause (a)*

should be read independently of Sub-clause (b). A statute cannot be construed merely with reference to grammar. Statute whenever the language permits must be construed reasonably and rationally to give effect to the intention and purpose of the legislature. The expression 'and' has generally a cumulative effect, requiring the fulfilment of all the conditions that it joins together and it is the antithesis of 'or'". (Copy enclosed as **Annexure B**).

This being the principle of law, it is necessary that 'and' appearing in Section 8 (2) (a) is read as it is rather than being replaced with "or".

2.4. In the alternate, assuming without admitting, if the word "and" is read as "or" in Section 8(2)(a), the Adjudicating Authority (in this case the Hon'ble NCLT) is duty bound to adjudicate whether such "dispute" is *bonafide* or merely a sham dispute raised by the Corporate Debtor to escape liability of the outstanding operational debt. Furthermore, assuming that the words "if any" used after the word "dispute" in Section 8(2)(a) of the Code, were meant to ascribe a wider meaning to the word "dispute" to include any and all disputes, whether in relation to the operational debt or not, it would result in an absurdity and an unintelligible position which could not have been the intention of the legislature. Also, even if it being the case, the "dispute" would still need to be tested for its bona fide nature and the Adjudicating Authority would still be obligated to adjudicate this question rather than summarily rejecting the operational creditor's application without application of mind.

2.5. Further, Section 9(3)(c) and Form 3 (Format of Demand Notice under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) clearly lays down that a copy of certificate from the Financial Institutions maintaining accounts of the operational creditor confirming that there is <u>no payment of an unpaid operational debt by the Corporate Debtor is required to be furnished</u> along with the application under Sections 8 and 9 of the Code. These provisions act as safeguards to superfluous and frivolous applications that may be made by the Operational Creditors.

3. *Dispute to be bona fide and of substance.*

3.1. It is submitted that it was the duty of the NCLT, Mumbai as the "Adjudicating Authority" under the Code to adjudicate on the *bona fide* of the "dispute" in question for fulfilling the purpose for which the Code was enacted. The NCLT, Mumbai failed to adjudicate and determine whether or not, the "dispute" raised by the Respondent was sham and moonshine and that it was raised merely for the avoidance of payment of undisputed debt. The "dispute" referred under Sections 5(6) read with 8(2)(a) is required to be genuine and of substance. A mere 'notice of dispute' stating that the debt is disputed would not amount to a valid "notice of dispute".

3.2. As an analogy, while dealing with petitions under Section 433 (e) of the Companies Act, 1956 ("**1956 Act**") which provided for the winding up of a Company on the ground of it being unable to pay debts, in a series of Judgment, various Courts have held:

(a) *That the defence of the bona-fide debt of the Company is in good faith and of substance;*
(b) *The defence is likely to succeed in point of law; and*
(c) *The Company adduces prima-facie proof of the facts on which the defence depends.*

The consistent position taken by the courts has been that if a dispute raised by a Corporate Debtor is not genuine and *bona fide* and defence taken by it does not raise a real issue but is a sham one, it is the duty of the Court to disregard the pleas in that regard. Such duty of the Court which has been reiterated and emphasised by the Hon'ble Supreme Court in a plethora of Judgments, is inherent in every Adjudicating Authority exercising the jurisdiction to adjudicate a claim under any law. An Adjudicating Authority, by the nature of its duty, must be deemed duty bound to investigate and ascertain that the pleas taken before it are *bona fide*, genuine and tenable in law.

3.3. The above submissions regarding a *bona fide* dispute were crystalized by the Supreme Court in *IBA Health India Pvt. Ltd.* v. *Info-Drive Systems*; [(2010) 10 SCC 553, (relevant paras 20 to 23)], wherein it held that a Company Court can only proceed with a winding up petition if the Respondent raises a substantial or *bona fide* dispute as to the existence of the debt. (Copy enclosed as **Annexure C**).

4. *Powers of Appellate Tribunals.*

4.1. In this context, the Appellant submits that an appellate court/ tribunal possesses wide powers to adjudicate when the inferior court fails to act as the Adjudicating Authority. The extent of powers of an Appellate Tribunal has been spelled out by various Courts in a catena of judgements. The Hon'ble Supreme Court has laid down that where an appellate authority is conferred with power, without hedging the same with any restrictions, the same has to be regarded as one the widest amplitude and the power of such an appellate authority would be co-extensive with that of the lower authority.

4.2. This Hon'ble Appellate Tribunal, being a judicial body, has all those incidental and ancillary powers which are necessary to make the existence of the authority fully effective. These incidental and ancillary power are necessary for the efficacious and meaningful adjudication of the matter at hand. As has been rightly pointed out by J.C Maxwell, "*where an act confers a jurisdiction, it impliedly also grants the power of doing all such acts or employing such means, as are essentially necessary to its execution*".

4.3. In support of the submission regarding the amplitude of powers of this Tribunal, the Appellant relies on the following cases;

4.3.1. In *Ebrahim Aboobaker* v. *Custodian General of Evacuee Property*; [(1952) 1 SCR 696, (relevant para 14)], the Constitution Bench of the Supreme Court held that "*a Court of Appeal has not only jurisdiction to determine the*

soundness of the decision of the inferior Court as a Court of error, but by the very nature of things it has also jurisdiction to determine any points raised before it in the nature of preliminary issues by the parties. Such jurisdiction is inherent in its very constitution as a Court of Appeal". (Copy enclosed as **Annexure D**).

4.3.2. In *N.K. Dharmadas* v. *State Transport Appellate Tribunal of Kerala and Ors.*; [AIR 1963 Ker 73, (relevant paras 6 to 10 and 15 to 21)], the Full Bench of the Kerala High Court while determining the inherent powers of an Appellate Authority constituted under the Motor Vehicles Act, 1939, held that "*the power of remand is implicit in an appellate jurisdiction on the ground that it is incidental to and essential for, the proper exercise of that jurisdiction, the fact that the Code of Civil Procedure, 1908, has not been made applicable can have no reaction on the existence or otherwise of that power*". (Copy enclosed as **Annexure E**).

4.3.3. In *Union of India & Anr*. v. *Paras Laminates Pvt. Ltd.*; [(1990) 4 SCC 453, (relevant para 8)], the Supreme Court enunciated the principle that a judicial body has all the incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. (Copy enclosed as **Annexure F**).

5. *Impugned Order is not sustainable in law.*

5.1. The NCLT, Mumbai erred in not acting as an "Adjudicating Authority" and dismissed the petition, without considering whether the objections raised by the Respondent constitute a "dispute" within the meaning of Sections 5 (6), 8 (2) (a) and 9 (5) (ii) (d) of the Code. Also, the NCLT, Mumbai did not go into the question as to whether the dispute raised by the Respondent was *bona fide* or of substance, or whether such 'dispute' was a sham, put up to evade an incontestable liability. Hence, it is submitted that the NCLT, Mumbai did not exercise its jurisdiction, vested under the Code.

5.2. Furthermore, NCLT, Mumbai dismissed the Petition without appreciating the spirit and intention of the enactment i.e. the Code. The scheme of the Code clearly casts an obligation on the "*Adjudicating Authority*" to interpret the Code in a manner to fulfil the purpose for which it was formulated and is not rendered futile. The NCLT Mumbai had taken the view that if Corporate Debtor, states that it is disputing the claim of the Operational Creditor, without going into the bonafide of such dispute, the petition is to be dismissed, without consideration. Such exercise would render the "*Adjudicating Authority*", a mere administrative authority, thereby defeating the intent of the Code.

5.3. In support of the submissions with regard to the powers of the NCLT to adjudicate a claim under the Code, the Appellant relies on the following Judgments:

5.4. In *SBP and Co.* v. *Patel Engineering Ltd. & Anr.*; [(2005) 8 SCC 618, (relevant paras 16 to 19)], the Hon'ble Supreme Court, in the context of interpreting Section 8 of the Arbitration and Conciliation Act, 1996, held that "*a judicial authority is entitled to, has to and is bound to decide the jurisdictional issue raised before it, before making or declining to make a reference under Section 8*". (Copy enclosed as **Annexure G**).

5.5. In *A. Ayyasamy* v. *A. Paramasivam & Ors.*; [(2016) 10 SCC 386, (relevant paras 25 and 45.1)], the Hon'ble Supreme Court held that it is for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration. This was held in the context of the avoidance of arbitral adjudication on account of fraud by the parties. (Copy enclosed as **Annexure H**).

5.6. In *District Mining Officer* v. *Tata Iron and Steel*; [(2001) 7 SCC 358, (relevant para 18)], the Hon'ble Supreme Court held that "*A bare mechanical interpretation of the words and application of legislative intent devoid of*

concept or purpose will reduce most of the *remedial and beneficent legislation to futility*". (Copy enclosed as **Annexure I**).

5.7. Therefore, it is submitted that the powers of the "*Adjudicating Authority*" are not merely administrative or mechanical but are wide enough to interpret the Code in a manner as to give meaning to the intention of the legislature. It is also submitted that the Authority is duty bound to exercise its jurisdiction wisely and for the benefit of the parties.

6. *Brief facts:*

6.1. The Respondent issued Purchase Orders ("**POs**") between October 14, 2013 to December 12, 2013 for a Campaign of Star TV. Copies of the POs are annexed to the Company Appeal (AT (Insolvency) No. 06 of 2017 ("**Company Appeal**"). The POs do not contain any undertaking or any provision for Non-disclosure. The Appellant provided the required services and raised monthly invoices between December 03, 2013 and November 5, 2014. Copy of the said invoices raised by the Appellant are annexed to the Company Appeal. Despite the fact that invoices were payable within 30 days from their date, Respondent failed and neglected to discharge its obligations to pay. In interest of maintaining relationship, Appellant continued to provide the services in the hope that the payments due from the Respondent will be made as soon as the Respondent receives the payments from its customer, Star TV.

6.2. After the Appellant had provided the services and raised the last invoice on November 5, 2014, the Appellant was made to execute a Non-Disclosure Agreement ("**NDA**"). A copy of the NDA is annexed to the Company Appeal. The Appellant was asked to execute the NDA on the assurance that immediately after its execution, Appellant's payments will be released forthwith. Principal obligation under the NDA was an undertaking by the Appellant that it *"shall not disclose any Confidential Information of the*

Disclosing Party……" (Clause 3 of the NDA). The NDA though executed on December 26, 2014, provided that it will apply retrospectively from November, 2013, the period already gone by.

6.3. The Respondent however failed to honour its assurance that the outstanding payments will be released soon after execution of the NDA. Instead, the Respondent sent an e-mail on January 30, 2015 stating that payment against the pending invoices has been withheld as the Appellant had disclosed confidential information on November 25, 2014; and thus, committed a breach of the NDA which was not in existence at that time, having been executed subsequently on December 26, 2014. A copy of the mentioned e-mail is annexed to the Company Appeal. The contention of the Respondent was clearly preposterous and untenable, inasmuch as there cannot be any breach of a contract by an act which was committed even prior to its execution. In so contending, the Respondent apparently relied on the provisions in the NDA that it will apply retrospectively from November 1, 2013. Such contention too is absolutely unsustainable in law and in fact and to this extent, does not qualify as a valid dispute as mentioned under the Code.

7. From the above, it is clear that NCLT, Mumbai failed to exercise its jurisdiction and erred by rejecting the Application of the Appellant. It is also seen that the NCLAT has all the powers to set aside the Impugned Order and remand back the matter to the NCLT, Mumbai for fresh adjudication on merits.

8. It is, therefore, submitted that the Hon'ble NCLAT may be pleased to pass orders as prayed for in the Company Appeal.

New Delhi
Date: 21/04/2017

PRA LAW OFFICES
ADVOCATES FOR THE APPELLANT