

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI  
BENCH-III**

**C.P.No.IB-582/(ND)/2017**

**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:**

**STAR MOBITEL LIMITED**

Registered office at:  
G-26, 2<sup>nd</sup> Floor, South Ex – I,  
New Delhi – 110049.


...Applicant

**VERSUS**

**MICROMAX INFORMATICS LIMITED**

Registered office at:  
Block – A, Plot No. 21/14,  
Narayana, Industrial Area,  
Phase – II, New Delhi – 110028.

...Respondent



**Coram:**

**R.VARADHARAJAN,  
HON'BLE MEMBER (JUDICIAL)**

**DR. V.K. SUBBURAJ  
HON'BLE MEMBER (TECHNICAL)**

Counsel for the Applicants: Mr. Sunil Fernandes, Mr. Vishes, Mr. Mohit  
Advocates

Counsel for the Respondent: Mr. Mudit Sharma, Mr. Parveez, Mr.  
Gaurav, Advocates

## ORDER

Date: .08.2018

1. The above application has been filed under the provisions of Section 9 of Insolvency and Bankruptcy Code, 2016 ("the Code") by Star Mobitel Limited against Micromax Informatics Limited ("Respondent"). The transaction leading to filing of the present application as reflected in the application is stated to be as under:

a. Initially the Respondent approached the Applicant for opening of the flagship store of Micromax on premises of the Applicant admeasuring 500 sq. ft. However, after finalization of the said premises, Mr. Sharma, representative of the Respondent met the Mr. Chetan Nanda, representative of the Applicant and stated his willingness to open flagship store of Micromax on bigger premises for which the second floor admeasuring 1550 sq. ft. situated at G-26, South Ex – I, New Delhi – 110049 was offered by the Applicant and the same was accepted by the Respondent. On the basis of such commitments of the Respondent, the Applicant got the said property vacated by earlier occupants i.e.



Sony on 31.05.2014 and subsequently offered the premises to the Respondent on 01.06.2014.

- b. After the said premises were vacated by Sony the Applicant vide email dated 20.06.2014 requested the Respondent to share drawings of the flagship store of Micromax as civil work was to be completed on the basis of the said drawings.
- c. After continuous reminders by the Applicant, the parties executed an Agreement dated 01.10.2014 ("the Agreement") whereby the Respondent decided to operate the Flagship Store for a term of three years commencing from 01.10.2014 to 30.09.2017, which was also the lock-in period and further agreed to pay a sum of Rs. 11,00,000/- each month as monthly support and monthly back end support after achievement of various targets.
- d. After execution of the Agreement and even after continuous follow ups by the Applicant qua finalization of drawings of the Flagship Store, the finalization was done only on 06.01.2015. The civil construction was completed in March 2015 and the store was

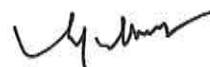
ready in April 2015. The Respondent started the operation of the store on 22.05.2015.

- e. As per the terms of the Agreement the Applicant sent repeated reminders to the Respondent demanding monthly support for eight months amounting to Rs. 88,00,000/- for the period commencing from 01.10.2014 to 31.05.2015, out of which monthly support for May, 2015 only was paid and the monthly support for the seven months commencing from 01.10.2014 to 30.04.2015 was illegally denied by the Respondent vide email dated 21.07.2015 stating that there was no internal mechanism to pay monthly support before the activation of the said Flagship Store. The Respondent was under an obligation to pay the monthly support for the said 7 months irrespective from the date of operation of the Flagship Store and the same was reiterated to the Respondent time and again.
- f. The Respondent paid monthly support and back end support for a period of 21 months commencing from 01.05.2015 to 31.01.2017, amounting to Rs. 2,53,72,434 (Rs. Two Crores Fifty-Three Lakhs Seventy-Two Thousand Four Hundred and Thirty-Four Only) to



the Applicant vide issuance of credit note by BMS Distributors. The Applicant purchased various products of Micromax as per the terms of the Agreement from the Distributor, subsequent to which value of the invoice was adjusted from the credit note issued to the Applicant by the Distributor from time to time except in the month of September 2015 wherein a cheque of Rs. 10,00,000/- was issued by the Respondent in favour of the Applicant after confirmation from the Respondent and the same was credited in the account of the Applicant on 14.09.2015.

g. The Respondent addressed emails dated 21.01.2017, 08.02.2017 and 10.03.2017 to the Applicant wherein the Respondent unilaterally and arbitrarily decided not to pay monthly support with effect from 31.01.2017. The Respondent stopped paying the monthly support from the month of February 2017 to the Applicant and the said issue was time and again raised by the Applicant vide its email dated 24.01.2017, 27.02.2017, 10.03.2017, 20.05.2017, 24.05.2017, 21.06.2017, 27.06.2017 and 26.07.2017. However, the said concerns of the Applicant were never addressed. The Respondent continuously paid backend support to the Applicant without any payment of the monthly



support. The Respondent failed to pay Monthly Support of 15 months commencing from October 2014 to April 2015 and February 2017 to September 2017, amounting to Rs.1,65,00,000/- (Rupees One Crore Sixty-Five Lakhs Only).

h. The Applicant being bound by the lock in period, adhered to the terms of the Agreement. Since the Respondent miserably failed to adhere to the terms and conditions of the Agreement and as the term of the Agreement was ending on 30.09.2017, the Applicant vide its email date 27.09.2017 intimated the Respondent that the Flagship Store stands closed w.e.f. 01.10.2017.

i. The Agreement was determined by efflux of time and as per the terms of the Agreement, the Respondent had not paid an amount of Rs.1,65,00,000/- being unpaid Monthly Support for 15 months commencing from October 2014 to April 2015 and February 2017 to September 2017 to the Applicant.

j. That the Applicant after no satisfactory response from the Respondent and left with no option, sent Form 3 dated 28.09.2017 vide speed post under Rule 5 of the AAA Rules to the Respondent



demanding payment of Rs.1,65,00,000/- Applicant by the Respondent.

k. The Respondent on receipt of Form 3 on 28.09.2017 sent its reply dated 10.10.2017 through its legal counsel. The Respondent further sent another reminder to the Applicant on 24.10.2017 stating that the Respondent will have the right to initiate arbitration proceedings against the Applicant after expiry of 30 days.

2. The Respondent made the following averments in reply dated 10.10.2017 to the Form 3 demand notice sent by the Applicant:

- a. The demand of Rs.77,00,000/- as monthly support was in bad faith and contrary to agreed terms.
- b. The demand of Rs.88,00,000/- for monthly support from February 2017 to September 2017 is a wrongful claim as the Applicant itself had breached the Agreement by engaging in sales of competing brands.
- c. The Applicant had diverted its business operations and has dedicated its efforts to institutional sales and wholesale operations

and not retail operations contrary to the terms agreed to under the Agreement.

- d. The Applicant had started retail operations of competing brands.
- e. There is a pre-existing dispute between the parties which the parties were trying to resolve through discussions.
- f. The Respondent invoked arbitration under clause 19 of the Agreement.

3. The Respondent has taken the following stand in its reply to the application under Section 9 of the Code:

- a. The Respondent denies the existence of relationship of a corporate debtor and an operational creditor between the parties. The alleged amounts are not amounts being claimed towards sale of goods, rendering of contractual services, employment or government dues. Therefore, the claim cannot be classified as operational debt. The services that the Applicant was obligated to provide under the Agreement were never performed by the Applicant and the Respondent terminated the Agreement for breach of contract. Therefore, no legitimate due can accrue in favor of the Applicant for reason of providing services.

- b. With respect to the first claim of Rs.77,00,000/- being amount due for period between October 2014 to April 2015 the Respondent states that it had refused the unlawful request of the Applicant since there was no Agreement between the parties to pay rental amount, no fixed consideration was payable for promotion support and the request was beyond the scope of the agreed terms. The Respondent communicated to the Applicant vide email dated 21.07.2015 that any support payment i.e. fixed monthly reimbursement for the Applicant exclusively working for the sale of Respondent's products, shall only commence when the Applicant starts to exclusively sell Respondent's products.
- c. With respect to the second claim of Rs.88,00,000/- being amount due for period between February 2017 to September 2017 the Respondent claims that this amount is falsely claimed as it relates to the period after the Respondent had terminated the Agreement on 21.01.2017.
- d. Further, the Respondent claims that the Applicant is liable to pay Rs.2,53,72,434/- to the Respondent. This claim arose after the



Respondent found that the Applicant had breached the Agreement and misrepresented the facts to claim an amount in excess of Rs.2.31 crores from the Respondent. The Applicant has committed the following breach of the Agreement, according to the Respondent:

- i. Engaged in direct competition with Respondent by carrying out retail operations of competing brands like HTC, Samsung etc.
  - ii. Did not provide branding and promotion support as per the Agreement and stopped taking requisite effort to extend the sale of the Respondent's products.
  - iii. Diverted the business operations to wholesale operations and sold Respondent's products in wholesale market, thereby disturbing the entire market operating price of Respondent's products.
- e. The Respondent also sent email dated 21.01.2017 to the Applicant informing that due to the intentional and severe violations of the Agreement committed by the Applicant, the Applicant shall not be eligible for any support payment and provided the steps for processing of refund of money and terminated the Agreement by



invoking clause 7(c). The Respondent also requested the Applicant to amicable resolve the dispute.

- f. The Respondent also relied on the balance sheets of the Applicant for F.Y. 2014-15 and 2015-16 as per which there are no dues as alleged against the Respondent. The Respondent further states that the Applicant suppressed the balance sheet for FY 2016-2017 because it does not reflect the Applicant's claim of Rs.22,00,000/- from the Respondent towards the rental support for the month of February 2017 to March 2017.
- g. The Respondent contends that an inference can be drawn that the claim of the Applicant is false from the absence of any document to show the payment of service tax at the rate of 14% on the alleged Monthly Support for the period 01.10.2014 to 30.04.2015 or any reflection of such service tax from the balance sheets for the FY 2013-14 and 2014-15.
- h. The Respondent claims that it has already invoked arbitration vide letter dated 10.10.2017. In the absence of any response to the invocation from the Applicant, the Respondent has filed a petition



under Section 11 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi, which is presently pending.

- i. The Respondent contends that the Applicant has not filed a proper certificate under Section 9(3)(c) of the Code.
  - j. The Respondent has also taken the stand that the Respondent Company is solvent with a pan India presence with a turnover of more than Rs. 98,895 million and profit of Rs. 2,005.71 million.
4. The Applicant has given the following response to the reply filed by the Respondent:
- a. As per the terms of the Agreement, the Respondent was operating its flagship store of the said premises in order to promote its brand and in lieu of the same the Applicant was paid Monthly and Back End Support by the Respondent. Thus, it would be incorrect to state that the Respondent has not availed any services of the Applicant.



- b. The alleged termination of the Agreement by the Respondent was contrary to clause 7(c) of the Agreement. Further, the Respondent never demanded the amount of Rs.2.31 crores before receiving the Form 3 demand notice from the Applicant.
5. The Respondent has filed a supplementary affidavit placing on record orders of the Hon'ble High Court of Delhi and the sole arbitrator which show that the Hon'ble High Court of Delhi appointed the sole arbitrator for conducting the arbitration proceedings between the parties and such proceedings between the parties are ongoing. The Respondent seeks to substantiate its argument that there is existence of dispute between the parties by relying on the above orders.
6. On 05.04.2018 the Respondent filed an application under Section 65 of the Code for imposition of penalty on the Applicant for initiating fraudulent and malicious proceedings. The Respondent has reiterated the grounds taken by it in its reply to the main application and in its supplementary affidavit and further claims that the Applicant has maliciously initiated the process of insolvency as a strategic tool before this Tribunal to harass and coerce the Respondent to drop its lawful claim despite the knowledge that there exist no operational debt and



there are disputes in existence between the Applicant and the Respondent.

7. The main application as well as the application under Section 65 came up for arguments together. We have perused the applications and the subsequent responses and heard the parties. The issues required to be addressed to adjudicate on the application are as follows:

- a. Whether there is a pre-existing dispute between the parties in relation to the claim made by the Applicant?
- b. Whether there exists the relationship of an operational creditor and corporate debtor between the Applicant and the Respondent?
- c. Whether there is any operational debt due from the corporate debtor to the operational creditor?
- d. Whether the Applicant has complied with the requirement under Section 9(3)(c) of the Code?
- e. Whether the Applicant has maliciously initiated the present proceedings against the Respondent requiring imposition of penalty on the Applicant?

Issue I



8. The Respondent has emphasized that the ongoing arbitration proceedings between the parties show that there is a pre-existing dispute between the parties. However, the arbitration clause was invoked by the Respondent only in response to the Form 3 demand notice sent by the Applicant and not prior to that. Thus, the pendency of the arbitration proceedings itself does not show that there is a pre-existing dispute as the proceedings were initiated after the receipt of the Form 3 demand notice.
9. On perusal of the application it is seen that the Applicant had demanded the amount of Rs. 77,00,000/- from the Respondent as monthly support for the months of October 2014 to April 2015 vide email dated 11.07.2015 and 14.07.2015. The Respondent vide email dated 11.07.2015 denied the claim and in email dated 21.07.2015 stated that there was no internal mechanism for payment of rental support for the period before the initiation of the store.
10. On 21.01.2017 the Respondent vide email terminated the Agreement with effect from 31.01.2017 by citing declining business output and poor footfall as reasons which were making the arrangement unviable for the Respondent. In response to the termination the Applicant wrote email dated 24.01.2017 to the Respondent claiming that the Respondent failed



to make any major launches through the Applicant's store, as promised and the sales decreased since there were no significant phones launched by the Respondent. The Applicant claims that despite the lack of initiative from Micromax the Applicant has at times managed to over achieve its targets by almost 200%. The Applicant also reminded the Respondent of its pending dues in relation to the monthly support for months of October 2014 to April 2015. Further, the Applicant requested the Respondent continue with the arrangement till October 2017.

11. Again on 10.03.2017 the Applicant wrote to the Respondent rejecting the termination, claiming that the termination is unilateral and arbitrary and no reason has been stated by the Respondent for terminating the Agreement. The Applicant further claimed that an amount of Rs.77,00,000/- as rent from October 2014 to April 2015 was due from the Respondent. The Respondent replied to the Applicant's email on the same day stating that the termination was as specified in the Agreement and due to valid reasons. The Respondent also denied the claim of Rs.77,00,000/- and referred to the email dated 21.07.2015 for the same.


12. The exchanges referred to above show that there has been a dispute between the parties with regard to the payment of Rs.77,00,000/- as

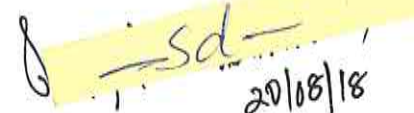


monthly support to the Applicant by the Respondent. This dispute existed between the parties since 2015 is sufficient to reject the prayer for initiating Insolvency Resolution against the Corporate Debtor.

13. In light of the conclusion reached above, there is no requirement to address the other issues framed. Further, although we have given the finding that there is a pre-existing dispute between the parties, there is no reason apparent on record to believe that the proceedings were initiated fraudulently or maliciously. Thus, no penalty is imposed on the Applicant.

14. Thus, the application stands rejected. No order as to costs.

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

  
**(R. VARADHARAJAN)**  
**MEMBER (JUDICIAL)**

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