IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH COURT III

C.P. No. 1952/IBC/MB/2019

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
THG Publishing Private Limited
CIN: U22300TN2017PTC115593
Registered office at: Kasturi Building, 859&860, Anna Salai, Chennai-600002 Tamil Nadu

.....**Operational Creditor**

Vs

Deadline Advertising Private Limited
(CIN: U74300MH1996PTC104127)
Registered office at: 304, Amore Commercial Premises Co-operative Society, CTS No. E/788, Junction of 2nd and 4th Road, Khar (W), Mumbai-400052

.....Respondent

Order delivered on: 19.01.2022

Coram:
Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Operational Creditor: Mr. Abhishek Tila a/w Aboli Mandik and Adv. Shivani Sanghavi i/b DMD

For the Respondent: Mr. Nausher Kohli a/w Munaf Virjee and Akash Agarwal i/b ABH Law LLP

Per: Chandra Bhan Singh, Member

ORDER

1. This Company petition is filed by *THG Publishing Private Limited* (hereinafter called "Operational Creditor") seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *Deadline Advertising Private Limited* (hereinafter called "Respondent") by invoking the provisions of Section 9 Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of an Operational Debt of Rs. 9,23,160/- (Rupees Nine Lakhs Twenty-Three Thousand and One Hundred Sixty only).
2. The submissions by the Operational Creditor are as follows:
   2.1. The Applicant is a company incorporated on 21.03.2017, under the provisions of the Companies Act, 2013 and is a wholly owned subsidiary of Kasturi & Sons Limited (KSL), which is the proprietor of THE HINDU newspaper. By way of an order dated 29.08.2017, the National Company Law Tribunal, Chennai, sanctioned the scheme of demerger whereby the publishing business undertaking of KSL relating to the business of printing and publishing of newspapers, journals, magazines and periodicals including all debts, borrowings, obligations and liabilities of KSL which accrue or arise out of the activities or operations of KSL pertaining to the publishing business undertaking on or after the Appointed Date and were transferred to and vested in the Applicant with effect from the appointed date i.e. 01.04.2016.

2.2. The Operational Creditor submits that the Respondent is a company incorporated under the provisions of the Companies Act, 1956 and works as an advertisement agency dealing in both print and electronics media. The Respondent was accredited by the Indian Newspaper Society (INS), an independent body that authenticates circulation figures of India newspapers and periodicals.

2.3. The Operational Creditor further submits that during the course of business, the Respondent issued a Release Order dated 06.04.2016 bearing number PRO/16-17/13 upon KSL, for publishing advertisements on 11.04.2016, in BUSINESS LINE newspaper (all editions) and THE HINDU newspaper (Bangalore and Chennai edition).

2.4. The Operational Creditor submits that KSL, acting upon the Release Order, duly published the advertisements, as per the requirements of the Respondent, as more particularly detailed in the aforesaid Release Order. Thereafter, KSL issued an invoice dated 11.04.2016 bearing number IA041607308 for a total amount to Rs. 8,16,000/- (Rupees Eight Lakhs and Sixteen Thousand only) being the amount payable under the aforementioned Release Order.

2.5. On 08.01.2018, the Operational Creditor received a letter dated 22.12.2017 addressed by the INS informing, *inter alia* that INS Accreditation conferred upon the Respondent, stood cancelled with effect from 22.12.2017 for failure of the Respondent to provide up to date clearances and additional bank guarantee.

2.6. Subsequent thereto, the Operational Creditor received a letter from the INS dated 04.04.2018 enclosing a cheque

for an amount of Rs. 2,09,554/- (Rupees Two Lakhs Nine Thousand Five Hundred and Fifty-Four) being the pro-rate share of the Applicant on account of the proceeds upon invocation of bank guarantee provided by the Respondent to INS.

2.7. The Operational Creditor, thereafter, on 16.05.2018, served a notice upon the Respondent towards the balance amount of Rs. 6,06,446/- being due and payable, with respect to the aforementioned Release Order. The notice dated 16.05.2018 was delivered to the Respondent on 23.05.2018. The Operational Creditor did not receive any reply to the said notice dated 16.05.2018 nor any payment from the Respondent.

2.8. The Operational Creditor further submits that he is left with no alternative and served a demand notice dated 19.09.2018 under Section 8 of the Insolvency and Bankruptcy Code, 2016 to the Respondent, at its registered office, for payment of the outstanding amount of Rs. 6,06,446/- along with interest in the sum of Rs. 2,36,514/- calculated from 01.07.2016 till 31.08.2018, at the rate of 18% per annum, within 10 days from the receipt of the demand notice. The demand notice was delivered to the Respondent on 26.09.2018. No reply has been received by the Operational Creditor to the demand notice dated 19.09.2018 and the Respondent has not paid the unpaid operational debt, till date.

2.9. The Operational Creditor further submits that the present Petition is not barred by the law of limitation. Under the terms of the contract with the Respondent, a credit period of 60 days was permitted for making payment towards invoices issued by the Operational

Creditor, which period expired on 10.06.2016, and accordingly, the Operational Creditor is entitled to pursue the present claim. Furthermore, in any event by virtue of part-payment in the sum of Rs. 2,09,554/- made by the INS on 04.04.2018, on behalf of the Respondent, that payment constitutes an acknowledgement of liability on 04.04.2018 more so since no objection was raised to INS discharging the debt of the Respondent in such sum accordingly.

3. **The submissions of the Respondent are as follows**:

3.1. The Respondent and the Operational Creditor have shared a business relationship since 1989. The nature of the business between the parties was that of a Principal and Agent viz. where the Operational Creditor acted as the principal who in turn appointed the Respondent as its Agent on a commission basis in order to increase the Operational Creditor's business revenue by attracting and engaging customers who were desirous of publishing their advertisements with the Operational Creditor. Therefore, the Operational Creditor and the Respondent have been acting as Principal and Agent respectively for approximately 30 years, contrary to what has been projected in the present petition.

3.2. The Respondent further submits that in 1995, the Respondent was accredited with the Indian Newspaper Society (INS) due to the immense recognition and reputation of the Respondent. INS acts as the central organization of the press of India, an independent body authenticating circulation figures of newspapers and periodicals in India. It is an organization which plays a major role in protecting and promoting the freedom of

press of India. The society was founded in 1939. Its headquarters are at Rafi Marg, New Delhi. INS membership comprises the owners, proprietors and publishers of print media who discusses and suggest various measures to the government regarding the problems related to the newspaper industry. Indian newspaper industry today faces problems ranging from rising cost and paucity of newsprint to shrinking revenue from advertisement due to boom in electronic media. The executive committee of INS represents the current 990 members from newspapers, journals, periodicals and magazines.

3.3. The Respondent further submits that until the present dispute, the Respondent and the Operational Creditor were never engaged into any dispute as to repayment of any dues and the Principal and Agent relationship continued uninterrupted. The timely payment of the dues by the Respondent are duly stated and reflected in the payment schedule of the Respondent.

3.4. The Respondent further submits that on or about 2016, a client by the name of Avanse Financial Services Limited (Avanse) approached the Respondent via an intermediate agency namely Meltwater Experia private Limited (Meltwater), intending to publish its advertisement with the Operational Creditor's newspaper. Thereby, Avanse became a client of the Operational Creditor through the Respondent i.e. the Operational Creditor's Agent. Due to efforts of the Respondent, various advertisements by Avanse were duly published on the Operational Creditor's newspaper. However, to the complete shock and surprise of the Respondent, upon the due date for payment, Avanse

failed to remit the dues to the Respondent. Thereby, the Respondent was unable to remit the dues to the Operational Creditor. At this stage, it was the Operational Creditor's legal obligation to initiate appropriate legal proceedings against Avanse to recover its monies. However, the Operational Creditor chose not to do so moreover, the Operational Creditor continued generating business from Avanse through another agent and eliminated the Respondent by filing the present petition against the Respondent.

3.5. The Respondent further submits that the Operational Creditor has proceeded with and continued to engage the services of the Respondent and has placed order worth over 7,00,000/- with the Respondent even after amounts remaining unpaid by Meltwater of Avanse. Therefore, this very fact establishes that the Operational Creditor has no grievances as to non-payment against the Respondent.

3.6. The Respondent further submits that the Operational Creditor and the Respondent's business, there is no question of any "debt" being due and payable to the Operational Creditor by the Respondent. The invoices referred to by the Operational Creditor are not sole instances of when the parties have undertaken business with one another as reflected hereinabove. As Per the prevalent market practice and as per the terms of the provisions of the Agreement between the Operational Creditor and the Respondent, the Operational Creditor was well aware that it would be paid its dues upon the Respondent receiving monies from end user client such as Avanse or the intermediate agency Meltwater. This

Practice has been carrying on for three decades between the parties.

3.7. The Respondent submits that the Operational Creditor cannot be permitted to take advantage of the strenuous situation that the Respondent has been placed in due to the defaults committed by Meltwater. The Operational Creditor was and is well aware of the reasons that have rendered it impossible for the Respondent to pay any monies to the Operational Creditor. The default committed by Melwater are beyond the control of the Respondent.

3.8. The Respondent submits that in the month of February 2016, Mr. Prashant Jagdish Rathee, Ms. Bhavana Sansanwal Rathee, Mr. Krishna Suvarna and Shashikant Joshi, approached and represented that:

a. They (i.e. Mr. Prashant Jagdish Rathee, Ms. Bhavana Sansanwal Rathee, Mr. Krishna Suvarna and Shashikant Joshi) were the directors of a creative advertisement agency, engaged in the business of creative advertisements on behalf of their clients/customers on television, radio and newspapers, carrying on their aforesaid business in the name of Meltwater. They were looking after the day to day business, operations and affairs of the Meltwater.

b. They introduced Mr. Krishna Suvarna as the sole proprietor of Kris Dedia Works, who was also in the business of collecting the advertisements for various media from various manufactures, traders, sellers and service providers and thereafter get the same released in prominent newspapers, through other advertising agencies.

c. They represented that they had large clientele, who were desirous of releasing advertisements of their products and services in prominent newspapers on payment of handsome amount of advertising charges.

d. If the said company accepted the advertisements offered by them and got the same released in prominent newspapers, the Accused would diligently pay the advertisement charges thereof after the agreed period of credit either RTGS or cheques, without committing any default.

e. The said company would earn profit every month, on account of the advertisement offered by them which were to be released by the said company in prominent newspapers. That the cheques drawn by the accused from the bank account of Melwater would be duly honoured and they would not stop the payment thereof under any circumstances.

3.9. The Respondent relying on the aforesaid representations to be true, was induced to enter into the business transactions with them from the end of February 2016 for releasing the advertisements of the customers/clients of Meltwater and the said Krishna Suvarna in various newspapers till June 2016.

3.10. Accordingly, between February 2016 to June 2016 at the instance and on behalf of the above persons, the said Company was caused to released several advertisements on behalf of their clients like (i) M/s Furniturewala (ii) M/s Avanse Financial Services Pvt. Ltd. (iii) Aadhar Housing Finance Services Pvt. Ltd. (iv) JSW Energy Limited (v) JSW Steel Limited, (vi) IDP Education Indian Pvt. Ltd. (vii)

Midscape One Marketing Pvt. Ltd. (viii) Arena Jewellers (ix) Clapsnslap.com and (x) Benzer (hereinafter referred the "the said clients") in the prominent newspapers like (a) Times of India (b) Daily Thanti (C) Deccan Chronicle (d) Hindustan Times and (e) the Hindu (hereinafter referred as "the newspaper publishers") throughout India.

3.11. The Respondent submits that the release of aforesaid advertisements in the above referred newspapers, the said company raised approximately 61 bills on Meltwater for an aggregate amount of Rs. 2,20,34,588/-. The said bills are duly received by the Accused and they have never raised any dispute about the genuineness, accuracy or correctness thereof. As per the said bills, Melwater was liable to pay to the Respondent and the Respondent was entitled to recover from the said Meltwater a sum of Rs. 2,20,34,588/-

Pre-Existing disputes between the Respondent and the Petitioner:

3.12. The Respondent submits in his written submission that there have been disputes with respect to the petitioner's client Avanse much prior to the Demand Notice dated 19.09.2018 issued by the Petitioner upon the Respondent.

3.13. Between February 2016 to June 2016 at the instance and on behalf of Meltwater and its directors/representatives, several advertisements on behalf of Meltwater's client like (i) M/s Avanse Financial Services Pvt. Ltd., (ii) M/s Furniturewala (iii) Aadhar Housing Finance Services Pvt. Ltd. (iv) JSW Energy Limited (v) JSW Steel Limited, (vi) IDP Education Indian Pvt. Ltd. (vii) Midscape One Marketing Pvt. Ltd. (viii) Arena Jewellers (ix) Clapsnslaps.com and (x)

Benzer (Meltwater Clients) in the prominent newspaper lime (a) Times of India (b) Daily Thanti (c) Deccan Chronicle (d) Hindustan Times and (e) The Hindu (petitioner) (newspaper publishers) throughout India.

3.14. Towards the release of aforesaid advertisements of Meltwater Clients, the said newspapers publishers have duly raised their respective bills/invoices. Illustratively, the petitioner raised the invoice on its client Avanse. The said bill/invoices clearly refer the names of the clients, on whose behalf the said advertisements were caused to be published in respective newspapers. After the release of aforesaid advertisement in the above referred newspapers, the Respondent raised approximately 61 bills on Meltwater for an aggregate amount of Rs. 2,20,34,588/-. Hence representatives of Meltwater issued cheques in favour of the Respondent towards discharge of its liability. However, the cheques were dishonoured and the Respondent lodged criminal complaint against the representatives of Meltwater and a company petition under IBC against Meltwater.

3.15. The Respondent further submits that if any adverse orders are passed against the Respondent, then it will jeopardize the running of the Respondent as a going concerned and also position of the Respondent to claim its money to the tune of Rs. 2.20 crores which is due and payable by Meltwater to the Respondent.

3.16. For the reason set out, the respondent submits that the present petition under section 9 of the Code should be dismissed against respondent in interest of justice.

FINDINGS

1. This Company petition is filed by *THG Publishing Private Limited* (hereinafter called "Operational Creditor") against *Deadline Advertising Private Limited* (hereinafter called "Respondent") under Section 9 Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of an Operational Debt of Rs. 9,23,160/- (Rupees Nine Lakhs Twenty-Three Thousand and One Hundred Sixty only).
2. The Bench notes that during the course of the business, the Respondent issued a release order dated 06.04.2016 upon the Operational Creditor for publishing advertisement on 11.04.2016 in BUSINESS LINE, Newspaper (all edition) and The Hindu newspaper (Bangalore and Chennai edition) which was duly done by the Operational Creditor. It is also the contention of the Operational Creditor that thereafter invoice dated 11.04.2016 for a total amount of Rs. 8,16,000/-was raised out of which partly it was paid by the INS (Indian Newspaper Society).
3. The Bench notes that the nature of business between the parties i.e. Operational Creditor and Respondent is that of a Principal and Agent viz. where the Operational Creditor acted as the Principal who in turn appointed the Respondent as an agent on a commission basis in order to increase the Operational Creditor's business revenue by attracting and engaging customers who are desirous of publishing their advertisement with the Operational Creditor.
4. As mentioned by the Respondent, the Bench notes that the Respondent was provided with the credit period of 60 days

from the end of the month which could go up to 90 days. The reason for such credit period was to enable the Respondent to collect monies from the end use client actual Respondent and pay monies to the Operational Creditor after deducting its commission. This arrangement is very clear to the Bench from invoice raised by the Operational Creditor purportedly upon the Respondent. Here, the Bench notes that the invoices in question has not been raised against the Respondent but raised against the client M/s Avanse Financial Services Private Limited. It is clear that the client is not the Respondent but M/s Avanse Financial Services Pvt. Ltd. who is a client of the Operational Creditor through the Respondent who is merely an agent of the Operational Creditor. A snapshot of the invoice where the name of the client of the Operational Creditor M/s Avanse Financial Services Pvt. Ltd. and not the Respondent M/s Deadline Advertising Pvt. Ltd. placed below for reference:

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Kasturi & Sons Limited
859-860, Anna Salai,
Chennai - 600 002.
CIN : U22110TN1940PLC001091
Customer GST:

ADVERTISEMENT INVOICE
SAC CODE : 998363
MUMBAOB-0416001558

THE HINDU
GROUP OF PUBLICATIONS
Phone : 044 - 28576300
Fax : 044-28591203
E-mail : advtaccts@thehindu.
A001 : FULL ACCREDITATED

A/c Code : 510147200 Invoice.No : IA041607308 Date : 11/04/2016 Currency : INR Inv.Pg.no : 2

DEADLINE ADVERTISING PVT LTD
304,AMORE
JUNCTION OF 2ND & 4TH ROAD
KHAR(WEST)
GREATER MUMBAI-400052

R.O.No.& Date : PRO-16-17-13 & 06/04/2016
Client : AVANSE FINANCIAL SRVICES PVT LTD
Package :

PUBLICATION CODE	PARTICULARS	INS.DATE	UOM	SIZE	SPACE	RATE	PREMIUM	AMOUNT

GROSS AMOUNT	OTHER CHARGES	TRADE DISCOUNT	ADDL TRADE DISCOUNT	BOX & POSTAGE			NET PAYABLE (R/O)
960000.00		144000.00	0.00	0.00			816000.00

Amount(In Words) :
RUPEES EIGHT LAKH SIXTEEN THOUSAND ONLY

SGST @ 2.5
CGST @ 2.5
IGST @ 5 %
Total 816000.00

PAN.No. :AAACK3000H
Prov.GST ID. :29AAACK3000H1Z0

(PLEASE SEE REVERSE FOR RTGS TRANSFER DETAILS,INSTRUCTIONS,PUBLICATION CODES AND ADDRESSES OF OUR BRANCH OFFICES)

Encl. : Tear Sheets
E. & O. E.

Associate. Vice President
Advertisement Commercial.

NOTARY GOVT. OF MAHARASHTRA

5. The Respondent in its reply mentioned that the client M/s Avanse Financial Services Pvt. Ltd. approached the Respondent via. an intermediate agency namely Meltwater Experia Pvt. Ltd. (Meltwater) for publishing its advertisement with the Operational Creditor's newspaper. The Respondent/Respondent further submits that after when the advertisement was published in Operational Creditor's newspaper, M/s Avanse Financial Services Pvt. Ltd., the client

failed to remit the dues to the Respondent/Respondent. Thereby the Respondent was unable to remit the dues to the Operational Creditor. Therefore, the Bench is of the view that the Operational Creditor had recourse to legal remedies and could have initiated appropriated legal proceedings against M/s Avanse Financial Service Pvt. Ltd. to recover to its monies as Avanse is Operational Creditor's client duly reflected in Operational Creditor's invoices raised upon the Respondent.

6. The Bench also notes that the Respondent was engaged by the Operational Creditor as an agent because it was accredited with the Indian Newspaper Society (INS). An agreement between the INS and the Respondent at para 2(q) clearly mentions that the Respondent shall be entitled to 15% commission pertaining to advertisement business. The relevant extract of which is as under:

   "…(q) As and from the date of accreditation, the Advertising Agency shall be entitled to receive from the members of the Society the maximum & minimum commission of 15% in respect of advertising business placed by it with such members. In the case of Provisional Accreditation the Advertising Agency shall be entitled to receive maximum and minimum commission of 10% only…"

7. It is again clear from the above to the Bench that the arrangement was between the parties of principal-agent and not of Operational Creditor and Respondent. It is also clear to the Bench that the party which has defaulted in making payment is M/s Avanse Financial Services Pvt. Ltd., the client of the Operational Creditor and not the agent of the Operational Creditor i.e. the Respondent in this petition.

8. Now an issue arise that if it is a principal-agent relationship, is the Respondent not liable to pay any dues arising from

default. In this regard, the Bench would like to refer to the Indian Contract Act, 1872 which clearly defines the Principal-Agent relationship under Section 182 and the same is as follows:

> *"182. "Agent" and "principal" defined. – An "agent" is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal" "*

9. It is also clear to the Bench that the Operational Creditor bring the Principal is always under obligation to recover money from the client and not from his agent unless the agent has failed to perform his duties. The Respondent in his defence has referred to the judgement of Hon'ble Bombay High Court in the matter of *Seth Maneklal Mansukhbhai Vs Jwaladutt Rameshwar Pillani (ILR 1947 BOM 378).*

10. The Bench note that the Petitioner has not mentioned that the Respondent while performing his duties has not acted in good faith. Therefore, the Bench is of the clear view the agent could not be held liable for default on the part of the client of the Operational Creditor.

11. Therefore, the amount claimed in the petition Rs. 9,23,160/- does not qualify as an Operational Debt under Section 5(8) of the Code and is not default under Section 3(12) of the Code.

12. In view of the above, the Bench dismisses the above company petition bearing no. 1952 of 2019.

Sd/-	Sd/-
CHANDRA BHAN SINGH	**H.V. SUBBA RAO**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**