

**IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI**

**CP (IB) No. 92/MB-VI/2019**

*[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]*

IN THE MATTER OF:

**BHARTI AIRTEL LIMITED**

[CIN: L74899HR1995PLC070609]

**Registered Office:** Bharti Crescent 1,  
Nelson Mandela Road, Vasant Kunj, Phase II  
New Delhi-110070.

**...Operational Creditor**

V/s

**I NETWORK SOLUTIONS PRIVATE LIMITED**

[CIN: U74900MH2015PTC264916]

**Registered Office:** Shop No.8, Mariyam Bai House  
Old CST Rd., Opp. Agyur Villa  
Kalina, Sataacruz (East), Mumbai- 400029  
Maharashtra.

**...Corporate Debtor**

Reserved: 13-09-2023  
Pronounced: 18.12.2023

**CORAM:**

**HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)**

**HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)**

**Appearances: Hybrid:**

Operational Creditor : Adv. Yasmeen i/b Link Legal

Corporate Debtor : Adv. Darryl Pereira a/w Adv. Beverly Fernandes  
& Adv. Natasha Kasad

**ORDER**

***[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]***

**1. Background**

1.1. This Application bearing C.P. (IB) No. 92/MB/C-VI/2019 was filed on 03.01.2019 by Bharti Airtel Limited, the Operational Creditor (OC), under section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of INetwork Solutions Private Limited, the Corporate Debtor (CD). The OC is engaged in the business of providing telephone service, fixed line, enterprise internet data service and while the CD is an Internet Service Provider (ISP). A total amount of Rs. 1,12,60,845/- (One crore twelve lakh sixty thousand eight hundred forty-five rupees) along with interest at the rate of 18% per annum, fell due to the OC from the CD in relation to supply of Enterprise Internet Bandwidth. Hence, the OC prays that Corporate Insolvency Resolution Process (CIRP) be initiated in respect of the CD under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC)

**2. Contentions of OC**

2.1. The OC submits that the CD had approach to supply Enterprise Internet Bandwidth services and the OC had agreed to supply the same to the CD. On 23.03.2016, the CD issued a Letter of

Commissioning authorising the OC to commence billing of services and charge rental for the services provided.

- 2.2. The OC issued several invoices to the CD between March,2017 and May,2018. While the CD made payments for some invoices, it failed to pay in respect of several others. Consequently, on 26.04.2018, the OC discontinued the broadband internet bandwidth service to the CD and demanded immediate payment against the outstanding invoices.
- 2.3. The OC submits that the amount owed by the CD to the OC arises from invoices issued between 17.10.2017 to 22.05.2018, totalling Rs. 1,20,31,086.80/- (One crore twenty lakh thirty-one thousand eighty-six rupees and eighty paise) as the principal amount, along with additional sum of Rs. 1,29,758.20/- (One lakh twenty-nine thousand seven hundred fifty-eight rupees and twenty paise) as interest for delayed payment. This interest is calculated @ 18 per cent per annum from the date of the outstanding invoice until the notice period, resulting in a total sum of Rs. 1,21,60,845/- ( One crore twelve lakh sixty thousand eight hundred forty-five rupees ).
- 2.4. The OC submits that despite sending various emails and a statutory notice on 09.07.2018 to the CD, requesting for payment, no response was received from the CD.
- 2.5. In view of the above events, the OC issued a Demand notice under Section 8 of the IBC. The notice was dispatched on 28.09.2018 to the CD and was acknowledged as received on 29.09.2018. The

CD failed and willfully refused to respond to the Demand notice and no payment has been released in favour of the OC till date.

- 2.6. The OC further submits that an Affidavit dated 25.04.2019 under Section 9(3)(b) of the IBC was filed regarding the fact that the OC has not received any notice or letter regarding any dispute of unpaid operational debt or dispute over any invoices from the CD.

### **3. Contentions of CD**

- 3.1. The CD in its Affidavit in Reply, denies all allegations and contentions of the OC, stating that-
- a) The OC failed to demonstrate any default by it.
  - b) The Demand Notice is defective and it does not comply with the IBC and the rules. The Notice is undated, and the OC has suppressed in the Application that the Notice was undated.
  - c) The Invoices were never raised and issued/delivered to the CD before the undated demand notice. Additionally, the petition lacks a Certificate from a Financial Institution, as required under section 9(3)(c) and also the Application is not accompanied by affidavit as required by Section 9(3)(b).
  - d) There is no evidence regarding the invoices provided by the OC, proving the delivery of each invoice demanding payment from the CD before the alleged default occurred. It

has further disputed some of the invoices produced by the OC.

- 3.2. The OC further contends that after the introduction of GST on July 1, 2017, it was mandatory for the CD to receive hard copies of all invoices monthly. However, the OC never issued any invoices to the CD. Consequently, billing became a significant concern leading to increased customer complaints due to broadband link downtime. Customers began refusing payments, and arrears from customers also became a growing problem.
- 3.3. The CD contends that in January, 2018, the OC, in an effort to enhance service quality, procured internet links and bandwidth from another vendor named "Intech Online Pvt Ltd," operational from March/April 2018. This is evidenced by an email dated 28.03.2018 from the OC to the CD. From April, 2018 to August, 2019, all invoicing has been done by Intech Online Pvt. Ltd. to the CD, and the CD duly settled all invoices raised by Intech Online Pvt Ltd. Consequently, the OC had no entitlement to issue invoices to the CD.
- 3.4. The CD contends that in ISP business, if invoices remain unpaid, services would be terminated promptly. The CD highlights that if the OC genuinely had outstanding dues before transitioning the services to Intech Online Pvt Ltd, they would not have continued providing the link or ensuring service continuity.
- 3.5. The CD contends that number of dissatisfied customers voiced concerns about the bandwidth provided by the OC. Complaints

from customers resulted in them not paying their dues due to deficiency of service of the OC, and hence, the OC is not entitled to any payment for such service shortcomings. Further, these shortcomings were taken up with them much before the alleged Demand Notice and filing of the Application.

- 3.6. Further, due to the above, CD submits that the petition is liable to be rejected under section 9(5)(ii) of the IBC.

**4. Rejoinder by OC**

- 4.1. In its rejoinder, the OC attempted to rebut statements made in the CD's counter, more particularly saying that although the Demand Notice did not mention a date, the service of the demand notice can be inferred from the postal receipt produced by it and the tracking report and that this is an inadvertent mistake which does not nullify the Notice or the rights available under the IBC.
- 4.2. The OC further contests the CD's denial of receiving invoices, highlighting that the CD admitted and acknowledged the debt in various emails. The OC submits that the CD issued several cheques, all of which were dishonoured.
- 4.3. The OC also submits that the invoices raised were timely supplied to the CD and system generated, and no disputes were raised by the CD before filing their reply regarding the outstanding invoices.
- 4.4. The OC contends that upon the CD's request, both parties reconciled accounts, and an amount of Rs. 1,12,60,845/- (One

Crore Twelve Lakh Sixty Thousand Eight Hundred Forty-Five Rupees) was acknowledged as due and payable. This acknowledgment was recorded in an email dated 03.04.2018.

4.5. The OC further submits that the furnishing a certificate from a financial institution confirming non-payment of operational debt, as mandated under Section 9(3)(c) of the Code, is not a prerequisite for triggering the insolvency process and is directory as held by the Hon'ble Supreme Court in *Macquarie Bank Vs. Shilpi Cable Technologies*.

4.6. With respect to incorrect naming of the CD as "Intech Online Pvt Ltd" instead of 'I Network Solutions Pvt. Ltd' (CD herein), the OC submits that this having stemmed from system error, was duly communicated to the customer. The OC emphasizes that crucial details like PAN number, GSTN numbers, and the authorised person's name on the invoices correspond to the CD and were issued in accordance with GST regulations. Therefore, the reply filed by CD is only with the intention to mislead the proceedings.

## **5. Analysis & Findings**

5.1. We have heard both the Counsel in detail and perused all records. With respect to the contention of the CD that the OC has not provided any certificate from any financial institution maintaining its accounts confirming that there is unpaid operational debt by the CD in terms of Section 9(3)(c) of the IBC, we agree with the OC that as has been held by the Hon'ble SC in *Macquarie Bank Vs. Shilpi*

*Cable Technologies*, this requirement is not mandatory. However, we do not find any affidavit in terms of Section 9(3)(b) of the IBC that no notice relating to any dispute of the unpaid operational debt is given by the CD, along with the Application, which is mandatory in nature. This goes against the OC.

- 5.2. It is seen from the records as produced by the OC that it sent a notice dated 09.07.2018 calling upon the CD to make certain payment within 7 days from the date of receipt of the same, making allegations of criminal breach of trust and cheating under Sections 406 and 420 of the Indian Penal Code, 1860. Further, the OC has produced copy of the Demand Notice under Section 8 of the IBC. However, this Notice does not carry any date. The OC has further produced a postal receipt which is illegible and hence, we are unable to determine the date on which the Demand Notice was issued. However, the OC has provided a delivery receipt and track report as evidence to demonstrate the proper service of the Demand Notice to the CD at its registered address. It is apparent that although the Demand Notice was undated, it was seen effectively served to the CD by registered post on 29.09.2018. It is interesting to note that after receipt of the registered Notice, the CD did not reply to the said Notice. Therefore, we hold that absence of date in the Demand Notice does not make it an invalid document.
- 5.3. On perusal of further documents, we note that the OC mentioned the cessation of supplying Broadband Internet Bandwidth to the CD from 26.04.2018 due to non-payment. However, it appears that the

OC continued to issue invoices in the name of the CD until 12.06.2018. However, the Application does not contain any substantial document supporting the alleged debt as the OC has only produced certain invoices and interest calculations in vague Excel sheets of the due amount computed by the OC. No bank statement or ledger account statements has been produced by the OC. The OC has produced details regarding dishonour of 6 cheques issued by it to the CD. These documents cannot substantiate existence of any debt or liability for the purposes of debt and default under the IBC although it would point to business transactions between the parties. Hence, we cannot hold that there existed any debt due and payable to the CD by the OC and it is in default.

- 5.4. The CD raised another issue regarding pre-existing disputes and concerns. The CD *vide* email dated 19.03.2017 had to request the OC for invoices so as to enable it to prepare separate cheques for each invoice. It demanded hard copies from the OC for taxation purposes and raised concern regarding non-receipt of billings amount for various locations *vide* emails dated 27.09.2017 and also *vide* email dated 04.12.2017, the CD complained about non-receipt of bills for 10 months and requested for online option from the CD to check the amounts and making payments. The same request was made on 05.12.2017 by another email. The CD also raised issues concerning the quality of service provided by the OC. The CD submitted several emails in their reply, for instance, 23.11.2017

for reducing bandwidth owing to customer discontinuing the services for constant link flapping for 8 days in respect of Ratnagiri Circuit. Another dispute dated 11.06.2018 regarding disconnection of different Circuits were made by the CD to the OC due to huge downtime every alternate days. There are sufficient records also available to indicate that the OC had raised service request numbers for resolution reports by emails dated 13.11.2018, 14.01.2018, 20.01.2018. It is the case of the CD that the OC had to manage bandwidth from another vendor, 'Intech Online Pvt. Ltd.' to improve quality of service. We find that there are number of bills raised by the OC in their name from 01.04.2018 to 01.12.2018, and thereafter. The OC did not provide any valid explanation to the above in their Re-joinder. The explanation offered by the OC in the Rejoinder is that these bills incorrectly mention the name as '*Intech Online Pvt. Ltd.*' Instead of '*I Network Solutions Pvt. Ltd.*' (the CD herein), due to system error. These bills range from 22.03.2018 to 22.05.2018. We hold that the billing by OC to a third party corroborates the case of the CD that due to deficiency of bandwidth, the OC had to arrange third party vendor to satisfy the customers after the CD raised disputes. The contention of the OC in the Rejoinder that the CD itself availed of the services of this third party after discontinuation of services of the OC cements the case of the CD switching over to a better service provider and pre-existing dispute.

- 5.5. Further, the CD had sent email dated 31.08.2019 regarding service deficiencies. The CD mentioned that they had communicated these concerns to the OC, and despite the OC's attempts to resolve them, no satisfactory resolution was achieved. The OC also has stated in its Rejoinder that the OC had reconciled the account and as per the mutual understanding, an amount of Rs. 1, 12,60,845/- is due and payable by CD as on 03.04.2018. However, the email dated 03.04.2018 produced by it indicates that the amount of Rs. 7,129,749/- was payable as amicably agreed post reconciliation of all the inputs shared with the OC by the CD. But there is nothing to show that the CD had agreed to make payment of this amount which also casts a doubt regarding the actual payment due and payable. Considering all the above facts and circumstances, we find that the CD has made out a case for pre-existing dispute with the OC.
- 5.6. We are of the considered view that when section 5(6) is read with Section 8(2)(a) of the IBC, it means that the dispute must be raised by the CD within 10 days from the receipt of demand notice. No doubt, the CD has not replied to the notice within 10 days from the receipt of the demand notice, but this is not condition precedent for filing an application under Section 9 of the IBC. There is no bar for raising pre-existing dispute after filing of the application under Section 9 of IBC as laid down by the Hon'ble NCLAT in *Brandy Realty Services Ltd. v. Sir John Bakeries India (P) Ltd.*, [2022 SCC Online NCLAT 290], where it was held that:

.the statutory scheme under Section 8 and 9 does not indicate that in an event Reply to Notice is not filed within 10 days by CD or no Reply to Notice under Section 8(1) have been given, the CD is precluded from raising the question of dispute. In view of the foregoing, we are of the considered opinion that mere fact that no reply to demand notice having been filed by the CD does not preclude the CD to bring relevant materials before the Adjudicating Authority to establish that there is pre-existing dispute which may lead to the rejection of Section 9 application. OC did not offer any explanation to all the above. Hence, we conclude that the CD has successfully raised disputes that can be characterised as a 'pre-existing dispute', and consequently, the present Application is liable to be disallowed due to the existence of pre-existing disputes that arose well before the receipt of the undated Demand Notice.

- 5.7. Furthermore, we observe that total sum of Rs. 1,12,60,845/- was claimed by the OC as operational debt. However, an email dated 03.04.2018 suggested a different agreed amount of Rs. 71,29,794/- after a reconciliation process done between the parties. This email lacked proper Statement of Account (SOA) attachments, making it impossible to determine the outstanding amount. The OC has produced only invoices raised by it and has not made available any ledger statement reflecting actual amounts due and payable. Hence, all these go against the claim of the OC.

**ORDER**

Based on the above discussions, this Application bearing C.P. (IB) No. **92/MB-VI/2019** under Section 9 of I&B Code, 2016, filed by Bharti Airtel Private Limited, the OC, for initiating CIRP in respect of I- Network Solutions Private Limited, the CD is **rejected**.

However, rejection of this Application does not prevent the OC from pursuing any legal remedy against the CD under any other law for the time being in force.

**Sd/-**  
**SANJIV DUTT**  
**MEMBER (TECHNICAL)**

**Sd/-**  
**K. R. SAJI KUMAR**  
**MEMBER (JUDICIAL)**

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