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IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI  
BENCH-VI

IB-1104/(ND)/2018

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

**In the matter of:**

**M/s Apps Discover Technologies Pvt. Ltd.**

Registered office at:  
Unit No.9B, Ground Floor,  
Tower B4, Spaze I-Tech Park,  
Sector-49, Sohna Road,  
Gurgaon, Haryana-122001

...Applicant

**Versus**

**M/s ADS Curry Pvt. Ltd.**

Registered office at:  
B-280, Vivek Vihar, New Delhi,  
East Delhi, 110095, India

...Respondent



C.P. IB-1104/ND/2018

M/s Apps Discover Technologies P. Ltd. vs. M/s ADS Curry Pvt. Ltd.

**Coram:**

**DR. P.S.N. PRASAD**  
**Hon'ble Member (Judicial)**

**DR. V.K. SUBBURAJ**  
**Hon'ble Member (Technical)**

Counsel for Applicant: Varun Tandon, Advocate  
Counsel for Respondent: Chetan Joshi, Advocate



C.P. IB-1104/ND/2018  
M/s Apps Discover Technologies P. Ltd. vs. M/s ADS Curry Pvt. Ltd.

*[Handwritten signature]*

## ORDER

Date:21.08.2019

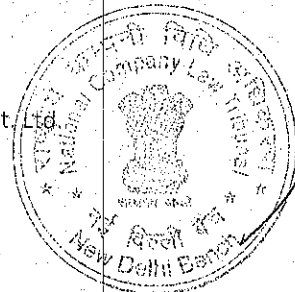
1. This is an application filed by the Applicant M/s Apps Discover Technologies Pvt. Ltd., seeking to initiate corporate insolvency resolution process ("CIRP") under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code") of the Respondent M/s ADS Curry Pvt. Ltd., for the alleged default on the part of the Respondent in clearing the debt of Rs. 15,27,965/- towards the services rendered by the Applicant. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

- i. The Applicant and the Respondent had executed an Insertion Order dated 08.11.2016 ("the IO") for the performance of digital marketing services. The services to be provided by the Applicant were to be governed by the Standard Terms and Conditions appended to the IO.
- ii. The payment for the services rendered under the IO were to be governed by Clause 3 of the IO which has been reproduced hereunder for the sake of convenience:

"3.1 Reporting: Save in respect of third party Ad server Ads, the price will be solely based upon the Volume compiled by the Advertiser tracking and reporting system. Advertiser will

C.P. IB-1104/ND/2018

M/s Apps Discover Technologies P. Ltd. vs. M/s ADS Curry Pvt. Ltd.



provide the Publisher with a report on monthly basis, unless otherwise agreed in the IO detailing the volume in relation to the campaign. The aforesaid report will be broken out by day and be sent by the 5<sup>th</sup> of every following month. Publisher agrees to accept the Advertiser report as the official basis for measuring the Volume and acknowledges that in some cases, Advertiser will need to make adjustments to reported statistics due to specific contractual provisions (e.g Fraudulent activities), statistical errors, or third party tracking provided by Client.

3.2 Invoices: Unless Advertiser has prepaid, Publisher will issue the invoices on as agreed basis upon its receipt of the reports aforementioned in Section 3.1 from Advertiser. Invoices will be sent to Advertiser's billing address as set forth on the IO and will at a minimum contain the IO number, company name, campaign name and any number or other identifiable reference as required for invoicing on the IO. The invoice shall cover only those inventory that meet the criteria specified in this Agreement. Publisher must send the invoices in time, otherwise Advertiser shall not bear any liability of late payment therein.

C.P. IB-1104/ND/2018

M/s Apps Discover Technologies P. Ltd. vs. M/s ADS Curry Pvt. Ltd.



3.3 Payments: Advertiser shall pay the Price in full to the Publisher within 40 days as of the issuance date of invoice from Publisher. All amounts payable to Publisher under this Agreement will be paid in INR/USD to Publisher Bank Account below. Publisher may update its bank account information from time to time during the Term by providing Advertiser with an update. Advertiser will pay the Payment within 40 days of invoice generation. Invoice will raise on every 1<sup>st</sup>/30<sup>th</sup> of every month.....”

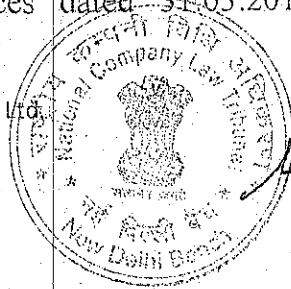
- iii. The Applicant was entitled to receive payments under the IO in terms of the volume generated and payment was to be made by the Respondent on the basis of invoices raised by the Applicant.
- iv. The Applicant in terms of the IO raised invoices from time to time upon the Respondent. The Applicant has till date generated volume to the tune of Rs. 31,58,604/-. It is stated that the Respondent has failed to make payment on account on invoices dated 31.03.2017 and 11.05.2017. The total amount of the outstanding dues is Rs. 15,27,965/- which pertain to services rendered to the Respondent in the months of February and March 2017. The amounts fell due after the invoice were received by the Respondent.

C.P. IB-1104/ND/2018

M/s Apps Discover Technologies P. Ltd. vs. M/s ADS Curry Pvt. Ltd.



- v. Despite invoices being raised from time to time in terms of the IO, the Respondent failed to make payment of the outstanding debt. The Applicant sent several emails as reminders for the payment of the outstanding invoices but has not received such amount till date. The Applicant sent a final reminder on 05.01.2018 however the Respondent failed to respond to the requests of the Applicant.
- vi. The Applicant issued Demand Notice in the form of Form-3 under Section 8 of the Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 dated 20.06.2018 calling upon the Respondent to clear the amount of default i.e. Rs. 15,27,965/- within a period of ten days of receipt of the demand notice. The Respondent upon receipt of the Demand Notice dated 20.06.2018 issued a reply dated 28.08.2018. The contents of the reply are not tenable.
- vii. The Respondent was duty bound to make payment to the Applicant on the basis of various invoices raised by the Applicant in terms of the IO. The Respondent has grossly failed to abide by the terms and conditions of the IO despite unequivocally accepting the services of the Applicant.
- viii. The Applicant has till date not received any amount from the Respondent in respect of invoices dated ~~31.03.2017~~ and



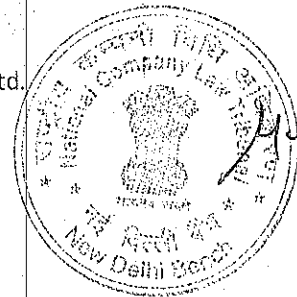
11.05.2017. Further, the Respondent has failed to make any payment to the Applicant from the date of receipt of the demand notice dated 20.06.2018 till the filing of the present application.

2. Consequent to the notice issued by this Tribunal, the Respondent filed its reply in which the following contentions are made:

- i. The Respondent is in the business of an advertising agency whereby the respondent/Respondent undertakes, facilitates and fulfils the advertisement/marketing needs of its clients through various publishers. In this entire transaction, the Respondent only acts as an agent and in the said capacity it facilitates communication and flow of instructions between its client and the publishers which, in the present case, are 'Jabong' and 'Apps Discover' respectively. Therefore, the Respondent cannot be held liable for payment of the alleged dues in any manner since the Respondent is not the end user of the services and had acted only in the capacity of an agent.
- ii. It is within the knowledge of the applicant that it is the corporate entity i.e. Jabong - Novarris Fashion Trading Private Limited which is the ultimate end user/debtor of the services provided by the Applicant and this fact is amply evident from

C.P. IB-1104/ND/2018

M/s Apps Discover Technologies P. Ltd. vs. M/s ADS Curry Pvt. Ltd.



the Insertion order and invoices under which the Applicant is claiming recovery. Therefore, the Applicant cannot pursue any cause of action against the Respondent which has merely acted in the capacity of an agent and when the principal i.e. Jabong is known to the Applicant, the Respondent cannot be held liable for the recovery which can only be effected through the said principal, known to the Applicant.

- iii. The Respondent, in this entire transaction, only acted as an agent of the principal Jabong in order to facilitate and coordinate with respect to marketing campaigns of Jabong.
- iv. The invoices relied upon by the Applicant clearly enumerates Jabong's name which was the end user and against which the debt is due. Moreover, the invoices raised by the Applicant were duly delivered to Jabong against receiving, clearly depicting that the invoices were also forwarded to the principal borrower for payment.
- v. In terms of Section 230 of the Indian Contract Act, 1872 an agent cannot be sued for the recovery against the principal, when the principal is known to the party seeking recovery of the dues and this fact is amply evident from the invoices that the principal i.e. Jabong was known to the Applicant.

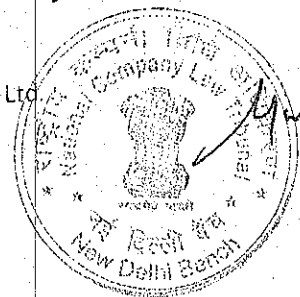


3. The Applicant has filed a rejoinder to the reply filed by the Respondent in which he has reiterated the certain points raised by him in the petition and they are as follows:

- i. Mere enumeration of the corporate entity Jabong as an end user in the invoices raised by the Applicant against the services rendered to the Respondent, wherein the installs were generated by the Applicant for Jabong by providing online space or time for advertisement, does not imply that the debt is due against the end user in receipt of the services and not against the party contracting for the services to be rendered to the end user.
- ii. Any alleged connection between the Respondent and Jabong is their interse arrangement, and therefore, has no binding on the Applicant, which was engaged by the Respondent for the provision of digital marketing services by the Applicant vide IO dated 08.11.2016.
- iii. It is absolutely absurd and baseless to state that the Respondent cannot be held liable for payment of the alleged dues since the Respondent is not the end user of the services and has acted only in the capacity of an agent.
- iv. The invoices sent to the Respondent were generated towards digital marketing services rendered by the Applicant to the

C.P. IB-1104/ND/2018

M/s Apps Discover Technologies P. Ltd. vs. M/s ADS Curry Pvt. Ltd.



Respondent, and therefore, it is the Respondent who is liable to make payment to the Applicant against the services rendered to it by the Applicant.

4. We have gone through the documents filed by both the parties and heard the arguments made by the counsels. The parties have entered into an agreement and according to the conditions stipulated in the agreement the Applicant has raised the invoices from time to time. Through the Applicant has raised invoices for an amount of Rs. 31,58,604/- the Respondent has paid Rs. 16,57,212/- only and defaulted on an amount of Rs. 15,27,965/- in respect of invoices dated 31.03.2017 and 11.05.2017. This clearly amounts to part payment made by the Respondent.
5. The Standard Terms and Conditions appended to the IO dated 08.11.2016 clearly binds the Applicant and the Respondent only. They do not make any reference to the clients of the Respondent. The invoices have been generated in the name of the Respondent only. There is no privity between the Applicant and Jabong. The Respondent cannot shirk off its own liability by claiming that it is not the end user of the services when it has directly entered into an



agreement with the Applicant for provision of services for consideration.

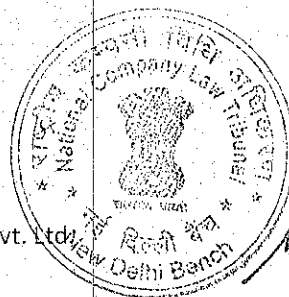
6. The Applicant has clearly established the existence of debt and default on the part of the Respondent. In the above circumstances this Tribunal initiates CIRP of the Respondent company.

7. A moratorium in terms of Section 14 of the Code is imposed forthwith in following terms:

“(a) the institution of suits or continuation of pending suits or proceedings against the Respondent 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 Respondent any of its assets or any legal right or beneficial interest therein;

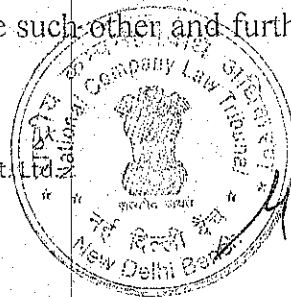
(c) any action to foreclose, recover or enforce any security interest created by the Respondent in respect of its property including any action under the



Securitization and Reconstruction of Financial 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 the possession of the Respondent.
- (2) The supply of essential goods or services to the Respondent as may be specified shall not be terminated or suspended or interrupted during moratorium period.
- (3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.”


8. The interim resolution professional (“IRP”), named in the list provided by the IBBI, is Mr. Hemani Gupta, email id: [hka.consultants@gmail.com](mailto:hka.consultants@gmail.com), phone number: 9910611114 being confirmed by this Bench. He shall take such other and further steps

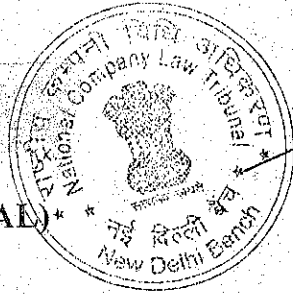


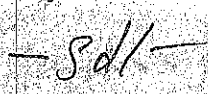
as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days before this Bench.

9. The Applicant shall deposit a sum of Rs. 2 lakhs to enable the IRP to meet the immediate expenses. The same shall be accounted for by the IRP and shall be reimbursed to the Applicant to be recovered as costs of the CIRP.

10. Renotify this case for report of the IRP on 23.09.2019.

  
(Dr. V.K. SUBBURAJ)  
MEMBER (TECHNICAL)



  
(DR. P.S.N. PRASAD)  
MEMBER (JUDICIAL)

Deepak

  
26/8/19  
सहायक पंजीयक  
ASSISTANT REGISTRAR  
राष्ट्रीय कम्पनी विधि अधिकरण  
NATIONAL COMPANY LAW TRIBUNAL  
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13

C.P. IB-1104/ND/2018  
M/s Apps Discover Technologies P. Ltd. vs. M/s ADS Curry Pvt. Ltd.