

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

CP (IB)1849/MB/C-IV/2019

Under section 9 of the I&B Code, 2016

In the matter of

Bsmart Tech Private Limited

[U72300MH2013PTC247971]

...Operational Creditor

v/s.

**Essel Utilities Distribution Company
Limited**

[U40103MH2012PLC234503]

...Corporate Debtor

Order pronounced on : 26.07.2021

Coram:

Shri Rajesh Sharma
Hon'ble Member (Technical)

Smt. Suchitra Kanuparthi
Hon'ble Member (Judicial)

For the Petitioner: Mr. Nihall Shaikh a/w Mr. Shrikant Pillai, Advocates

For the Respondent: Mr. Nirman Sharma a/w Mr. Vishal Jathari, i/b
MDP & Partners

ORDER

Per: Suchitra Kanuparthi, Member (Judicial)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (**IBC**) by **Bsmart Tech Private Limited** ("the Operational Creditor"), seeking to initiate Corporate

Insolvency Resolution Process (CIRP) against **Essel Utilities Distribution Company Limited** ("the Corporate Debtor"). The Operational Creditor claiming a sum of Rs.17,54,240.10 which is said to amount in default as on 23.07.2015 which is said to be the date of default.

2. The Petitioner is a Company incorporated under the provisions of Companies Act, 2013 and is the Next Generation Wireless Solutions company engaged in the business of Data Processing, Operation and Management of data, processing or tabulation of all types of data of other firms undertaken by a computer and providing services on hourly basis for processing tabulation of data. Similarly, the Corporate Debtor is a Company incorporated on 14.08.2012 under Companies Act, 1956 and is a subsidiary of Essel Group. Its registered office is at 513/A, 5th Floor, Kohinorr City, Kiro Road, L.B.S. Marg, Kurla (West), Mumbai-400070, MH. this Bench has jurisdiction to deal with this petition.
3. The Petitioner has been providing its services to various clients/companies, and had arrangement with the Corporate Debtor to provide bulk SMS services. The Petitioner also raised several invoices from time to time which includes Bulk Messages Charges and Inter Operator Charges. As per terms and conditions

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of the invoices, the Corporate Debtor was liable to pay the amounts within 10 days from the date of each invoice, however, no amount is received within the said period.

4. The Petitioner further submits that they had rendering uninterrupted services to the Corporate Debtor and timely payments were being paid by the Corporate Debtor. After December, 2015 the corporate Debtor arbitrarily and unilaterally stopped making the payments despite availing services from the petitioner. The last payment of Rs. 2,39,893.28 was made by the Corporate Debtor was on December, 1, 2015.

5. As a gesture of goodwill, the Petitioner continued to provide uninterrupted services to the Corporate Debtor even though the invoices remain outstanding since July, 2015. Subsequently, the Petitioner received a sum of Rs. 1,35,034/- towards TDS and the Petitioner adjusted Rs.1 lakh towards (Telecom Regulatory Authority of India) TRAI deposit. Therefore, as on date the outstanding amount of Rs.17,54,240.10 is due and payable by the Corporate Debtor.

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Sr. No.	Invoice No.	Invoice Date	Invoice Due Date	Invoice Amount (INR)	Interest @12% p.a. from the due date of invoice till 03.05.2019
1.	BTPLBLK0615-177	07.23.2015	08.02.2015	84,293.41	38,077.53
2.	BTPLIUC0615-178	07.23.2015	08.02.2015	273,253.95	123,435.92
3.	BTPLBLK1015-217	11.12.2015	11.22.2015	327,291.38	135,794.54
4.	BTPLIUC1015-65	11.12.2015	11.22.2015	86,430.58	35,860.40
5.	BTPLBLK1115-206	12.14.2015	12.24.2015	80,141.30	32,407.82
6.	BTPLIUC1115-168	12.14.2015	12.24.2015	90,807.31	36,720.98
7.	BTPLBLK1215-173	01.06.2016	01.16.2016	71,487.10	28,367.65
8.	BTPLBLK1215-137	01.06.2016	01.16.2016	81,806.14	32,462.47
9.	BTPLBLK0116-42	02.01.2016	02.11.2016	81,465.03	31,630.75
10.	BTPLIUC0116-31	02.06.2016	02.11.2016	93,566.55	36,329.46
11.	BTPLBLK0216-34	03.01.2016	03.11.2016	75,274.76	28,509.54
12.	BTPLIUC0216-25	03.01.2016	03.11.2016	87,198.87	33,025.68

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13.	BTPLBLK0316-42	04.01.2016	04.11.2016	88,984.76	32,795.15
14.	BTPLIUC0316-32	04.01.2016	04.11.2016	105,401.02	38,845.33
15.	BTPLBLK0416-32	05.01.2016	05.11.2016	56,931.75	20,420.56
16.	BTPLIUC0416-32	05.01.2016	05.11.2016	66,140.99	23,723.78
17.	BTPLBLK0516-47	06.01.2016	06.11.2016	1,762.83	614.33
18.	BTPLIUC0516-34	06.01.2016	06.11.2016	2002.37	697.81
	TOTAL			17,54,240.10	709,719.70
	(A)+(B)			24,63,959.8	

6. Since, the Corporate Debtor failed to repay the outstanding dues, the Petitioner sent repeated reminders to the Corporate Debtor requesting for clearing of outstanding amount. The corporate Debtor vide its email 04.02.2016 informed and admitted to the Petitioner that they are in receipt of invoices for the month of Oct-Nov, 2015, however, there has been some differences in SMS gap, as the invoices reflect the total SMS count to be 25,32,815 as against 17,15,018 as per Corporate Debtor record. The Petitioner pointed out that the Corporate Debtor did not raised any issue or

refused to pay invoice amount, but only raised a query on the alleged differences in SMS count.

7. The Petitioner also submits that vide its email on 12.02.2016 and 21.03.2016 informed the Corporate Debtor that the alleged invoices that 02.02.2016 and 01.03.2016 have been dispatched to the Corporate Debtor and requested to make payment as per defined payment terms. However, despite of aforesaid invoices and emails, the Corporate Debtor neither responded to said emails nor repay the outstanding dues.
8. Since, the Petitioner failed to repay the outstanding dues, the Petitioner vide email dated 22.03.2016 forwarded the details of all outstanding invoices with request to clear them at the earliest in order to use the services without interruption. The Corporate Debtor vide email dated 28.03.2016 responded that they are checking the logs and requested the Petitioner to share the logs post October 2015. The Petitioner further email on 12.05.2016, informed the Corporate Debtor that invoices dated 01.05.2016 have been dispatched. The Petitioner sent regular follow ups on 27.06.2016, 29.07.2016 and 01.08.2016, the however the Corporate Debtor neither made the payment nor responded to the aforesaid emails.

9. The Petitioner vide email dated 31.01.2018 provided the details of outstanding invoices and requested the Corporate Debtor to clear the long pending invoices due and payable to the Petitioner. Despite receipt, the Corporate Debtor has not responded to any of the mail. The Petitioner thereafter issued demand notice u/s 8 of IBC on 05.12.2018, the same was delivered to the Corporate Debtor on 12.12.2018. Despite receipt of said Demand Notice, the Corporate Debtor failed repay the outstanding dues. Hence this Petition.

REPLY ON BEHALF OF THE CORPORATE DEBTOR.

10. The corporate Debtor filed affidavit in reply through its Authorised Representative Ms. Saroj Benbansi, and denying all the allegation, contentions, statement contained in the Competition.
11. At the outset the Corporate Debtor categorically mentioned that the Petitioner failed to place on record the work order dated 15.05.2019 vide the said work order the Petitioner was assigned to render Bulk SMS services to the respective customers of the Corporate Debtor. She further submits that the Corporate Debtor was making regular payment to the petitioner as per invoices. However, suddenly while reconciling the account, the Corporate Debtor noticed that there was difference in the unit of SMS mentioned in the invoices raised by the Petitioner for the month of Oct-Nov. 2015.

12. Additionally, the rate of per unit of SMS charged by the Petitioner was 0.07. however, as per work order the agreed rate was 0.05. The Corporate Debtor was also pointed to the Petitioner that invoices dated 06.01.2016 received by it does not reflect the SMS count, as such the Corporate Debtor sought clarification by the Petitioner which was never clarified by the Petitioner till date. She also submits that the trailing mail dated 16.09.2015 appended to the email dated 04.02.2016 shows that the Corporate Debtor requested the Petitioner to provide clarity on supporting documents in relation to the invoices raised by it for the Month of March, April and May, 2015, which was never provided by the Petitioner.
13. The email exchanged between the parties clearly shows that the Corporate Debtor continuously request the Petitioner to assist in opening of link/documents which was sent by the Petitioner as the petitioner was unable to open the same and send the logs. The Corporate Debtor also submits that the Petitioner has stopped rendering its services from 16.05.2016. Thereafter, the Corporate Debtor replied to the Demand Notice on 08.01.2019 denying all the allegations/contention made therein.
14. The Corporate Debtor submitted there were pre-existing dispute between the parties which is evident from the email dated

04.02.2016 and the material available on record and hence the petition is not maintainable and liable to be dismissed in *limine* with costs. The Corporate Debtor also submitted that the Operational Debt of the Petitioner arises out of the invoices for the Month of Oct-Nov 2015 and Jan 2016. The Corporate Debtor further made allegations regarding the signature and affixing of seal on the invoices by the Petitioner. The relevant terms and conditions pertaining to submission of the invoices contained in the said Work Order are reproduced hereinbelow:

“10. Invoice in duplicate written by ink or typed and duly signed alongwith Bank Guarantee (if applicable) in original, must be submitted to Accounts Department at Operating Location;

11. Billing; The Contractor shall submit the invoice for the Work carried out under the terms of the contract along with the proof/invoices wherever applicable. Item Code for each activity of work, is to be clearly indicated and bill prepared activity wise.

[a] For ongoing Contracts Bills to be submitted fortnightly i.e. for the period 7th to 21st of each month, bills to be submitted latest by 25th and for the period 22nd to 6th, bills submitted latest by 10th of the same month with all statutory compliances.

[b] For Onetime Contracts bills to be submitted after completion of work along with the certified measurement sheet by officer in-charge.

[c] Date of submission of bills to be user department will be stamped on bills by receiving officer. In case of non-stamping, date of certification of bill will be considered as date of submission of bill.

15. The Corporate Debtor further claims that upon bare perusal of the aforementioned relevant clauses, it is clear that the invoices wireless needs to be signed and certified by the concerned officer and/or project-in-charge of the corporate Debtor. However, in the present case none of the alleged invoices is sealed, signed and/or certified by the concerned person of the corporate Debtor. Thus, alleged claim of the Petitioner is not maintainable and deserves to be dismissed.

16. The Corporate Debtor also objected to the levy of interest at 12% since there is no contract terms for levy of interest. The Corporate Debtor further claimed that the Petitioner has not come with clean hand and failed to produce work order therefore guilty of *suppressio veri and suggestio falsi* and view the above the petitioner is liable to be dismissed.

REJOINDER FILED BY THE PETITIONER

17. The Petitioner denied the fact that he has suppressed the material facts and submitted that the contents of the reply are misleading and unstamped. The Petitioner submits that at the request of the corporate Debtor, the Petitioner had sent a revised proposal indicating the SMS rate for the year 2015-16. The revised proposal therefore provides that the SMS charge would be at 0.07 instead of 0.05. The Corporate Debtor has not disputed the applicable rate as per the revised proposal. Further, the Petitioner has provided logs to the Corporate Debtor as the clarification on the SMS unit mention on the outstanding invoices.

ADDITIONAL REPLY FILED BY THE CORPORATE DEBTOR

18. In addition to the reply filed by the Corporate Debtor, the Corporate Debtor filed additional reply, thereby submits that the claim is entirely barred by limitation as the invoices pertain to the year 2015-2016 and the present petition belatedly on 07.05.2019. Therefore, the Corporate sought to dismiss the Petition.

WRITTEN SUBMISSION FILED BY THE PETITIONER

19. The Petitioner claim that the Corporate Debtor is liable to pay to pay Rs. 17,54,240.10 alongwith interest @12% p.a. in respect of outstanding operational debt for providing Bulk SMS services. The

Corporate Debtor unilaterally stop paying services from July 2015. The Corporate Debtor vide email on 04.02.2016 acknowledged the Petitioner that they are in the receipt of invoices and request for clarification on the difference on SMS count. The counsel for the Petitioner relied on the judgment of ***Pedersen Consultants India Private Limited vs. Nitesh Estates Limited*** passed by National Company Law Appellate Tribunal, New Delhi, in ***Company Appeal (AT) Insolvency No. 702 of 2018*** wherein it was held that the Application u/s 9 cannot be rejected on mere dispute of amount. The Petitioner further submitted that the Petition is not barred by limitation as suggested by the Corporate Debtor.

FINDINGS

20. We have prudently verified the documents available on record and upon perusal of pleadings of both sides the only issue arises for consideration are whether the claim made by the Petitioner is time barred or whether any pre-existing dispute raised by the Corporate Debtor. The Petitioner was evidently provided Bulk SMS Services to the Corporate Debtor. The Corporate Debtor issued the Work Order which is as below:

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Exhibit -A

Essel Utility Distribution Company Ltd
(Unit) 213 A, Wing, Khar West, City Khar road,
Off- LBS Marg Kurla (W), Mumbai,
Maharashtra, India 400070.

Supplier Code: 4956		PO No: 10024150143	PO Date: 15-MAY-15
Supplier Name: Smart Tech Pvt Ltd		Rev No: 0	Rev Date:
Supplier Address: 135 Continental Building, Cr Avinia Seesad road, Worli Mumbai 400 012, Mumbai, India 400 012.		Ship To: Essel Utility Distribution Company Ltd - Mumbai, (Unit) 213 A, Wing, Khar West City Khar road, Off- LBS Marg Kurla (W), Mumbai, Maharashtra, India 400070.	
GST:		CST: EUDCL00NLLC	Cost Center: 000
TIN:		TIN: EUDCL00NLLV	Approval Ref: 1500000370
Currency: INR		Req. Name: -	Req. Department:

S.No.	Item Code	Description	Details of Description	UOM	Quantity	Unit Price	Total Price
1	2510030093	Providing Services	Bulk Message Charges	NDS	2500000	0.65	1,250,000.00
							151,200.00
							3,024.00
							1,512.00
							1,418,736.00
TOTAL Line Value:							1,290,000.00
TOTAL Net Value:							155,736.00
GROSS TOTAL:							1,418,736.00

No of Line Items: 1
PO Value in Words: Fourteen Lakh Fifteen Thousand Seven Hundred Thirty Six

Annexure enclosed in Report: YES / NO

Authorised Signatory

TRUE COPY
MDFC PARTNERS
Advocates & Solicitors

Mumbai - Thane
Dist.
Reg. No. 2854

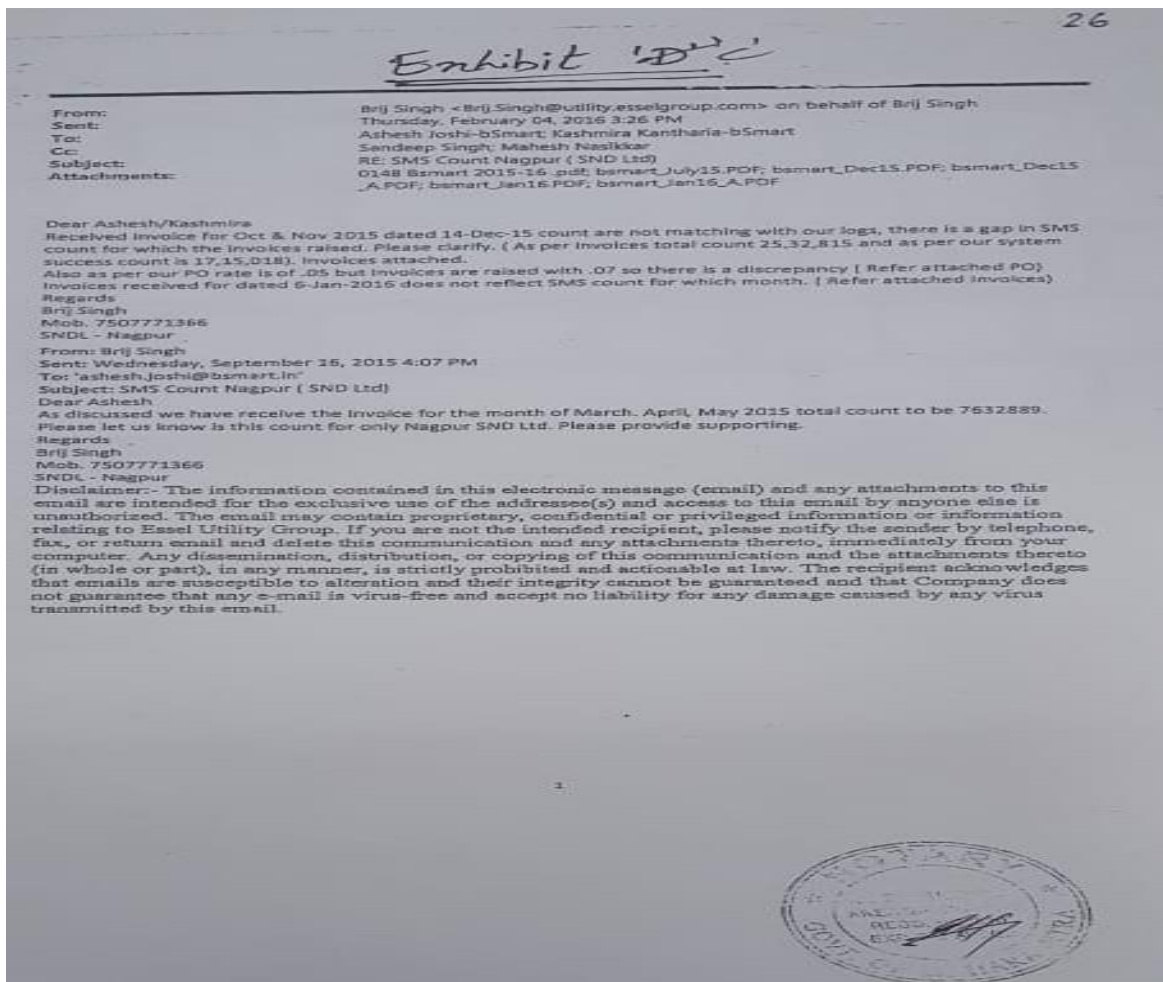
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21. The Petitioner have been providing uninterrupted services to the Corporate Debtor and the Corporate Debtor had been paying timely. However, after December, 2015, the Corporate Debtor failed to make the payment. The last payment made by the Corporate Debtor to the Petitioner was on December, 2015 for amount of Rs.2,35,893.28. There is an outstanding amount of Rs. 17,54,240.10 which is due and payable by the Corporate Debtor. The Petitioner sent several reminders requested the Corporate Debtor to clear the outstanding amount.

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22. The Corporate Debtor vide its email dated 04.02.2016 informed the petitioner that they are in receipt of invoices for Oct-2015, However, there are some differences in SMS gap, as the invoices reflect the total SMS count to be 25,32,815 as against 17,15,018 as per Corporate Debtor record. The email dated 04.02.2016 is reproduced hereunder:



23. This Bench is of the opinion that the invoices for the month of Oct-Nov 2015 were outstanding and there were exchange of emails between the parties regarding the pending invoices, however, the Corporate Debtor in his reply have claimed that they have not been able to reconcile or open the logs sent by the Petitioner. There has been a dispute raised by the Corporate Debtor with reference to the SMS count as per the email dated 04.02.2016. Though there was no dispute regarding payment terms as raised by the Corporate Debtor but evidently there has been dispute with regard to the SMS count as claimed by the Petitioner in the said invoice and SMS count as recorded by the Corporate Debtor, this amounts to be a pre-existing dispute between the parties and in view of judgment of ***Mobilox Innovations Private Limited vs. Kirusa Software (P) Limited 2017 1 SCC Online SC353***, the contents of the email dated 04.02.2016 amounts to be plausible dispute between the parties.
24. Further, the said claim is also time barred in view of the fact that the invoices pertaining to the year 2015-2016 and the petition was filed on 07.05.2019, the last payment made by the Corporate Debtor was on 01.12.2015. The email of the Corporate Debtor raising a dispute dated 04.02.2016 which may have extended the limitation also ends by February, 2019 and in view of the fact that

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the petition was filed on 07.02.2019, this Petition is barred by limitation.

25. This Court doth order as follows;

- i. The Petition is barred by limitation and is filed beyond the period of limitation.
- ii. The email dated 04.02.2016 raising a pre-existing dispute between the parties.

26. Accordingly, in view of the above observations and perusing the materials available on record, the petition is dismissed with no costs.

27. The Registry is directed to communicate this order to both the parties immediately.

Sd/-
RAJESH SHARMA
Member (Technical)

26.07.2021

/Rohit/

Sd/-
SUCHITRA KANUPARTHI
Member (Judicial)