NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT HYDERABAD
*** *** ***

CP (IB) No.12/9/AMR/2019
(CP (IB) No.273/9/HDB/2018

In the matter of M/s SREEDEVI DIGITAL SYSTEMS Pvt. LIMITED

(Under section 9 of the Insolvency and Bankruptcy Code, 2016)

M/s. Ice TV Private Limited,
8-2-411, Flat No. 205,
Lumbini Rock Castle Apts,
Road No. 6, Banjara Hills,
Hyderabad – 500 034,
Telangana. ... **Petitioner/Operational Creditor**

Versus

M/s. Sreedevi Digital Systems Private Limited,
Regd. Office at B-8/2,
Industrial Estate, Visakhapatnam,
Andhra Pradesh – 523 007. ... **Respondent/Corporate Debtor**

Date of Order: 04.10.2019

CORAM:

Hon'ble Janab Mohammed Ajmal, Member Judicial.

Appearance:

For Petitioner : Mr. Sandeep Reddy Sama, Advocate.

For Respondent : Mr. Arun Kumar Satyavolu, Advocate.

ORDER

4/10/19

In this Application under section 9 of Insolvency and Bankruptcy Code, 2016 (the Code) the Petitioner, an Operational Creditor (OC), seeks initiation of Corporate Insolvency Resolution Process (CIRP) in respect of the Respondent Corporate Debtor (CD).

Immaneni Eswara Rao
Regn No. IBBI/IPA-001/IP-P01224/2018-2019/11943
Insolvency Professional

2. The Petitioner is a registered Company incorporated on 02.01.2013 vide CIN: U64204AP2013PTC085196, under the Companies Act, 1956 with its registered office in Banjara Hills, Hyderabad. It *inter alia* carried on the business of establishment, set up of various types of technical and cable networks and cable TV channels etc. The Respondent is a Private Limited Company incorporated on 04.12.2012 vide CIN: U72900AP2012PTC 084596, under the Companies Act, 1956 with its registered office in Visakhapatnam. It *inter alia* carried on the business of trading in electronic media and distribution of satellite communication. Sometime in 2013-14, the Respondent approached the petitioner through a mutual friend namely Mr. Nitin Reddy to purchase 45,000 units of Digital Set Top Boxes (DSTBs) for its digital cable TV network in Visakhapatnam it was agreed between the parties each DSTB would be sold at the rate of Rs. 1020/- (Rupees One Thousand Twenty only) before taxes. They also agreed that the petitioner would bear the Customs Duty in respect of the consignment and the Respondent would reimburse the same within a period of one year from the date of delivery of the DSTBs failing which to pay interest @ 24% per annum on the outstanding dues. The petitioner supplied 45,000 DSTBs to the Respondent between 10.06.2014 and 22.08.2014 and raised respective invoices including 5% CST aggregating Rs. 4,81,95,000/- (Rupees Four Lakhs Eighty One Ninety Five Thousand only). In addition the petitioner also incurred expenses to the tune of Rs. 1,28,81,798/- (One Crore Twenty Eight Lakhs Eighty One Thousand Seven Hundred Ninety Eight only) towards Customs Duty. Thus, a total of Rs. 6,10,76,798/- (Rupees Six Crores Ten Lakhs Seventy Six Thousand Seven Hundred Ninety Eight only) remained due and payable from the Respondent. Between 02.06.2014 to 30.10.2015 the Respondent made a payment of Rs. 3,15,56,500/- (Three Crores Fifteen Lakhs Fifty Six Thousand Five Hundred only). No payment was made thereafter, despite several approaches over telephone and through the common friend.

3. Later however with the intervention of well-wishers the parties entered into some agreement through two Memorandum of Understandings (MoUs) on 22.11.2015 respectively for the outstanding dues of Rs. 1,66,38,500/- (Rupees One Crore Sixty Six Lakhs Thirty Eight Thousand Five Hundred only) towards the cost of the DSTBs and Rs.1,29,80,018/- (Rupees One

Crore Twenty Nine Lakhs Eighty Thousand Eighteen only) towards the reimbursement of Customs Duty. Payment of outstanding dues for the DSTBs would commence from 20.12.2015 and would be cleared in 12 monthly instalments. The Respondent paid a total of 60,00,000/- (Rupees Sixty Lakhs) between 03.12.2015 and 02.08.2016. Thereafter no payment was made.

4. The Petitioner then issued a Pleader's Notice on 24.01.2018 calling upon the Respondent to clear outstanding dues of Rs. 2,36,18,518/- (Rupees Two Crores Thirty Six Lakhs Eighteen Thousand Five Hundred Eighteen only) with interest @ of 24% within 15 days thereof. The same having not been heeded to, it issued a demand notice in Forms-3 & 4 under section 8 of the Code on 16.02.2018. The notices were served on the Managing Director (MD) of the Respondent on 27.02.2018. The Respondent did not respond to the notices within the statutory period of 10 days. However, the Petitioner's MD received an e-mail 28.03.2018 from the Respondent indicating that reply to the notice was sent on 08.03.2018 and the same was returned undelivered. A copy of the so-called reply dated 08.03.2018 had been attached to the e-mail. The said reply raised disputes as to the deficiency in service and mala fide intention of the petitioner in harming the Respondent's business. Meanwhile the petitioner also by e-mail dated 23.03.2018 requested the Respondent to pay support and maintenance charges in respect of Conditional Access System (CAS) licences. Since the debt was not paid the petitioner came up with the present petition.

5. The Respondent in its counter disputed the maintainability of the petition *inter alia* on the grounds of suppression and misrepresentation of material information. The Respondent has no debt to clear nor is it obliged to pay the amount claimed by the petitioner. The claim made by the petitioner is disputed and not playable. In addition the Respondent contended the following.

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i. The Corporate Debtor Company is a "Multi System Operator", as provided under Regulation 2 (m) of The Telecommunication (Broadcasting and Cable Services) Interconnection (third amendment) Regulations, 2006 and is engaged *inter alia* in the

business of distribution/retransmission of Cable Television signals to the subscribers since 2012.

ii. Analogue technology was previously used to transmit and retransmit the signals from the broadcaster to the viewers through the Multisystem Operators (MSO), the Corporate Debtor herein and the Local Cable Operators (LCO). The various stakeholders in the said process were the Broadcasters, the Multisystem Operators entities like the Respondent, who received the signals from the Broadcasters and transmitted them to the Local Cable Operators and the Local Cable Operators, in turn transmitted them to the viewers. The Central Government found various shortcomings and inadequacies in such system. Hence in the year 2005, the Central Government based on the recommendations of Telecom Regulatory Authority of India (TRAI), sought to address the issue by recommending switch from the analogue system to the more advantageous digital system in the country.

iii. In addition to this, by digitisation and the addition of a set-top box (STB) to a television, the viewer could experience a range of interactive services including email, games, shopping, information and internet access, recording of channel content for later viewing, order and watch movie on demand, etc. With digitization, it is possible to provide programmes in High Definition with higher resolution and improved sound for better viewing experience. The MSOs welcomed this forward march in technology as proposed by TRAI. As the statutory mandate was not in place, the MSOs decided to attempt to voluntarily digitalize their Cable Television Networks. The Respondent procured the STBs from Hyderabad and started installing them in the premises of customers, willing to improve the quality of Television viewing.

iv. By amendment of the Cable Television Networks (Regulation) Act 1995 it became obligatory on every cable operator to transmit or re-transmit programmes of any channel in an encrypted form through digitally addressable system. In the process, Hyderabad and Visakhapatnam were to be digitized before 31.03.2013.

v. The shift from the analogue to the digital system required a subscriber to purchase a Set Top Box (STB) to be placed in his premises. By virtue of digitization, the MSO could monitor the exact number of subscribers, choice of their programmes, monitor the payments. Thus altogether shifting the control from LCO to MSO.

vi. The STB is a device, when connected to a television allows a subscriber to receive in unencrypted/descrambled form subscribed pay channels through an addressable system. An 'addressable system' means an electronic device (which includes hardware and associated software) put in an integrated system through which signals of cable television network can be sent in encrypted form. These can be decoded by the device or devices, having an activated "Conditional Access System (CAS)" at the premises of the subscriber within the limits of authorisation made, through the Conditional Access System and the subscriber management system, on the explicit choice and request of such subscribers, by the cable operator to the subscriber. 'Subscriber Management System' means a system of device which stores the subscribers' records and details.

vii. The Respondent Company being a MSO purchased STBs from various vendors, such as MICO and INOVO etc. Owing to increased pressure and demand of the local cable operators and deadlines fixed by Central Government, it was looking for a vendor who could supply STBs within a shorter period, unlike other vendors, who took a minimum of two months for supply of STBs. All vendors were located in China.

viii. At such juncture, a close acquaintance, also a MSO, represented to the Respondent that he was unable to make payments for the STBs he had ordered. These supplied by Shenzhen Coship Electronics Co. Ltd (Coship), lying in Customs bounded warehouse in Chennai Port were incurring day to day demurrages. He persistently requested the Respondent to purchase the said STBs for seeding in its network.

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ix. The said acquaintance also knew the Petitioner. The Petitioner who had imported the STBs represented to the Respondent that the

STBs manufactured by Coship were with SD MPEG 2 DVB-C receiver with ULSB PLVR, 8 MB Flash and 64 MB RAM, MLSTAR 50-17 Chip. The STBs are embedded with 'CAS' provided by IRDETO Company, the licensor and owner of the software relating to 'CAS'.

x. On such recommendation the Respondent consented to buy 45000 nos. of STBs. Because it was a matter of understanding, no purchase order was placed and the Petitioner agreed to secure release of the STBs lying in the Chennai Port, tendering the required customs duty on the consignment and sell the said STBs @ Rs.1020 per box plus CST @ 5%. The Petitioner on 02.06.2014 collected Rupees 40 lakhs towards advance for the proposed sale, since it had to clear the customs duties.

xi. The Operational Creditor as per the said oral understanding, raised certain Tax Invoices 001 to 009 on various dates for an amount of Rs. 4,81,95,000/- (Rupees Four Crores Eighty One Lakh Ninety Five Thousand only) towards the cost of the STBs. The invoices contained the following terms and conditions.

a. If Payment is not received within due date interest @ 24% per annum will be charged extra.
b. Complaints must be notified within 7 days.
c. Any dispute subject to Hyderabad Jurisdiction.

xii. The Petitioner supplied STBs as per the oral understanding in nine trenches of 5000 nos. each at a cost of Rs. 53,55,000/-. The Respondent altogether paid an amount of Rs. 3,75,56,500/- (Rupees Three Crore Seventy Five Lakh Fifty Six Thousand and Five Hundred Only) by August, 2016.

xiii. The Petitioner also represented that, it had an agreement dated 21.02.2013, with IRDETO for incorporating or embedding 'CAS', for the STBs supplied. A copy of the said IRDETO Conditional Licensee System Agreement, was however not furnished to the Respondent. Later the Petitioner, sent an addendum no. 2 executed with IRDETO, confirming that, clause 4.1.1 of the original agreement was expanded to include the Respondent's site address

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and clause 4.1.5 of the license agreement was also expanded enabling the Petitioner to sub-license to the Respondent.

xiv. The Petitioner showing the said addendum, induced the Respondent to pay the CAS Key activation fee directly to the Principal (IRDETO), assuring that the payment would be adjusted against the outstanding cost of the STBs. The Respondent paid Rs.68,75,300/- equivalent to US$ 1,12,500/- @ US$ 2.5 per box by way of bank transfers between 26th June 2014 and 30th January 2015. The payment was acknowledged by the Principal (IRDETO) for and on behalf of the Petitioner.

xv. Since the CAS keys of the STBs supplied were not activated by the CAS Vendor, IRDETO, for default of payment of CAS keys by the Petitioner, with malafide intention it dishonestly and mischievously induced the Respondent to make the payment directly to IRDETO, for and on its behalf, assuring to get it adjusted. Thus non-adjustment of the said Rs.68,75,300/- paid towards CAS keys activation fee on the instructions of the Petitioner, against the total invoice amount of Rs. 4,81,95,000/-, is a clear act of misrepresentation and fraud.

xvi. The Petitioner and IRDETO were fully aware that the license agreement dated 21.02.2013 was between them and by virtue of the addendum dated 20.06.2014, it expanded clause 4.1.1 and 4.1.5 facilitating the Petitioner to sub-license the Respondent Company. Therefore, whatever payments the Respondent was constrained to pay to IRDETO was at the instance of the Petitioner and it was on account of the Petitioner. Therefore the invoice amount of Rs.1020/- per box, was inclusive of all.

xvii. On 22.11.2015, a MoU was executed to acknowledge and confirm the payments to the Petitioner and for fixing a schedule for clearing balance outstanding amount of Rs. 1,66,38,500/- basing on the said 9 invoices to be cleared in 12 monthly instalments commencing from 20.12.2015. Further, it is clearly mentioned under clause-2 of the said MoU that, the STBs supplied were with CAS, IRDETO server with keys and DVB streamer. Hence there was no occasion for the Respondent to surmise that it had to bear

the cost of the activation fees. After the execution of the said MoU an amount of Rupees 60 lakhs was paid between 03.12.2015 and 02.08.2016, through bank transfer and an amount of Rupees 40 lakhs was collected by cash. But, the Petitioner dishonestly mentioned in his email communication dated 22.03.2016, that, he had only received a cash payment of Rupees 10 lakhs denying Rupees 30 lakhs also paid in cash. Indeed the said cash payment of Rupees 40 lakhs was received by the Petitioner on three occasions before 22nd March 2016. Thus, the Respondent has paid an additional amount of Rs. 2,36,800/- against the invoiced amount of Rs. 4,81,95,000/-. Therefore the question of initiation of CIRP by the Petitioner is an abuse of process of law, since there is no element of default.

xviii. The alleged second MoU of the even date regarding payment of the so called Customs Duty is fabricated and contrived for the purposes of extracting and exploiting the transaction between the parties. There was only one MOU executed on 22.11.2015 between them. There is no whisper in the alleged second MOU regarding the alleged understanding that, the Respondent would reimburse the amount towards Customs Duty. The contention is an afterthought. It is improbable since the said amount is beyond the amount covered by the invoices. There was no such agreement in writing or otherwise to claim reimbursement of Rs. 1,28,81,798/- towards Customs Duty.

xix. The Petitioner in its notice dated 24.01.2018 clearly mentioned that they have imported 1,05,000 STBs from Shenzhen, China in the month of June 2013 and were simply lying in Customs bounded warehouse, Chennai due to their financial incapacity to release them and agreed to sell 45000 STBs @ Rs. 1020 per STB + tax, for a total sale consideration of Rs. 4,81,95,000/-. The Petitioner subsequently claimed for reimbursement of Custom Duty to the tune of Rs. 1,29,80,018/- and deliberately refused to adjust Rs.68,75,300/- paid directly to the CAS vendor IRDETO towards CAS keys activation fees and denied the cash payment of Rupees 40 Lakhs, except for Rupees 10 lakhs. This clearly demonstrates

that the claim made by the operational creditor is fake, false, fabricated and beyond the invoiced amount.

xx. The Respondent altogether has paid Rs. 4,84,31,800/- (Four Crores Eighty Four Lakhs Thirty One Thousand Eight Hundred only), which is in excess of the invoice amount of Rs. 4,81,95,000/-. Therefore no 'debt' subsists within the meaning of definition u/s 3(11) of the Code. For the purpose of maintaining a claim, there should be an occurrence of a default and the Petitioner could only demand the amount covered by the invoices, which in the instant case has already been cleared. As indicated there has been no default.

xxi. The total alleged Corporate Debt of Rs. 2,36,18,518 (Rupees Two Crores Thirty Six Lakhs Eighteen Thousand and Five Hundred and Eighteen only) along with interest @ 24% p.a. from 21.12.2016 is sham and cloak for an unacknowledged debt foisted on presumptions and assumptions. The alleged debt is a moon shine in daylight, thus denied.

xxii. The claim of reimbursement of Customs Duty is void for the reason that the Respondent is not the direct importer and the said amount is not covered by the invoices nor was there any written contract to that effect.

xxiii. The alleged service of demand notice dated 24.01.2018 and statutory notice dated 16.02.2018 in Form-3 on the Respondent is not supported by acknowledgement. Thus furtherance of the proceeding under the Code, is perverse, void and liable to be dismissed.

6. The Petitioner in its rejoinder refuted the averments and contended that the Respondent was bound to make good the payments. The Respondent has failed to exhibit the existence of a dispute prior to the issue of the demand notice. Therefore the application under section 9 of the Code deserves to be admitted.

7. Basing on the rival pleadings the following issue arises for determination.

i. Whether the Respondent has brought to the notice of the petitioner the existence of a dispute preceding the receipt of the notice on 27.02.2018?

Issue No. I:

8. There is no quarrel that the petitioner has supplied 45,000 DSTBs to the Respondent. It is not in dispute that the Respondent had not paid the total dues of Rs. 4,81,95,000/- (Rupees Four Crores Eighty One Lakh Nine Hundred Ninety Five only) and the petitioner had raised invoices for the said amount between 02.06.2014 and 20.08.2015. The Respondent had made payment of Rs. 3,15,56,500/- to the Petitioner. No payment was made after 20.08.2015. An amount of Rs. 1,66,38,500/- (Rupees One Crore Sixty Six Lakhs Thirty Eight Thousand Five Hundred only) remain outstanding. The parties entered into Memorandum of Understanding (MoU) on 22.11.2015 regarding payment of the outstanding dues. This is not in dispute. They allegedly executed another MoU for payment of Rs. 1,29,80,018/- (Rupees One Crore Twenty Nine Lakhs Eighty Thousand Eighteen only) towards Customs Duty. The execution of this MoU dated 22.11.2015 is disputed. The Respondent has also claimed adjustment of Rs. 68,75,300/- (Sixty Eight Lakhs Seventy Five Thousand Three Hundred only) paid directly to the IRDETO towards activation of CAS against the total invoice amount of Rs.4,81,95,000/- (Rupees Four Crores Eighty One Lakhs Ninety Five Thousands only) as it was not required to pay anything beyond the cost of DSTBs as agreed. The Respondent was also not required to pay the Customs Duty which was the Petitioner's liability.

9. The Petitioner issued a Pleader's notice dated 24.01.2018 bringing the fact of default to the Respondent. It was addressed to Mr. I. Rama Krishna Raju, the Managing Director of the Respondent in his correct address as given in the Articles of Association. The postal receipt shows that it was despatched on 24.01.2018 and delivered on 27.01.2018. The notice was not responded to. Subsequently, the Petitioner issued the notice under section 8 on 16.02.2018 demanding payment of the outstanding dues to the tune of Rs.2,36,18,508/- (Rupees Two Crores Thirty Six Lakhs Eighteen Thousand Five Hundred and Eight only) as per MoU dated 22.11.2015. The notices

were served on the Respondent on 27.02.2018. The Respondent did not reply within 10 days as statutorily required. It however sent an email 28.03.2018 enclosing the copy of a reply alleged to have been issued on 08.03.2018, informing that the said notice returned unserved. No material is placed before this Authority to show that the Respondent indeed had issued the reply on 08.03.2018. The reply is referred to only in the email dated 28.03.2018. Section 8 of the Code requires that the Respondent (CD), shall within a period of 10 days of the receipt of the demand notice, bring to the notice of the petitioner the existence of a dispute, if any. In the instant case the Respondent has failed to comply with the statutory requirements. From the above it would appear that the Respondent has raised a dispute as regards the quantum of the debt which according to the petitioner is the outstanding dues towards the cost of the DSTBS and the dues towards Customs Duty. The Respondent has also disputed the execution of the 2nd MoU dated 28.11.2015 under which the petitioner claims payment of the Customs Duty. Besides there is also the issue of payment of CAS dues. Whether or not a MoU to that effect was executed between the parties and is vitiated by fraud cannot be gone into by this Authority. Besides, the Respondent did not raise any dispute relating thereto within the statutory period of 10 days.

10. It is settled that the Adjudicating Authority under the Code needs to exercise a summary jurisdiction and would not be required to conduct an in-depth enquiry into the allegations, counter allegations by way of examination of witnesses and critical examination of documents. The Adjudicating Authority needs only to see if a dispute has been raised within the statutory period and has been brought to the notice of the petitioner. In the present case that has not been done. The Hon'ble NCLAT by order dated 24.07.2019 in **Pedersen Consultants India Pvt. Ltd. v. Nitesh Estates Limited in CA (AT) (Insolvency) No. 720 of 2018** held that the claim means a right to payment even if it is disputed. Therefore merely because the Corporate Debtor has disputed the claim by showing that there is certain counter claim, it cannot be held that there is pre-existence of dispute. It further went on to hold that, "*The respondent disputed that the alleged debt is not the amount as shown in the Form. However, on mere dispute of*

amount, the application under Section 9 cannot be rejected, as in terms of Section 3(6) which defines 'claim' to mean a right to payment even if it is disputed. The Hon'ble Supreme Court in Innoventive Industries Ltd v. ICICI Bank and Anr. [(2018) 1 SCC 407] noticed the definition of 'claim' and observed that even if the right of payment is disputed, the Code gets triggered the moment default is of rupees one lakh or more (Section 4). In the circumstances, in absence of any pre-existing dispute, it was not open for the Adjudicating Authority to reject the application under Section 9."

11. In the instant case it cannot be said that a debt, at least as far as the outstanding dues towards the cost of DSTBs is concerned, is not due and payable in law or in fact. The Respondent cannot shy away from payment of this amount. Therefore, the contention of the Respondent that there was a pre-existing dispute cannot be accepted. In that view of the matter the citations **Innoventive Industries Limited v. ICICI Bank & Anr: (2018) 1 SCC 407 and Mobilox Innovations Pvt Ltd v. Kirusa Software Pvt Ltd, (2018) (1) SCC 353** would have no application in the facts of the case in support of the Respondent. The Respondent having defaulted in payment of the operational debt the Corporate Insolvency Resolution Process is triggered and the petition under section 9 of the Code is maintainable. The issue accordingly answered in the negative. In view of the finding the petition under section 9 deserves to be admitted.

12. The petitioner has not suggested the name of the Insolvency Resolution Professional (IRP). The Respondent Company is headquartered at Visakhapatnam. Sri Immaneni Eswara Rao, IBBI/IPA-001/IPPO1224/2018-2019/11943, 40-26-22, Mohiddin Street, Opposite BSNL Exchange, Labbipeta, MG Road, Vijayawada – 520 010, Andhra Pradesh email: ier_ca@outlook.com, Mobile: 90520 00041 is appointed as the IRP. Meanwhile he had furnished his written consent in Form-2. No disciplinary proceeding is pending against him as verified from the IBBI website. Hence ordered.

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ORDER

The Company Petition be and the same is admitted on contest.

i. The Corporate Insolvency Resolution Process of the respondent shall commence from this date and shall be completed within 180 days hence, as provided under Section 12(1) of the Code.

ii. Shri Sri Immaneni Eswara Rao, IBBI/IPA-001/IPPO1224/2018-2019/11943, 40-26-22, Mohiddin Street, Opposite BSNL Exchange, Labbipeta, MG Road, Vijayawada – 520 010, Andhra Pradesh, email: ier_ca@outlook.com, Mobile: 90520 00041 is appointed as the Interim Resolution Professional (IRP).

iii. He is directed to take charge of the Respondent/Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of the Code and Rules made thereunder.

iv. Moratorium under Section 14 of the Code in respect of the respondent is hereby declared.

v. The Directors, Promoters and/or any other person associated with the management of Respondent Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 of the Code for effective discharge of his functions thereunder.

vi. The Registry is directed to communicate the order to the Petitioner/Financial Creditor and the Respondent/Corporate Debtor.

vii. The petitioner/OC and the Registry are also directed to send the copy of this order to IRP for necessary compliance.

4/10/19

MOHEMMED AJMAL
MEMBER JUDICIAL

Dy. Registrar/Asst. Registrar/Court Officer
National Company Law Tribunal, Hyderabad Bench

प्रमाणित प्रति
CERTIFIED TRUE COPY
केस संख्या
CASE NUMBER OC(IB)No.12/9/AMR/2019 (CP(IB)No.273/7/HDB/2018)
निर्णय का तारीख
DATE OF JUDGEMENT 4/10/19
प्रति तैयार किया गया तारीख
COPY MADE READY ON 4/10/19

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