

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 22 of 2019

[Arising out of Order dated 5th October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench, Bengaluru in CP(IB)NO.12/BB/2018]

IN THE MATTER OF:

M/s Gupshup Technology India Pvt. Ltd.

101, 1st Floor, Silver Metropolis,
Western Express Highway,
Goregaon (East),
Mumbai – 400 063.

...Appellant

Vs

M/s Zopsmart Technology Pvt. Ltd.

1502, 19th Main Road, Sector – 1,
HSR Layout, Bengaluru,
Bengaluru – 560 102.

...Respondent

Present:

For Appellant: Mr. Ashok Kriplani, Mr. Bajnath Patel and Mr. Hitesh, Advocates.

For Respondent: Mr. Sanjib K. Mohanty, Mr. Awanish Sinha, Ms. Shweta Kumari and Mr. Amit Acharya, Adcovates.

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 Zopsmart Technology Pvt. Ltd.' (Corporate Debtor) which having rejected by Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench, Bengaluru by order dated 5th October, 2018, the present appeal has been preferred by the Appellant.

2. According to Appellant two purchase orders dated 21st April, 2015 and 23rd April, 2015 were placed by the Corporate Debtor for availing promotional Short Messaging Services (SMS) from the 'Operational Creditor' for text SMS's. Accordingly, the Appellant delivered the required number of SMS's pursuant to two purchase orders. The Respondent has not raised any objection or demur as to the work executed by the 'Operational Creditor' in respect of the services provided. The Appellant raised invoices totaling to Rs.14,54,569/- which were duly accepted and acknowledged by the Corporate Debtor. Further case of Appellant is that pursuant to its claim the Corporate Debtor made part payment of Rs.2,95,359/- leaving balance amount of Rs.11,59,230/- along with interest of Rs.4,27,746/-. In spite of demand

notice made by the Appellant, the Corporate Debtor failed to pay the rest of the amount.

3. The Respondent opposed the prayer on the ground that the claim of the Appellant is frivolous, vexatious and not maintainable either in law or on facts. It is alleged that the application has been filed for harassment and coercion of the Respondent. Lack of bonafide was also raised. The Respondent further took plea that it has come to know about the Appellant and his services through internet and there was no written contract between the Appellant and the Respondent.

4. The Respondent has not disputed that the Appellant provided text SMS services to the Respondent through internet. The Respondent has taken such services in absense of any written contract. It has not disputed, on the other hand accepted that Respondent placed two purchase orders dated 21st April, 2015 and 23rd April, 2015 to the Appellant for availing promotional short messaging services (SMS) for text SMD services from the Appellant. The amount of Rs.2,95,339/- has been paid by the Respondent to Appellant has not been disputed. It was contended on behalf of the Respondent that three more invoices were issued on 15-16 June, 15-16 July and 15-16 August. Out of the total amount paid to the Appellant, a sum of Rs.23,178/- was paid towards the purchase orders placed by the Respondent to the Appellant and thereafter owing to telephonic request of the officials of the Appellant, the Respondent made further payment of Rs.2,72,161/- to the Appellant in good faith for extra invoices. It was contended that the Respondent has made

payment for purchase orders placed by them including two more invoices upto 31st July 2015, as a matter of trust.

5. It was submitted, in respect to purchase orders placed by the Respondent, on its own huge jump in the SMS quantity which were beyond the capacity of the Respondent was made. On 30th July, 2015, the Appellant sent SMS worth Rs.1,58,454/-, On 30th September, 2015, the Appellant sent SMS worth Rs.9,11,856/- and on 31st October, 2015, the Appellant sent SMS worth Rs.1,08,935/-. Contrarily, the Appellant has raised bill for SMS on 31st December, 2015 though it was beyond the capacity of the Respondent to comply with this huge number of SMS.

6. The Adjudicating Authority on hearing the parties observed as follows:-

“7. It is not in dispute there is no contract between the parties except two purchase orders for which due payment released and admittedly only emails being exchanged to continue passing on some e-mail correspondence between the parties. It is true that the Tribunal cannot take judicial notice of exchange of email correspondence regarding to disputes in question. It is also to be noted that the learned counsel for the respondent submits that in pursuant they have already paid taken into consideration to the extent that amount is due for the service rendered by the Petitioner. Therefore, this passing on the SMS exchange for the services

rendered cannot be treated as debt and default. Therefore, it is not possible for the Tribunal to verify the veracity of the SMS exchanged by the parties. Therefore, we are not in a position to accept the debt and default and we are convinced that the amount due to be paid was duly paid and we cannot enter into this issue. CP(IB)No.12/BB/2018 is rejected. No order as to costs.”

7. On hearing learned counsel for the parties and the judgment, we find that the Adjudicating Authority has not applied its mind nor gone through the application under Section 9 (Form 6) to find out whether there is debt payable or not. It has simply rejected the application on the ground that there is no contract between the parties which cannot be a ground.

8. In **“Innoventive Industries Ltd. Vs. ICICI Bank and Ors. – (2018) 1 SCC 407”**, the Hon’ble Supreme Court 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 sub-section (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.”

9. From the decision of the Hon’ble Supreme Court it is clear that the Adjudicating Authority is only required to notice as to whether there is a debt and default or not. It was open to the Respondent (Corporate Debtor) to take plea that there was no debt payable in law or in fact but no such plea was taken. Therefore, as per decision of the Hon’ble Supreme Court, if the record is complete and debt is payable, it was duty of the Adjudicating Authority to admit the application.

10. It is not the case of the Respondent that there is a pre-existing dispute. The Respondent has not pleaded and nor the Adjudicating Authority held that there is no record of debt or default. In this background, merely on the ground that there is no agreement reached between the parties, it was not open to the Adjudicating Authority to reject application under Section 9 preferred by the Appellant.

11. For the reasons aforesaid, we set aside the impugned order dated 5th October, 2018 and remit the case to the Adjudicating Authority for passing appropriate order taking into consideration the record 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 actions. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

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

(Kanthi Narahari)
Member (Technical)

NEW DELHI

2nd July, 2019

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