NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT- V

C.P. 1104/IB/MB/2020

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Bsmart Tech Private Limited

Unit No. 808, 8th Floor, Marathon Nextgen Icon, Ganpatrao Kadam Marg, Lower Parel West, Mumbai – 400013, Maharashtra, India

….. Operational Creditor/ Petitioner

Vs

Tubelight Communication Limited

504, 5th Floor, Advent Atria Tower, Chincholi Bunder, Malad (West), Mumbai – 400064

….. Corporate Debtor

Order Reserved On: 14.03.2023

Order Pronounced On: 23.03.2023

Coram:

Hon'ble Shri. Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via Videoconferencing)

For the Petitioner: Adv. Aniketh Nair a/w Adv. Kaushal Udeshi i/b Mr. Mustafa Motiwala

For the Respondent: Adv. Rajesh Choudhary i/b RKC LEGAL

Per: Shri. Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The above Company Petition is filed by **Bsmart Tech Private Limited** hereinafter called as the ("**Operational Creditor**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against **Tubelight Communication Limited** hereinafter referred to as the ("**Corporate Debtor**") by invoking the provisions of Section 9 Insolvency and Bankruptcy code (hereinafter called "**Code**") read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for a Resolution of Operational Debt of Rs. 4,72,41,377/-.

2. The Operational Creditor is a wireless solutions company engaged in the business of data processing, operation & management of data and providing services on hourly basis for tabulation and processing/tabulation of data. It also operates as the bulk SMS messaging networks and has expertise in processing services. The Operational Creditor has been providing its services to several companies either on the basis of contractual arrangement or on the basis of invoices.

3. The Operational Creditor mentioned that the Corporate Debtor is an IT & Telecom domain company offering wide range of services to different brands within the country and abroad across different domains with respect to cloud telephony, one-time password SMS services, mobile VAS and call centre solutions. The Corporate Debtor herein is basically solution provider for a communication business who operates in India and abroad. The Corporate Debtor was initially known as Tubelight Digital Media and Services Pvt. Ltd. Thereafter, on August 17, 2017 its name changed to Tubelight Communications Private Limited and subsequently to Tubelight Communications Ltd. on December 13, 2017. In order to provide such services to its Clients, the Corporate Debtor is dependent upon a service provider such as the Operational Creditor.

4. The Operational Creditor further mentioned that the Corporate Debtor had approached the Operational Creditor for procuring bulk messaging services. Accordingly, the Operational Creditor provided its services to the Corporate Debtor and issued invoices from time to time. Pursuant to the services being provided, the Operational Creditor had issued twenty-nine invoices for the period April, 2017 to August, 2017. The said invoices were issued on monthly basis for the services provided in previous month, which were required to be paid within a period of ten days from the date of invoice, as mentioned under payment terms of each invoice. It is pertinent to note that the Corporate Debtor availed the services without any demur and/or protest and the Corporate Debtor never raised any dispute regarding the services provided by the Operational Creditor nor that the invoices were incorrectly addressed or issued to the Corporate Debtor. Despite providing quality services and other credentials of the respective invoices as shared by Operational Creditor vide its email dated September 7, 2017 for cross verification of logs (on the basis of which the invoices are generated), the Corporate Debtor failed to clear the invoices in a timely manner. While the Corporate Debtor made payments for the invoices till March, 2017, it failed to make payments towards the invoices issued from April, 2017 onwards.

5. It is pertinent to mention that the aforementioned invoices raised by the Operational Creditor, amounts to INR. 4,77,30,780.68/-. However, certain part payments were made by the Corporate Debtor with respect to invoices, taking the same into consideration, the dues of the Corporate Debtor are to the tune of INR. 4,72,41,377.15/-. Since the Corporate Debtor failed to clear the invoice within the period of ten days from the date of the invoices, the Operational Creditor followed up with the Corporate Debtor by way of demand notices. The Operational Creditor addressed emails dated September 6, 2017 and September 14, 2017 to the Corporate Debtor calling upon the Corporate Debtor to clear the outstanding amounts.

6. Since the Corporate Debtor has failed to make any payments despite receipt of reminder emails, the Operational Creditor was constrained to issue the demand

notices to the Corporate Debtor and the following sequence of events took place:-

a. The Operational Creditor on November 14, 2017, issued a demand Notice to the Corporate Debtor with respect to payment of dues amounting to the tune of 4,72,41,377.15/-. The Operational Creditor whilst demanding the payment of the complete amount of dues granted a period of fifteen days to the Corporate Debtor from the date of receipt of said letter to take all necessary steps in this regard.

b. On receipt of the aforesaid demand notice, the Corporate Debtor vide its reply dated December 6, 2017 simply refuted its liability to pay, merely on the ground that there is no contractual relationship between the Corporate Debtor and Operational Creditor.

c. Thereafter, the Operational Creditor vide another notice dated January 4, 2018 requested the Corporate Debtor to make payments against its dues and also proposed for an amicable settlement of issues between the parties anytime between January 4, 2018 to January 12, 2018. The Corporate Debtor vide its reply dated February 21, 2018, once again refuted its liability to pay and denied all the facts with respect to dues of the Operational Creditor. However, the Corporate Debtor agreed to meet the representatives of Operational Creditor in order to resolve the issues in an amicable manner without involvement of any third party and provided the meeting takes place at the office of the Corporate Debtor.

d. Thereafter, the Operational Creditor vide its notice dated March 13, 2018, intimated the Corporate Debtor that as per its reply to demand letter dated February 21, 2018, it is clear that the Corporate Debtor is willing to pay all the dues of the Operational Creditor against which the aforementioned invoices were raised by the Operational Creditor. In addition to this, it was also intimated to the Corporate Debtor that since the parties are willing to amicably settle the matter, such settlement shall be "without prejudice" to legal rights of the Operational Creditor.

e. The Operational Creditor on March 31, 2018, issued another notice calling upon the Corporate Debtor to pay the outstanding amount, failing which, the Operational Creditor shall be constrained to take necessary legal action against the Corporate Debtor. The Operational Creditor also intimated the Corporate Debtor that despite agreeing to share the payment plan, the Corporate Debtor failed to do so.

f. The Corporate Debtor vide its reply dated 02.04.2018, once again simply refuted its liability to pay in lieu of services rendered as per the Invoices.

g. The Operational Creditor vide its notice dated 30.04.2018, requested Corporate Debtor to make payments of its dues as the same have remained outstanding since April 2017 and despite rendering quality services and several assurances with respect to payments, Corporate Debtor has failed to release the payments. In addition to this, Operational Creditor also requested for depositing the TDS amount with respect to deductions already made by the Corporate Debtor against the invoices as the Corporate Debtor not only defaulted in payment dues of Operational Creditor but also defaulted in payment of statutory dues that were to be deposited with tax authorities.

h. Since the Corporate Debtor neither made any payments against the dues of the Operational Creditor nor gave any reply to the abovesaid demand notice, the Operational Creditor was left with no option but to send out another demand notice of unpaid debt. It is important to note that the Operational Creditor vide its aforesaid notice provided all the details pertaining invoice numbers and the total amount of debt due from the Corporate Debtor. It is pertinent to mention herein that the Corporate Debtor neither paid the outstanding amount nor responded to the said demand notice.

7. In the meantime, another entity i.e. Infobip India Private Limited ("Infobip") initiated the insolvency proceedings against the Corporate Debtor.

8. During the pendency of the aforementioned matter, sometime in July, 2019, the Corporate Debtor approached the Operational Creditor and the settlement talks resurfaced. In the meeting held on July 30, 2019, the Director of the Corporate Debtor approached the Operational Creditor for the purposes of discussing the aspect of settlement in relation to the outstanding amount owed by the Corporate Debtor. The Corporate Debtor admitted its liability to pay and assured to provide an offer on the repayment plan with respect to the outstanding amount within a period of twenty (20) days. Thereafter on August 28, 2019, the Corporate Debtor called the Operational Creditor and sought some more time to provide the repayment plan on the ground that the management is internally coordinating to prepare and send the repayment plan. The Corporate Debtor assured the Operational Creditor that it would send the payment plan by August 30, 2019. In the meanwhile, due to the ongoing settlement talks and categorical assurance from the Corporate Debtor to pay the balance amount, the Operational Creditor agreed to withdraw the present insolvency application pending before the Hon'ble NCLT with liberty to file afresh. Accordingly, the Operational Creditor withdrew the insolvency application by filing a withdrawal memo with liberty to file afresh. That, since the Corporate Debtor failed to respond within the timeline committed by it (i.e. August 30), the Operational Creditor followed up with the Corporate Debtor on the status of the payment plan.

9. Despite time granted by the Operational Creditor as per its email, the Corporate Debtor failed to release any payments. Therefore, the Operational Creditor once again vide its email dated October 04, 2019 (Annexure N), requested the Corporate Debtor to release payments failing which the Operational Creditor will have to initiate legal action against the Corporate Debtor. It is pertinent to note that since the Corporate Debtor had breached the timeframes as agreed between the parties on several instances. Therefore, the Operational Creditor was not willing to provide any extensions beyond October 10, 2019.

10. Thereafter, on and around October 29, 2019, the Corporate Debtor approached the Operational Creditor over a call and assured that it will be clearing around

INR 1 crore to 1.5 crores by November 16, 2019 and 70% of the payment shall be cleared by the end of 2019.It is pertinent to state that the aforesaid assurance was in relation to overall debt amount owed to the Operational Creditor and Infobip. However, despite such assurances of the Corporate Debtor on several occasions, the Corporate Debtor failed to release any payments against its dues and the same still stands outstanding till date. In view of the aforesaid facts and circumstances, it is evident that the Corporate Debtor has no intention to pay the debt amount to the Operational Creditor and it seems that the assurances were made with the malafide intent to merely influence the Operational Creditor to withdraw the insolvency petition.

11. Thereafter, the parties met for settlement talks on and around January 24, 2020 wherein the Corporate Debtor assured that it will clear the dues of the Operational Creditor. The Corporate Debtor purposed to execute a settlement agreement between the parties wherein the Corporate agreed to make payment of dues in monthly instalments amounting to INR. 1,50,000/- (Indian Rupees One Lakh Fifty Thousand Only) each month till the debt amount is completely paid to the Operational Creditor. However, the Corporate Debtor neither executed a settlement agreement nor made any payment as per its own assurances. A copy of the minutes of meeting is herewith marked as Annexure "P".

12. Due to continuous-failure of the Corporate Debtor to make payments, the Operational Creditor was constrained to issue a fresh statutory demand notice dated February, 27, 2020 under section 8 of the Insolvency & Bankruptcy Code, 2016 which was duly delivered at the registered office of the Corporate Debtor on March, 02, 2020. It is pertinent to note that despite receipt of the aforesaid demand notice, the Corporate Debtor failed to respond to the Operational Creditor. A copy of the Statutory Demand Notice dated February, 27, 2020 along with proof of service.

13. In view of the above, the total amount due from the Corporate Debtor to the Operational Creditor is 4,72,41,377.15/- The default occurred when the

Corporate Debtor failed to make payment of invoice amount within period of ten days from the date of invoice as envisaged under each invoice and neglected to make payments of the outstanding debts to the Operational Creditor despite the repeated reminders.

14. The default occurred when the Corporate Debtor failed to make payments or show existence of any dispute within the statutory period of ten (10) days from the receipt of the second statutory demand issued by the Operational Creditor in terms of Section 8 of the Code.

Reply: -

15. In the reply, the Corporate Debtor denies each and every averments and/or submissions made in the present Application which is contrary to and inconsistence with the averments made and facts stated in the present reply.

16. The Corporate Debtor had entered into the Agreement with Infobip, however inspite the said Infobip without any prior written consent has illegally routed the said messaging services through Operational Creditor. As per the terms and condition of the said contract/Agreement, the Corporate Debtor is only liable and accountable to Infobip and not towards the Operational Creditor.

17. The Corporate Debtor from time to time has placed on record the deficiency in services of the services provided. However, in spite thereof, the company failed and neglected to improve its services and lastly illegally terminated its services. Due to the said Deficiency in services, the Corporate Debtor has suffered severe business loss, not only in terms of money but also of goodwill in the market.

18. The Infobip issued a joint Demand Notice dated 30th April 2018 for the alleged amount of Rs. 5,76,303.81/- in which the Operational Creditor's illegal claim was included and further filed a Company Application No. 2872 of 2018 under Section 9 of the Code. The said Application was withdrawn by Infobip. The said Notice issued under Section 8 of the Code jointly by Infobip and Operational

Creditor and as per the Section 8 of the Code the Operational Creditor cannot make a joint application for the dues which was in dispute since the beginning.

19. The dispute between the Infobip and Corporate Debtor in view of the outstanding amount has been settled and the Corporate Debtor is no longer liable or responsible for any outstanding amount regarding the availed messaging service, and as mentioned above, there was no direct contract between the Operational Creditor and the Corporate Debtor.

20. There was an existing dispute from the very beginning and regarding which the Corporate Debtor has been complaining time and again to the Infobip as well as Operational Creditor.

Affidavit in rejoinder

21. The Petitioner has denied that there is no privity of Contract between the Operational Creditor and the Corporate Debtor. It is stated that the Applicant has rendered its services to the Corporate Debtor pursuant to which it has raised invoices from time to time, and the Corporate Debtor has also made payments against some of the invoices. Therefore, the Corporate Debtor is estopped from raising the frivolous allegation of absence of privity of contract.

22. It is denied by the Petitioner that the Corporate Debtor from time to time has raised deficiencies in the services of the Applicant and the company had failed to improve its services and the Corporate Debtor lastly illegally terminated its services.

23. The Petitioner submits that the dispute between the Corporate Debtor and Infobip pertaining to the outstanding amount has been settled and the Corporate Debtor is no longer liable for any dues towards Infobip. However, the fact remains that the present proceeding is separate and independent from that of Infobip, and settlement of dues of Infobip does not automatically discharge the Corporate Debtor from its obligation to make payment of the dues owed to the Operational Creditor. Further, if there is no debt payable to the Operational Creditor post settlement of the dues of Infobip, then why the

Corporate Debtor offered to settle the matter by offering to pay INR 2.5 crores in February, 2020, which was subsequent to the settlement of Infobip dues. It is evident from the above that there is no nexus between the earlier actions of the Corporate Debtor and what has been stated in the reply. In fact, the averments made in the reply contradicts the earlier actions of the Corporate Debtor.

24. It is denied that the Corporate Debtor had raised any issue pertaining to the deficiency of services and it is evident from the fact that the Corporate Debtor has failed to place on record any correspondence that substantiates its averments. It is denied that there is a pre-existing dispute.

25. It is stated that the Corporate Debtor has admitted the existence of the invoices and its related debt amount on several occasions including its emails dated February 19, 2021 and March 17, 2020 and the Corporate Debtor is making a frivolous attempt to wriggle out of its obligation to make payment of the outstanding amount solely on the ground that there was no formal agreement executed between the parties.

Findings: -

26. During the Course of arguments, the Counsel for the Petitioner/Operational Creditor has argued that the Operational Creditor rendered services to the Corporate Debtor and in this regard as many as 29 invoices were raised between 01.04.2017 to 01.08.2017 amounting to Rs. 4,72,41,377/-. The Counsel for the Operational Creditor has further argued that a demand notice dated 27.02.2020 was duly served upon the Corporate Debtor on 02.03.2020. The Counsel for the Operational Creditor has further pointed out that there is no pre-existing disputes between the parties nor any substantive dispute has ever been raised by the Corporate Debtor and therefore, it is a fit case for admission under Section 9 of the Code.

27. On the other hand, the Counsel for the Corporate Debtor has vehemently argued that there is no privity of contract between the Operational Creditor and

the Corporate Debtor. According to the Counsel for the Corporate Debtor, no master service agreement was executed between the parties and in fact, the another entity namely Infobip Private India Limited, a sister concern of the Corporate Debtor had some agreement with the Operational Creditor. Therefore, the Petitioner is not entitled to file any claim against the Corporate Debtor much less the Petition under Section 9 of the Code.

28. The Counsel for the Corporate Debtor has further referred to the service agreement (Annexure-2) which is shown to have been executed with Infobip India Private Limited and not the Corporate Debtor and according to the Counsel for the Corporate Debtor there is no privity of contract between the parties.

29. The Counsel for the Corporate Debtor has further argued that even otherwise the services provided by the Counsel for the Corporate Debtor were deficient in nature and this has been pointed out by the Corporate Debtor from time to time and even in reply to the statutory demand notice, the Corporate Debtor has denied the liability. In the light of these submission, it has been contended on behalf of the Corporate Debtor that the present Petition is liable to be dismissed.

30. We have weighed the contention raised by the Counsel for the Parties and have gone through the records.

31. In this case, practically the Corporate Debtor has denied that the Operational Creditor has been rendering services referred to in the invoices (Annexure-K). The Corporate Debtor has, in fact, raised a self-contradictory defence. On one hand, it is being claimed that there is no privity of contract between the parties and therefore, the Corporate Debtor is not liable for anything. At the same time, it has also been claimed that the services provided by the Operational Creditor were deficient in nature. In our considered view, the contentions raised on behalf of the Corporate Debtor are liable to be rejected. The Corporate Debtor having availed the services cannot be heard harping that there was no contract between the parties. Even if it was so, then the Corporate Debtor should not have accepted or enjoyed the services rendered by the Operational Creditor.

32. As regards, the second contention that the services provided were deficient in nature no substantive evidence has been brought on record nor at any point of time some serious discrepancy or deficiency in services has been pointed out. It is well settled that the pre-existing dispute must be substantial and should be in existence prior to the issuance of the demand notice. Therefore, even the plea raised on behalf of the Corporate Debtor regarding deficiency in services or a pre-existing dispute does not even prima facie stands established.

33. No other points have been raised. As a result of the foregoing discussion, we are of the considered view that the Petition has been able to establish that there is existence of "**debt**" and "**default**" committed by the Corporate Debtor in this case.

34. Accordingly, the above Company Petition is '**admitted**' by passing the following:

ORDER

A. The above Company Petition No. (IB) 1104 of 2020 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Tubelight Communication Limited.**

B. Since the Operational Creditor has not suggested the name of IRP to perform the duties of the Interim Resolution Professional (IRP) in the petition, this Bench hereby appoints **Mr. Pankaj Govindlal Khadloya**, Insolvency Professional, Registration No: IBBI/IPA-001/IP-P-02485/2021-2022/13810, having Email id pkhadloya@gmail.com as the interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

C. The Operational Creditor shall deposit an amount of Rs. (2) Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount only towards expenses and not towards his fee till his fee is decided by COC.

D. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

E. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

F. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

G. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

H. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

I. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

J. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

K. Accordingly, the C.P.(IB) 1104 of 2020 is **admitted.**

L. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-	**Sd/-**
ANURADHA SANJAY BHATIA	**KULDIP KUMAR KAREER**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**