

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 23 of 2019

(Arising out of Order dated 8th November, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench in C.P.(IB)No.25/BB/2018)

IN THE MATTER OF:

M/s GupShup Technology India Pvt. Ltd.
101, 1st Floor, Silver Metropolis,
Western Express Highway,
Goregaon (East),
Mumbai – 400063.

.... Appellant

Vs

M/s Interpid Online Retail Pvt. Ltd.
No.20, Ward No.93/78,
8th Main, 6th Cross,
Vasanthnagar,
Bengaluru – 560052.

.... Respondent

Present:

**For Appellant: Shri Jai Sahai Endlaw and Mr. Shivansh
Soni, Advocates.**

**For Respondent: Ms. Anushka Sharda and Mr. Rohit Ghosh,
Advocates.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

M/s Gupshup Technology India Pvt. Ltd. (Operational Creditor) filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') against 'M/s Interpid Online Retail Pvt. Ltd.' ('Corporate Debtor') which having rejected by Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench, Bengaluru by order

dated 8th November, 2018, the present appeal has been preferred by the Appellant.

2. According to the Appellant it entered into Agreement with Respondent – M/s. Interpid Online Retail Pvt. Ltd. on 8th October, 2014. The Agreement was for a period of one year and as per Clause 3.2 of the Agreement, it would get auto renewed for further period of one year each unless terminated by either party. As per Clause 4.2 of the Agreement, the Appellant would send monthly invoices to the Respondent for the fees accrued in the previous month in accordance with the terms set out in Schedule 3. Thereafter, the Respondent would verify the invoices from the Appellant and thereafter pay such valid invoices within 15 business days. Further, as per Clause 4.5 of the Agreement, the Respondent was liable to pay interest at the rate of 1.5% per month on any sums overdue after a period of 15 business days from the receipt of a valid invoice.

3. In between 2014-2015, the Appellant provided the said services to the Respondent from time to time for which the Appellant raised invoices at the end of every month towards the consumption of the said service in terms of the aforesaid Clause. The Appellant continued to provide services to the satisfaction of the Respondent and the Respondent did not raise any complaints about the services rendered by the Appellant or about the invoices raised by the Appellant in the years 2014, 2015 and 2016.

4. It is stated that for the first time Respondent defaulted in making the payment towards the invoices on 16th June, 2015 and had not made any

payment towards the debt since then, as a result of which its services were discontinued after July, 2015.

5. On 15th April, 2017, the Respondent acknowledged the debt and informed that they were expecting some funds from its investors, which was delayed and it was the reason for non-payment of the outstanding dues.

6. The record of the services carried out as on 5th September, 2017 shows that the Respondent availed the services through the SMS Dashboard and had its own dedicated user name and password for logging. However, the Respondent in their email dated 5th September, 2017 sought details of email logs and other supporting documents in order to verify the invoices.

7. The Appellant issued a Demand Notice under Section 8(1) on 24th October, 2017 and for the first time the Respondent in its reply under Section 8(2) by intimation dated 3rd November, 2017 raised false and frivolous allegations.

8. After completion of more than 10 days, the Appellant filed an application under Section 9, which has been dismissed by the Adjudicating Authority with following observations: -

“7. As per the provision of Section 9, an application can be admitted if the Application/Petition is filed under Section 9(2), there is no repayment of unpaid Operational Creditor, no notice of dispute has been received by the Operational Creditor, etc. As stated supra, admittedly, the Petitioner got issued a legal notice dated 11.10.2017 by claiming for Rs.57,86,148/- consisting of five invoices starting from 31.05.2015 to 31.07.2015 claiming for total

amount of Rs.74,08,377/-. Out of which respondent paid Rs.16,22,229/- and the remaining outstanding balance was 57,86,148/-. The Respondent vide its email dated 5th September, 2017, requested the petitioner to furnish supporting documents in support of its claim, followed by specific reply dated 24th October, 2017 to the above legal notice, by inter alia, raising dispute of claim.

8. Subsequently, the petitioner got issued Demand Notice dated 24.10.2017 in Form 3 under Rule 5 of I&B (AAA) Rules, 2016, by demanding the respondent to pay the outstanding of Rs.82,41,053/-. In support of its claim, they have enclosed Annexure-1 which contains the following details of claim:

Invoice Date	Invoice Reference Number	Amount (Rs.)
31/10/2014	CRM/POST/Oct/14-15/240	197,749
30/11/2014	CRM/PRE/2014/11/00038	885,860
30/11/2014	CRM/POST/Nov/14-15/023	730,513
31/12/2014	CRM/POST/DEC/14-15/015	1,067,965
31/12/2014	CRM/POST-EMAIL/14-15/DEC/0013	825,615
31/01/2015	CRM/POST/Jan/14-15/259	1,974,642
04/02/2015	CRM/PRE/2015/02/00006	704,618
28/02/2015	CRM/POST/Feb/14-15/259	1,482,916
28/02/2015	CRM/POST-EMAIL/Feb/14-15	879,869
31/03/2015	CRM/POST/Mar/14-15/247	2,446,308
31/03/2015	CRM/POST-EMAIL/14-15/Mar/0007	931,952
30/04/2015	CRM/POST-EMAIL/15-16/Apr/0014	1,772,095
30/04/2015	CRM/POST/Apr/15-16/297	3,046,507
31/05/2015	CRM/POST-EMAIL/15-16/MAY/0006	1,102,163

31/05/2015	CRM/POST/May/15-16/303	2,526,703
30/06/2015	CRM/POST/Jun/15-16/303	2,005,191
30/06/2015	CRM/POST-EMAIL/15-16/JUN/0008	1,180,077
31/07/2015	CRM/POST-EMAIL/15-16/JUL/0007	308,497
31/07/2015	CRM/POST/JUL/15-16/330	594,243
31/08/2015	CRM/POST-EMAIL/15-16/AUG/0007	121,391
31/08/2015	CRM/POST/Aug/15-16/354	34,332
	TOTAL AMOUNT (A)	24,819,206

*(B) Total Payments Received Against the Invoices
Rs.19,033,058/-*

Total Amount Due (A)	24,819,206
Total payments received against the Invoices (B)	19,033,058
Total Unpaid Amount (C)	5,786,148
Interest @ 1.5% till 24.10.2017 (D)	2,454,905
Total Amount to be Claimed in Default (E)	8,241,053

9. *As stated supra, as per the legal notice dated 11.10.2017, outstanding amount was Rs.57,86,148/- (Rupees Fifty Seven Lakhs Eighty Six Thousand One Hundred Forty Eight Only). The claims made in the legal notices and demand notice are different. As per the above Demand notice dated 24.10.2017 claim starts from 31.10.2014 for total claim of Rs.82,41,053/- as default, whereas the previous legal notice dated 08.10.2014 says Rs.57,86,148/- as outstanding amount.*

10. *The ICICI Bank Certificate dated 12.12.2017 (which is filed along with C.P. (Annexure-E) certified that*

an amount of Rs.1,75,37,476/- (Rupees One Crore Seventy Five Lakhs Thirty Seven Thousand Four Hundred and Seventy Six only) has been credited to the account of the Petitioner covering the period from 10.12.2014 to 28.4.2017. It is also not known whether the alleged outstanding amount as per the demand has been paid or not. In any case, it is not in dispute that Respondent is paying it dues in part and fell due for some amount, subject to re-conciliation of accounts and proof. So the instant case is filed to recover the alleged remaining outstanding amount from the Respondent. It is settled position of law that object of Code is not recovery proceedings.

11. All Tax Invoices raised by the petitioner contains following general conditions for payment which reads as under:

“1. All invoices are due and payable within 15 days from the date of invoice. 2. Int. Shall be accrued @ 18% to unpaid invoices, after 15 days. 3. Any question, dispute or invoices, charges, logs, and any relating queries thereon must be raised promptly within 7 business days from the date of receipt of invoice by recourse of the finance team @ invoice@gupshup.io, else any or all disputes shall be void and will not be entertained under any circumstances. 4. Undisputed amounts shall be paid within due date. 5. Company shall not be liable for any special, indirect or consequential damages of whatsoever nature. 6. Company reserves the right at any time to suspend or change credit terms provided herein or require full/partial

payment in advance, if in, company's opinion, the financial condition of buyer so warrants."

12. As detailed supra, there is a bona fide dispute exist in respect of alleged debt. Moreover, the amount itself is under dispute, the Petitioner himself stated that the Respondents are prompt in payment till 2014 and thereafter, committed default. Therefore, instead of settling their issues in terms of the Agreement mentioned supra, the present Company Petition is filed by seeking to recover the disputed amounts rather than to initiate appropriate Civil Proceedings. As per Demand Notice issued under the Code, the first default arise on 31.10.2014 and the present petition was filed in January 2018 as to how petition is filed within limitation as prescribed under the Act.

9. The Adjudicating Authority held that the claim is barred by limitation and there is existence of dispute.

10. On notice, the Respondent has appeared and filed reply affidavit. But learned Counsel for the Respondent failed to produce before the Appellate Tribunal any letter or email to suggest that a dispute was raised about the SMS services prior to the issue of Demand Notice dated 24th October, 2017.

11. Learned Counsel for the Respondent relied on a letter dated 24th October, 2017, but that cannot be relied upon, as it was written in reply to the Legal Notice dated 11th October, 2017 and for the first time the following plea has been taken: -

“4. *Re Para 3 and 4: Our client states that the contents of the paragraph under reply are false, and misleading. Our client further states that:*

(a) While Gupshup has been deceiving our Client by not providing relevant information sought by our Client in relation to the services, our Client does not have any intention to illegally gain or to cause any wrongful damage to Gupshup by not making any payments which are genuinely due and payable to Gupshup.

(b) It believes that GupShup has been fraudulently raising invoices (without providing supporting information as required under the Agreement) conspiring with former employee of our Client with an intention to illegally gain at the cost of our Client and is of the opinion that Gupshup should duly account for and provide all relevant information (including message and email logs, delivery reports) in relation to all invoices raised by the Gupshup pursuant to the Agreement, failing which we hereby call upon Gupshup to refund all payments (to the tune of INR 19,804,953) already made by our client along with interest at the rate of 18% per annum.

In view of all that has been stated above, our client dispute and denies all the allegations made against them in the Notice including any alleged liability, whether monetary or otherwise, as claimed by Gupshup.

In case Gupshup has a bona fide intent to honour the terms of the Agreement and to provide relevant information to the satisfaction of our client, our Client

would like to convey that it is always open to negotiations, amicable and reasonable settlement of the issues in good with.

To show our Client good faith and bonafides, our client is also ready and willing to deposit the entire agreed full and final settlement sum of Rs.31,00,000 (Rupees Thirty One Lacs) in escrow with Haribhakti & Co. LLP, who are Gupshup's statutory auditors, to be paid out to Gupshup upon Gupshup providing to our client all relevant material, including delivery logs, receipts and reports, telecom service provider invoices and payments details, along with a certificate from Haribhakti & Co., LLP that they are satisfied that the relevant material provided for the review is sufficient to support the invoices issued by Gupshup to our client to enable our client to verify the invoices and request Haribhakti & Co. LLP to remit the amount to Gupshup.”

12. In the present case, the Respondent has not disputed that the Appellant has provided text SMS services to the Respondent through internet. The Respondent has availed the services pursuant to the contract in question from time to time till the Appellant terminated the services.

13. The Hon'ble Supreme Court in **“Innoventive Industries Ltd. Vs. ICICI Bank and Ors. – (2018) 1 SCC 407”** observed and held as follows:-

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as

meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to **Section 3(6) which defines “claim” to mean a right to payment even if it is disputed.** The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein.

Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the

corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

14. From the decision of the Hon’ble Supreme Court, it is clear that **Section 3(6) defines “claim” to mean a right to payment even if it is disputed.** The Code gets triggered the moment default of Rs.1 lakh or more (Section 4) occurs.

15. Therefore, it is clear that when the Respondent has disputed the amount, as the amount is more than Rs. 1 lakh, the application under Section 9 cannot be rejected.

16. So far as limitation is concerned, for filing an application under Section 9, Article 137 of Part II of Third Division of Limitation Act, 1963 is applicable, which reads as follows: -

PART II – OTHER APPLICATIONS

Description of application	Period of limitation	Time for which period being to run
137. Any other application for which no period of limitation is provided elsewhere in this division.	Three years	Where the right to apply accrues

17. From the aforesaid provision of the Limitation Act, it is clear that the application is maintainable within three years from the date when the right to apply accrues. Since, the Insolvency and Bankruptcy Code, 2016 has come into effect since 1st December, 2016, we hold that the application is not barred by limitation.

18. So far as the claim of the Appellant is concerned, it cannot be argued that the claim is barred by limitation and, therefore, no debt is payable in the eyes of law. The Respondent defaulted in making payment towards the invoices for the first time on 16th June, 2015 and by email dated 5th September, 2017 sought details of email logs and other supporting documents in order to verify the invoices for payment. Since, a Legal Notice was issued by the Appellant on 11th October, 2017 and a Demand Notice under Section 8(1) on 24th October, 2017, we hold that the claim of the Appellant is not barred by limitation.

19. The Adjudicating Authority while passing the order, failed to appreciate the facts and erroneously held that there is a pre-existing dispute and the claim is barred by limitation.

20. For the reasons aforesaid, we set aside the impugned order dated 8th November, 2018 and remit the case to the Adjudicating Authority for passing appropriate order taking into consideration the records submitted by the Appellant in the light of decision of Hon'ble Supreme Court in "**Innoventive Industries Ltd. Vs. ICICI Bank and Ors.**", after notice and hearing the Respondent. In the meantime, it will be open to the Respondent ('Corporate Debtor') to settle the claim with the Appellant. Appeal is allowed with aforesaid observations and directions. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

(Justice A.I.S. Cheema)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

NEW DELHI

25th July, 2019

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