



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III**

Item No.402
IB – 1686/ND/2019

IN THE MATTER OF:

M/s. BEYOND TELE PVT. LTD.

..... Applicant/ Operational Creditor

VERSUS

M/s. MICROMAX INFORMATICS LIMITED & ORS.

..... Respondents/Corporate Debtors

SECTION

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

Order Pronounced On: 09.05.2023

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open court vide separate sheets. IB-1686/ND/2019 is **dismissed**.

-SD-

**(DR. BINOD KUMAR SINHA)
MEMBER (TECHNICAL)**

-SD-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI COURT-III
IB – 1686/ND/2019**

Order under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/s BEYOND TELE PVT. LTD.

Having Its Registered Office at:

**B-14, SHUBHAM ENCLAVE,
PASCHIM VIHAR, NEW DELHI-110087**

CIN: U32204DL2005PTC140866

Through Its Director

SH. KRISHAN GOPAL GOYAL

..... Applicant/Operational Creditor

VERSUS

M/s MICROMAX INFORMATICS LIMITED & ORS.

1. M/s MICROMAX INFORMATICS LIMITED

Having Its Registered Office at:

**PLOT NO. 21/14, PHASE-II,
NARAINA INDUSTRIAL AREA,
BLOCK-A, DELHI -110028**

CIN: U00000DL2000PLC104823

Through Its Director/ Company Secretary

2. SHRI RAJESH AGGARWAL

Director

3. SHRI RAHUL SHARMA

Director

4. SHRI VIKAS JAIN

Director

M/s Beyond Tele Pvt. Ltd. vs. M/s Micromax Informatics Limited & Ors.

IB – 1686/ND/2019

Date of Order : 09.05.2023



5. SHRI SUMIT KUMAR

Director

..... Respondents/Corporate Debtors

Order Pronounced On: 09.05.2023

CORAM:

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER
(JUDICIAL)**

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

APPEARANCES

For the Applicant : Mr. Praveen Suri, Advocate

For the Respondent : Mr. Mudit Sharma and Mr. Parvez Alam
Khan, Advocate

ORDER

PER: DR. BINOD KUMAR SINHA, MEMBER (TECHNICAL)

Description of the Parties:

1. This Application has been filed by M/s BEYOND TELE PVT. LTD., the Applicant/Operational Creditor on 12.06.2019, before this Adjudicating Authority, under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate Insolvency Resolution Process ("CIRP"), declaring moratorium and for appointment of Interim Resolution Professional ("IRP"), against M/s MICROMAX INFORMATICS LIMITED & ORS., the Respondents/Corporate Debtors on the ground that the Respondents/Corporate Debtors have defaulted to make payment of a sum of Rs. 16,53,992/- (Rupees Sixteen Lakhs Fifty Three Thousand Nine Hundred Ninety Two Only) as on 01.05.2018 and further interests at the rate of 18% per annum

M/s Beyond Tele Pvt. Ltd. vs. M/s Micromax Informatics Limited & Ors.

IB - 1686/ND/2019

Date of Order : 09.05.2023



from 01.05.2018. The Application has been filed through its Director SH. KRISHAN GOPAL GOYAL, DIN: 06768686 duly authorized vide Board Resolution dated 31.03.2019 which is filed along with the Application.

2. The Applicant Company namely M/s BEYOND TELE PVT. LTD. was incorporated on 16.09.2005, as a Company Limited by Shares (Non- govt. Company) having CIN: U32204DL2005PTC140866, under the Companies Act, 1956. The Authorised Share Capital of the Applicant Company is Rs.2,50,00,000/- (Rupees Two Crores Fifty Lakhs only) and the Paid-up Share Capital of the Applicant Company is Rs.2,50,00,000/- (Rupees Two Crores Fifty Lakhs only). On the date of application, the Applicant Company is involved in the Manufacturing of television and radio transmitters and apparatus for line telephony and line telegraphy. The Registered Office Address of the Applicant Company is B-14, Shubham Enclave, Paschim Vihar, New Delhi-110087.
3. The Respondent Company namely M/s MICROMAX INFORMATICS LIMITED was incorporated on 29.03.2000, as a Company Limited by Shares (Non- govt. Company) having CIN: U00000DL2000PLC104823, under the Companies Act, 1956. The Authorised Share Capital of the Respondent Company is Rs.250,00,00,000/- (Rupees Two Hundred Fifty Crores only) and the Paid-up Share Capital of the Respondent Company is Rs.155,42,01,340/- (Rupees One Hundred Fifty Five Crores Forty Two Lakhs One Thousand Three Hundred Forty only). On the date of application, the Respondent Company is engaged in the business of sales, marketing and distribution of GSM and CDMA mobile handsets, data cards, smartphones, LED TVs, Air-Conditioners, etc. under the brand name and style of "MIRCROMAX" (Products). The Registered Office Address of the Respondent Company is Block-A, Plot No. 21/14, Naraina Industrial Area, Phase-II, Delhi-110028. Therefore, this Bench has

M/s Beyond Tele Pvt. Ltd. vs. M/s Micromax Informatics Limited & Ors.
IB - 1686/ND/2019
Date of Order : 09.05.2023



jurisdiction to deal with this application. A copy of the Company Details/Master Data of the Respondent Company is filed along with the Application.

4. **Submissions of the Applicant:**

- i. The Corporate Debtor through their Directors i.e. Respondent No. 2 to 5 approached the Operational Creditor through its Director, Shri Krishan Gopal Goyal and offered to get appointed as an authorized distributor (having non-exclusive right to market and distribute) of Corporate Debtor and Operational Creditor believing representations of Corporate Debtors to be true entered into an agreement of Distributorship dated 12.2.2016.
- ii. The Operational Creditor was appointed as a Distributor (having non-exclusive right to market and distribute) by Corporate Debtors and entered into Micromax Product Distributor Agreement dated 12.02.2016 (Agreement), which was entered by Operational Creditor through its Director Mr. Krishan Gopal Goyal. The Distributorship Agreement was for an initial duration of 12 months, which was to be automatically renewed for another period of 12 months unless expressly terminated by the Corporate Debtor.
- iii. As per the terms of the agreement dated 12.02.2016 and also the terms settled at the time of distribution agreement, the Operational Creditor had given to Corporate Debtors, a Bank Guarantee of Rs. 1 crore and also gave 5 blank cheques bearing nos. 279358, 279359, 279362, 279361, 279360 wherein only the name of the company was filled up without mentioning of any amount in numeric and words & date, month, or year of the issue of the cheques in the name of Corporate Debtor.
- iv. The business between the Operational Creditor and Corporate Debtor was carried out and Operational Creditor showed its intention to discontinue the distributorship agreement of



Micromax Mobiles in March, 2018, however, due to persuasion of the market staff of the Corporate Debtor, it was ultimately ended on 31.05.2018 as agreed on 22.05.2018, when a meeting of Operational Creditor with Corporate Debtor through authorized representative took place and it was agreed that Operational Creditor will discontinue the distributorship from 31.05.2018 and he be provided one month's time to get itself cleared from the local shop-keepers to whom he has supplied the mobiles to Corporate Debtor and till that Corporate Debtor will not appoint any other distributor for the relevant area.

- v. The Operational Creditor was provided a support price by Corporate Debtor for some specific Micromax models during the period when the distributorship was going on and this fact can be verified by Corporate Debtor.
- vi. The Corporate Debtor was provided the claims of the Operational Creditor amounting to Rs.11,00,585/- and the Corporate Debtor has also assured the Operational Creditor regarding the clearance/receipt of stock of Rs.29,05,425/- without GST & VAT as applicable at the time of purchase of this stock, as per the statement. The Corporate Debtor has earlier also received the part stock from the Operational Creditor. The Corporate Debtor was either to provide a support price for the same or take the same back but Corporate Debtor has done nothing and instead of that got cleared Bank Guarantee of Rs. 1 crore without permission of the Operational Creditor and before settling the accounts with him. The Corporate Debtor had sent a mail wherein he has shown the amount due on 26.11.2018 as Rs.1,23,52,018/- whereas the Operational Creditor has already submitted claims of Rs.11,00,585/- as well as details of the statement by the Operational Creditor for clearance of his stock of Rs.29,05,425.04/- or in the alternative providing of the support price.



- vii.** The Corporate Debtor without permission of the Operational Creditor filled-up one of the security cheques for which the Corporate Debtor have got issued a cheque amount of Rs.24,00,878/-, which amount is not against as per earlier mail sent by the Corporate Debtor. The notice issued with regard to dishonoring of the cheque bearing no. 279362 is a security cheque and there is no liability of the Operational Creditor towards the Corporate Debtor and in fact, Corporate Debtor though, has illegally encashed the bank guarantee of Rs.1 crore, is liable to make balance amount to Operational Creditor and as Corporate Debtor instead of clearing the account of Operational Creditor without instructions and in order to create a false defence against the claim of Operational Creditor has presented the cheque in question, which was got stopped by Operational Creditor.
- viii.** The Operational Creditor had served a demand notice dated 13.05.2019 under section 8 of the Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor at its registered office through Sh. Praveen Suri, Advocate vide speed post (ED207136034IN-delivered) thereby demanding the amount due from corporate Debtor towards Operational Creditor i.e. Rs.16,53,992/- (Rupees Sixteen lakhs Fifty Three Thousand Nine Hundred and Ninety Two only) after deducting claim of Rs.23,52,018/- from claims of worth Rs.11,00,585/- and stock of Rs.29,05,425/- and as Operational Creditor is also to get a compensation of Rs.5,00,000/- (Rupees Five Lakhs only) towards mental agony and harassment besides interest @ 18% per annum since May, 2018 till date. The Corporate Debtor has sent a reply dated 23.05.2019 to the demand notice dated 13.05.2019, thereby intentionally denying the liabilities towards the Operational Creditor and this shows the incapacity of the Corporate Debtor to pay their Operational debts to their creditors as they have become insolvent.



- ix.** As the demand notice has been received by the Corporate Debtors but no amount /dues have been paid by the Corporate Debtor till date despite receiving the said demand notice. Thus the Corporate Debtor is in default to make the repayment of the operational debt to the Operational Creditor.
 - x.** From the claim of the Operational Creditor, it is clear that the Corporate Debtor is not paying its legal dues, therefore, has no capacity to pay its debts and has been virtually insolvent therefore the present application for winding up/seeking the insolvent status of Corporate Debtor company has been filed.
- 5. Short reply of the Corporate Debtors dated 07.01.2020:**
- i.** The Operational Creditor was appointed as the Authorized Distributor of the Corporate Debtors/Respondents, under the Micromax Product Distributor Agreement dated 12.02.2016 (Agreement).
 - ii.** The amount, as alleged by the Operational Creditor is admittedly not an amount being claimed towards (1) sales of any goods, (2) rendering of contractual services, (3) employment and/or (4) Government dues. Therefore, the alleged claim amount cannot be classified as operational debt in accordance with Section 5(21) of the Code and Petitioner, thus, does not fall under the definition of Operational Creditor as provided under Section 5(20) of the Code. The Operational Creditor never sold any goods to the Corporate Debtors/Respondents. No debt can therefore accrue in favour of the Operational Creditor against Corporate Debtors/Respondents for the sale of Goods.
 - iii.** The Operational Creditor in the present case has admittedly failed to demonstrate whether there exists a debt much less an admitted debt against the Corporate Debtors/Respondents. It is submitted that the Corporate Debtors/Respondents has since inception denied the maintainability of the alleged dues of



the Operational Creditor and still maintain its assertive position about disputing the claim in totality.

- iv.** As per the accounts duly maintained by the Corporate Debtors/Respondents, there is admitted outstanding balance of Rs. 24,00,878.56/- (Rupees Twenty Four Lakh Eighty Hundred Seventy Eight and Fifty Six Paise Only) payable by Operational Creditor towards the products supplied/delivered to them.
- v.** The Operational Creditor had duly admitted its liability and had issued a cheque bearing no. 279362 dated 06.03.2019 for the amount of Rs. 24,00,878/- (Rupees Twenty Four Lakhs Eight Hundred and Seventy Eight Only) drawn on Axis Bank Ltd. in favour of Corporate Debtor towards the payment of the aforementioned admitted outstanding debts dues. The above cheque was returned unpaid vide Returning Memo dated 08.03.2019.
- vi.** On 22.04.2019, Corporate Debtors/Respondents filed Complaint u/s. 138 of the Negotiable Instrument Act, 1881 read with Section 142 of the Negotiable Instrument Act, 1881 against the Operational Creditor and the same is pending adjudication before Ld. Metropolitan Magistrate, Patiala House District Court, New Delhi.
- vii.** It is submitted that there exists no debt as alleged and thus, the Corporate Debtor is not liable to make any payment. On the contrary, the Operational Creditor is liable to make the payment of Rs. 24,00,878/- to the Corporate Debtor.
- viii.** It is pertinent to mention that the Operational Creditor despite being aware of the fact that there is a pre-existing dispute, has deliberately and with malafide intention on 13.05.2019 issued a Statutory Demand Notice purported to be under Section 8 of the Code by raising a false and frivolous claim against the Corporate Debtors/Respondents. It is submitted that the Corporate Debtors/Respondents duly replied to the said notice and disputed the alleged debt.



- ix.** The Statutory Demand Notice dated 13.05.2019 issued by the Operational Creditor is not as per the prescribed format as required under the Code. It is submitted that Section 8 of the Code mandates that to initiate a Corporate Insolvency Resolution Process under the Code, an Operational Creditor has to serve a demand notice in the prescribed format to the Corporate Debtor. Hence, the statutory demand notice/invoice Demanding Payment under the Code is required to be issued in Form-3 or Form-4 as per the prescribed format. It is submitted that the Demand Notice has not been issued in mandatory Form 3 or Form 4, as stipulated, under Rule 5 of the Adjudicating Authority Rules by the Operational Creditor and thus the present petition is not maintainable.
- x.** The Operational Creditor has not complied with the statutory requirement of filing of a certificate from the financial institution maintaining accounts of the Operational Creditor confirming that there is no payment of an unpaid operational debt by the Corporate Debtors/Respondents. The said requirement is a mandatory requirement which the Operational Creditor has intentionally not complied with and, therefore, the present Company Petition is liable to be rejected on this ground alone under Section 9(5)(ii)(a) of the Code. Thus, in the absence of compliance of the statutory provision, the present petition is liable to be dismissed.

6. Rejoinder of the Operational Creditor dated 21.01.2020

It is submitted that the claim of the Operational Creditor is with regard to the sale of goods. In fact, the Distributor Agreement has been executed for the sale of mobile, etc. only therefore it very much forms part of the operational debt. It is further submitted that on basis of the Distributor Agreement, the Operational Creditor has sold the mobile phones of the Corporate Debtor



Company, therefore, it is very much maintainable and comes under the definition of operational debt as defined under the Code.

7. **Analysis and Findings**

- i. We have heard the Ld. Counsels appearing for both parties from time to time. We have also perused the documents on record.
- ii. The instant application has been filed by the applicant under Section 9 of the Code, seeking to initiate CIRP against the Corporate Debtor for a claim amount of Rs. 16,53,992/- which according to the applicant is due and payable by the Corporate Debtor on account of sales return which was not accounted for by the Corporate Debtor while invoking the bank guarantee of Rs. 1 Cr. and encashing of PDC worth Rs. 24,00,878/- against non-payment of cost of goods supplied by the Corporate Debtor as the manufacturer to the applicant, who was one of the distributors of such goods. The first and foremost question to be adjudicated therefore, is whether the applicant is an Operational Creditor to the Corporate Debtor?
- iii. After going through the averments made by the parties, we observe that the main contention of the Corporate Debtor is that there exists no Operational Debt between the parties. It would therefore be necessary to refer to the definition of Operational Debt as provided under Section 5(21) of the Code, which is as follows:

“(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”

From the definition of the “operational debt”, it is amply clear that for a debt to be classified as an Operational debt, the claim amount should be in respect of (1) sales of any goods, or (2)



rendering of contractual services, or (3) employment, or (4) Government dues. Admittedly, the claim made by the applicant is neither in respect of the provision of goods or services or employment, but with regard to accounting for goods to be returned. Accordingly, the goods to be returned during the continuation of the Distributorship Agreement or thereafter for any reason would fall within the ambit of contractual dispute, and the same cannot be treated as an “Operational Debt” as defined under section 5(21) of the Code.

- iv.** Guidance in this regard is also available in the judgment of Hon’ble NCLAT in ***Jain Irrigation Systems Ltd. Versus Pragyawan Technologies Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 311 of 2023***, wherein it is held that “*Section 9 Proceedings are not the proceedings where the dispute raised by the parties arising out of contract between the parties can be gone into and adjudicated. The scheme of Insolvency Proceedings contemplate that the proceeding shall go on only when there is an admitted debt and default, forum is not for deciding and adjudicating the contractual dispute between the parties.*”
- v.** Further, we noticed that the Distributor Agreement dated 12.02.2016 clearly laid down that the product sold to the distributor shall not be liable to be returned to Micromax during the continuation of the said agreement or thereafter. In particular, a reference to clauses 4.1, 4.2 and 4.3 of the Distributor Agreement dated 12.02.2016 reveals as under:

“4.1 The sale and purchase of the Products as between Micromax and the Distributor shall be governed by Micromax's Terms and Conditions of Sale, Service and Technical Support In effect and force on the date of sale of the products.

4.2 The product sold to the Distributor shall not be liable to be returned to Micromax during the



continuation of this Agreement or at any time thereafter for any reason whatsoever.

4.3 If there shall be any inconsistency between the provisions of the Conditions of Sale and provisions of this Agreement, then the latter shall prevail.”

It is clear from clause 4.3 of the Distributor Agreement dated 12.02.2016, as extracted above, that the Agreement will prevail over the Conditions of Sale and clause 4.2 of this agreement clearly barred the distributor to return any goods either during the period of the agreement or even thereafter. As a consequence, the applicant had no accrued right to recover any claim towards the goods returned by it to Corporate Debtor.

Hence there could be no claim made by the applicant towards any goods returned.

- vi.** Further, the Distributor Agreement dated 12.02.2016 also stipulates that Micromax shall have the right to invoke the bank guarantee furnished by the Distributor for securing payments in case of default. In particular, clauses 5.4.2, and 5.4.3 of the Distributor Agreement dated 12.02.2016 as extracted from the original text, state as under:

“5.4.2. Payments not received by Micromax as per the payment terms shall constitute a default, by the Distributor. Micromax shall have the right to invoke the bank guarantee furnished by the Distributor for securing payments in case of default. Distributor agrees not to seek any adjustments, set-off of any other amounts outstanding to Micromax in respect of the bank guarantee nor counter claim from Micromax.

5.4.2 Other Effects of Non-Payment. In addition, without waiving any other rights and remedies at law or under this Agreement, if an invoice is overdue, Micromax may (a) refuse to accept additional orders under this Agreement; (b) terminate this Agreement;



(c) refuse to ship ordered Products; and/or (d) seek collection from Distributor, including all legal fees and other costs of collection;

5.4.3 Micromax shall be entitled to deduct from any monies due to Distributor any sums owed by Distributor to Micromax. This shall include without limitation to rebates and/or any one time incentive payments from Micromax to Distributor.”

It is amply clear from the above cited terms of the Distributorship agreement, that the Corporate Debtor was well within its right to invoke the bank guarantee for securing payment in cases of default in payment by the applicant and was also allowed to deduct its dues from any rebates or commission payable to the applicant, besides refusing to accept new orders and even terminating the said Distributorship agreement. Be that as it may, in any case, the claim by the applicant herein is in the realm of contractual dispute and unless the said claim is adjudicated by the Competent Court and decreed in favour of the applicant, it cannot take the colour of an Operational debt under Section 5(20) of the Code.

- vii.** It is observed that in the Complaint filed under Section 138 of the Negotiable Instrument Act, 1881 filed before the Ld. Metropolitan Magistrate, Patiala House District Court, New Delhi regarding the invocation of bank guarantee furnished by the Distributor, the Corporate Debtor has raised a serious dispute in this regard, which is sub judice before the Ld. Metropolitan Magistrate, Patiala House District Court, New Delhi. The valuable rights and contentions of the Corporate Debtor have to be adjudicated upon by the Ld. Metropolitan Magistrate in accordance with the law, which the Corporate Debtor must be allowed to agitate before any and all competent Courts, Tribunals and/or Authorities.



viii. Here, we would also like to refer to the judgment of the Hon'ble Supreme Court in **Mobilox Innovations Private Limited Vs Kirusa Software Private Limited [Civil Appeal No. 9405 of 2017 para 34,** wherein the Hon'ble Supreme Court clearly laid down what the Adjudicating Authority has to examine in an Application under Section 9.

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- i. Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)***
- ii. Whether the documentary evidence furnished with the Application shows that the aforesaid Debt is due and payable and has not yet been paid? And***
- iii. Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational Debt in relation to such dispute?***

If any one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

ix. When we apply the principles as laid down by the Hon'ble Apex Court, we find that there is no operational debt as defined in Section 5(20) of the Code, which is already due and payable by the Corporate Debtor to the applicant. The debt, if any, would crystalize only after the contractual dispute is decided by Competent Court in the Applicant's favour. Therefore, we are of



the considered view that the instant application filed under Section 9 of the Code is not maintainable.

- x.** By going through the definition of Operational Debt and the terms of the agreement, we find that the goods were never sold by the Operational Creditor to Corporate Debtor, however, the Corporate Debtor had invoked the Bank guarantee and the said matter is sub judice before the Ld. Metropolitan Magistrate, Patiala House District Court, New Delhi.

In view of the above, we are inclined to **dismiss** this application.

8. Order

In the light of the above facts and circumstances, it is hereby ordered as follows:-

- i.** The Application bearing **IB-1686/ND/2019** filed by the Applicant under Section 9 of the Code r/w Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is hereby **dismissed**.
- ii.** The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.
- iii.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

No order as to costs.

-SD-

**(DR. BINOD KUMAR SINHA)
MEMBER (TECHNICAL)**

-SD-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**