

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT-I, MUMBAI BENCH**

C.P. No. 207/IBC/MB/2023

Under Section 9 of the Insolvency and
Bankruptcy Code, 2016
In the matter of

**GUPSHUP TECHNOLOGY INDIA PRIVATE
LIMITED**

CIN: U72100MH2005PTC150425

Having registered office at:

Unite No. 1, 1st floor, Silver Metropolis,
Western Express Highway, Goregaon (East),
Mumbai City Maharashtra 400 063.

.... Operational Creditor/Petitioner

Vs.

SAMCO SECURITIES LIMITED

(CIN: U67120MH2004PLC146183)

1004, A Wing, Naman Midtown 10th floor,
Senapati Bapat Marg, Prabhadevi,
Mumbai 400 013.

..... Corporate Debtor/Respondent

Order delivered on: 24.01.2024

Coram:

Hon'ble Justice (Retd.) Sh. Virendrasingh Bisht, Member (Judicial)

Hon'ble Shri Prabhat Kumar, Member (Technical)

Appearance :-

For the Operational Creditor : Mr. N. P. Chawla, Advocate a/w

Mr. Vibhor Kapoor, Mr. Karan Gandhi,

Mr. Chandor Sawhney,

Mr. Manish G Varma, Advocate

For the Corporate Debtor : Mr. Shyam Kapadia, Advocate i/b Olive Law

ORDER

[Per: Justice (Retd.) V. G. Bisht, Member (J)]

1. This is an application filed by Operational Creditor/Petitioner under section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as “IB Code” for short) against Corporate Debtor/Respondent, for initiating Corporate Insolvency Resolution Process (“CIRP” for short).

Brief facts:-

2. Operational Creditor and the Corporate Debtor entered into a service agreement dated 13.06.2019 wherein *inter alia* the Corporate Debtor agreed to avail the messaging services by way of SMS/Whatsapp/smart messaging services etc. The Corporate Debtor agreed to perform its payment obligations in accordance with clause 4 of the service agreement.
3. The Operational Creditor alleges that Corporate Debtor has failed to clear the dues/outstanding towards invoices (Annexure – 7 colly) dated 31.01.2022 to 01.07.2022. As per the terms of the invoices and services agreement, the payments were to be made within 15 days from the date of invoice failing the said payments were subject to the interest calculated 18% p.a. Accordingly, the date on which the debt fell due is 15 days from the date of individual invoice and the last payment from the Corporate Debtor against the invoices pending prior to the amounts claimed under present application was received on 23.06.2022. The amount of debt is Rs. 1,60,57,687/- (Rupees One Crore Sixty Lacs Fifty-Seven Thousand Six Hundred Eighty-Seven Only) including the interest.
4. The Operational Creditor accordingly issued a demand notice dated 05.12.2022 under the provisions of Section 8 of the IB Code and

also via e-mail dated 14.12.2022 which was duly served upon the Corporate Debtor. The Corporate Debtor on its part, however raised false and frivolous disputes and alleged that certain messages sent by the Operational Creditor on behalf of the Corporate Debtor were not delivered. However, there is not a single communication on record to support the contention of the Corporate Debtor. Therefore, the present petition.

5. The Corporate Debtor resisted the claim by filing its affidavit-in-reply *inter alia* contending successful delivery of messages was the material term/objective of the said agreement which the Operational Creditor was materially obligated to guarantee the same.
6. It is the case of the Corporate Debtor that since January, 2022 it noticed various deficiencies and discrepancies in the services provided by Operational Creditor. By its e-mail dated 06.01.2022 (Exhibit-B) it highlighted to the Operational Creditor that there were problems in delivery of SMS messages to its clients and requested to rectify the problems. Similar discrepancies were noticed in respect of opt-out service, SMS service and WhatsApp messages delivery. The Operational Creditor, it is alleged, never addressed these grievances. Even the rate charged by the Operational Creditor in respect of SMS services was not as per the said agreement while raising an invoice dated 31.01.2022. Despite the existing disputes and blatant disregard to the terms of the agreement, it has made payments for services rendered by the Operational Creditor for the period from January, 2021 to March, 2021 and October, 2021 to December, 2021, aggregating to Rs. 1,77,601.12/- against the corresponding invoices. The

remittance was duly informed by the Respondent by its e-mail (Exhibit-H) dated 23.06.2022.

7. According to the Corporate Debtor the Operational Creditor wrongly deactivated SMS and WhatsApp services in breach of its obligation under the said agreement. There is bonafide and genuine pre-existing dispute with respect to the performance of the Operational Creditor. Moreover, the dispute under the service agreement is arbitrable and as such the same is to be referred to the arbitration proceeding.
8. In the above said circumstances, the petition deserves to be rejected *in limine* along with costs, contended Corporate Debtor.
9. Mr. N. P. Chawla, learned Counsel, representing the Operational Creditor vehemently submits that there is sufficient documentary evidence on record to prove debt due and default at the hands of the Corporate Debtor. A spurious dispute is raised by the Corporate Debtor belatedly. Learned Counsel also invited our attention to the agreement and various invoices in support of argument and forcefully submitted that the present petition filed by the Operational Creditor for initiation of CIRP under Section 9 of the Corporate Debtor is liable to be admitted. Learned Counsel also placed reliance on the judgement of ***Infobay Interactive India Pvt. Ltd. Vs. Clear Channel India Pvt. Ltd. [C.P. (IB)/(MB)/2019 MANU/NC/2605/2021*** and ***Index Logistics Pvt. Ltd. Vs. Meenakshi Cargo Forwarders Pvt. Ltd. [C.P.(IB)/240/(CHE)2022]*** decided 10.07.2023, 2023 SCC Online NCLT 506 dated 10.07.2023. Besides the oral submissions, the learned Counsel has also filed written submissions. Perused.

10. Mr. Shyam Kapadia, learned Counsel, appearing on behalf of the Corporate Debtor, at the very out, referred to discrepancies pointed out in para 19 of the reply and also invited our attention to the various e-mails in respect of the dispute raised by the Corporate Debtor and emphasised the existence of pre-existing dispute between the parties. Learned Counsel also placed reliance on the various judgements as mentioned in his written submissions and submitted that the dispute is beyond the jurisdiction of this Tribunal and Section 9 of the Code and must be rejected *in limine* along with exemplary costs.
11. The Operational Creditor has specifically pleaded in the petition that the Corporate Debtor has failed to clear the dues/outstanding towards invoices dated 31.01.2022 to 01.07.2022. This further get supports from the demand notice ("Exhibit-9", page 95 of the petition). It is clear from the demand notice that Corporate Debtor was called upon to pay dues/outstanding towards invited of the invoices as per annexures (page 109 of the pleading) totalling Rs. 1,43,41,244/-. Notably this outstanding amount was also subject to levy of delayed payment of interest @18% p.a. equivalent to Rs. 17,16,443/-.
12. As against above, the Corporate Debtor vide its reply (Exhibit-10, page 155 of the petition) had raised various issues and tried to impress upon the pre-existing dispute in relation to service and invoices as raised by the Operational Creditor.
13. From the pleadings and documentary evidence put forth by the Corporate Debtor it is easy to understand that Corporate Debtor had raised an objection and disputed the invoice dated 31.01.2022 by its e-mail dated 31.05.2022 which is at (Exhibit-F) of the reply. The objections were to the following effects -

- *We haven't agreed anywhere to pay interest on outstanding balance*
 - *While observing the reports we notice Approx. 18,751,878 SMS weren't delivered and we are still being charged*
 - *This amounts to approx. Rs. 21.57 lacs which is huge and hence there is a dispute*
 - *We will also re look at back dated reports to verify previous campaigns*
 - *We are being wrongly charged for the SMS that aren't delivered, In spite of showing trust on Gupshup and transferring all our volumes to your company.*
 - *Also would like to understand if now on you have reduced rates of SMS to 10.5 paisa, then why were we offered 11.5paisa previously?*
 - *During the launch of campaigns it was agreed to offer us a good volume discount yet they raised billing at 11.5 paisa, additionally charging us for SMS that aren't delivered. Our ask of Rs. 16.5 lacs reduction in the total bill amount considering the reports and sms delivered.*
14. What can be called out from the above noted objections is that, in the words of the Corporate Debtor, there was no agreement to pay interest on the outstanding balance, approximately 18,751,878 SMS's were not delivered and still were charged @ Rs. 21.57 Lakhs and therefore disputed amount.
15. Apart from above, the Corporate Debtor through its various e-mails pointed out the deficiencies and discrepancies in the service provided by the Operational Creditor. However, the fact remains that the main dispute raised by the Corporate Debtor was levying of interest and charging of approximately Rs. 21.57 Lakhs on the account of un-delivered SMS's amounting to 18,751,878/- @ 11.5% paise. It may be mentioned here that as per the schedule-2 of the service agreement the transactional SMS costs was 10.5 paisa/SMS plus Taxes.
16. During the course of argument learned Counsel for the Operational Creditor furnished a calculation sheet without prejudice to the

rights of the Operational Creditor and submitted the particulars of the SMS's, rate at which it charged and the pending invoices.

17. According to the Operational Creditor, even if it is admitted for the sake of argument that there were no delivery of SMS's to the tune of 18,751,878 and if the same is subtracted from the total SMS's sent for January, 2022 then it works out to 8,55,83,858 SMS's for the said month and if the same is multiplied by 10.5 paise, as is the case of the Corporate Debtor, then after adding maintenance fees, notifications, CGST, SGST the amount payable even as per Corporate Debtor for the month of January works out to 1,06,26,875.33. This calculation sheet also includes the invoices for the month of February, March, April, May, June, 2022 and the amounts respectively which is also disputed by the Corporate Debtor. The total amount for the month of February, 2022 to June, 2022 works out to 1,59,849.5/-. If this amount is subtracted from the amount payable from the Month of January, 2022 then it comes to 1,04,67,025.8/-. If we see this amount, then it can be safely said that still the amount payable by Corporate Debtor is Rs. 1,04,67,025.8/-
18. We are also aware of another bone of contention between the parties that is in respect of the charging of the interest. According to the Corporate Debtor no interest terms were agreed upon between the parties and same was unilaterally raised in this regard. Corporate Debtor has pleaded that by its e-mail ("Exhibit-K") dated 09.08.2022 the Operational Creditor had admitted that parties had never agreed to the interest on outstanding payments in the said agreement but stated that as the invoices issued by it mention 18% interest on the delayed period, therefore, it is applicable. We have also gone through the said e-mail (Exhibit-K) filed on record by the

Corporate Debtor. In paragraph 2 of the said e-mail it is mentioned *“regarding the point towards interest charges, even though agreement is silent towards the same, our invoices terms clearly mentioned 18% interest on delayed payment, hence its applicable, as per agreement payment terms are 15 days.”*

19. Thus, on the count of the interest there is differences between the parties. We, at once, would like to mention here that the calculation sheet which we have referred hereinabove does not envisage the applicability of the delayed interest. Thus, there should not be any murmur on this count also. Needless to say even accepting the contention of the Corporate Debtor, we find that the Corporate Debtor is still in the debt of Rs. 1,04,67,025.8/- and therefore the petition meets the threshold limits as contemplated by the provisions of the I & B Code for initiating CIRP.
20. We are, therefore, of the considered view that present petition under section 9 of the code filed by the operational creditor to initiate CIRP in the matter of the corporate debtor deserves consideration and accordingly stands **admitted** under section 9(5)(I) of the I & B Code.
21. We, therefore, pass the following order

ORDER

This Application being C.P.(IB) No. 207/2023 filed under Section 9 of the I & B Code, 2016, filed by **GUPSHUP TECHNOLOGY INDIA PRIVATE LIMITED**, Operational Creditor/applicant against **SAMCO SECURITIES LIMITED** Corporate Debtor for initiating Corporate Insolvency Resolution Process is **admitted**. We further declare

moratorium u/s 14 of I & B Code with consequential directions as mentioned below:

- I. That this Bench as a result of this prohibits:
 - (a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - (b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - (c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Operational Assets and Enforcement of Security Interest Act, 2002;
 - (d) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I & B Code shall not apply to

- a. Such transactions as may be notified by the Central Government in consultation with any operational sector regulator;
 - b. A surety in a contract of guarantee to a corporate debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under subsection (1) of section 31 of I & B Code or passes an order for the liquidation of the corporate debtor under section 33 of I & B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under Section 13 of I & B Code.
- VI. That this Bench hereby appoints **Mr. Shailesh Bhalchandran Desai**, a registered insolvency resolution professional having **Registration number- IBBI/IPA-001/IP-P00183/2017-2018/10362** and Email ID- ip10362.desai@gmail.com as Interim Resolution Professional to carry out the functions as mentioned under I & B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

- VII. The operational creditor shall deposit a Sum of Rs. 5,00,000/- (Rupees Five Lakh only) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims. The amount so deposited shall be interim finance and paid back to the applicant on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC). The Remuneration of Interim Resolution Professional shall be Rs. 1,00,000/- p.m. till the constitution of CoC and decision of CoC in relation to remuneration of IRP/RP, in case it is not fixed by the operational creditor so far.
- VIII. A copy of this order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the corporate debtor.
- IX. The Registry is directed to immediately communicate this order to the operational creditor, the corporate debtor and the interim resolution professional even by way of email or WhatsApp. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)

Sd/-
JUSTICE VIRENDRASINGH BISHT
MEMBER (JUDICIAL)

Sapna