

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

CP (IB) 1196/MB/C-II/2017

Under Section 9 of the Insolvency and
Bankruptcy Code, 2016

In the matter of

Embee Software Private Limited
[CIN:U72200WB1992PTC055123]
...Operational Creditor

Versus

Hungama Digital Media
Entertainment Private Limited
[CIN:U12000MH1999PTC119259]
...Corporate Debtor/Respondent

Order Delivered on: 24.06.2020

Coram:

Hon'ble Member (Judicial) : Smt. Suchitra Kanuparthi
Hon'ble Member (Technical) : Mr. Chandra Bhan Singh

Appearances:

For the Operational Creditor : Mr Vishal Kandeja/w Ms
Nikita Bhansali, Advocates i/b
Yasmin Bhansali & Co.
For the Corporate Debtor : Mr Nirman Sharama i/b
Rohan P Munj, Associate

ORDER

Per: Chandra Bhan Singh, Member (Technical)

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

Corporate Insolvency Resolution Process (CIRP) against **Hungama Digital Media Entertainment Private Limited**("the Respondent").The Respondent has furnished information in Form 5 under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, in the capacity of Operational Creditor on 12.07.2017.

2. In the requisite Form, under the Head particulars of operational debt, the total debt is stated to be Rs.90,22,942.70 (Rupees ninety lakh twenty-two thousand nine hundred forty-two and paisa seventy only). The date of default was 08.02.2016 (*as last Bill raised on 08.01.2016, credit period in payment clause was 30 days*).
3. The Respondent is a private company limited by shares and incorporated on 01.04.1999 under the Companies Act, 1956, with the Registrar of Companies (RoC), Mumbai. Its Corporate Identity Number (CIN) is U12000MH1999PTC119259. Its registered office is at SF-B-07, 2nd Floor, Art Guild House, Phoenix Market City, LBS Marg, Kurla (West), Mumbai - 400070. Therefore, this Bench has jurisdiction to deal with this petition.

Submissions made by the Applicant/Operational Creditor

4. The Applicant has mentioned in his submissions that the Respondent had approached the Applicant for supply of Microsoft Azure licenses, whereupon in pursuance of purchase order and on making timely payment on an agreed, Applicant supplied to the Respondent Microsoft Azure licenses. This as per the Applicant, were duly delivered, installed and commissioned.

The Applicant mentions that such Microsoft Azure licenses were intended for a specific project undertaken by Respondent and thus being fully satisfied with the performance and benefits of the said licenses, the Respondent duly renewed the agreement, vide purchase order bearing No. PO15006, dated 13.02.2015.

5. The Operational Creditor further submits that at time of placing the order the Respondent was fully aware of the fact that only an identified minimum number of Azure credits would be available with the subject licenses, which if not used, would automatically lapse on the expiry of 12 months from date of the Enterprise Agreement. In terms of agreement, the Respondent had undertaken to make payment for any over-usage of the subject licenses beyond the minimum credits available. Thus, as and when the Respondent exceeded the minimum credits, such over usage was duly intimated to the Respondent. Therefore, upon over usage in the months of December, 2014 and January, 2015, after receipt of the invoice pertaining to the same from Microsoft Corporation (India) Private Limited, the Operational Creditor duly raised invoices upon the Respondent. Subsequently, being in requirement of Microsoft Azure licenses, the Respondent executed Enterprise Agreement with the Operational Creditor for the purchase of such further Microsoft Azure licenses in pursuance of purchase order bearing No. PO15027 dated 13.06.2015. This as per the Operational Creditor was duly delivered, activated and on boarded. Thereafter, the invoice for the above-mentioned purchase order of 30.06.2015 was duly raised by the Operational Creditor for a sum of Rs.46,64,354/-,

which was accepted by the Respondent. Thereafter, in the months of September, 2015, October, 2015 and November, 2015 there was once again over usage and/or over consumption at the Respondent's end which had been acknowledged by the Respondent. The Operational Creditor further states that as soon as Microsoft Corporation (India) Private Limited raised its invoice upon them, they were constrained to raise invoice on the Respondent, vide its invoices respectively bearing Nos. DSI1516-60567 and DSI1516-60622, respectively dated 21.12.2015 and 08.01.2016, for a sum of Rs.6, 86,764/- (for over usage in the month of September, 2015) and Rs.11, 75,567/- (for over usage in the months of October, 2015 and November, 2015).

6. The Operational Creditor submits that despite reaping the benefits and advantages of the software licenses supplied, the Respondent failed to make payment of the price/consideration in lieu thereof within the mutually agreed time.
7. Invoices have been placed on record by the Operational Creditor relating to work order and the amended work order which provides for terms of payment within 30 days from submitting the bills.
8. The Operational Creditor has also in its Petition enclosed a copy of the Demand Notice in Form 3 dated 15.02.2017 on the Respondent in terms of section 8 of the IBC.
9. The copy of the Petition was served on the Respondent in advance and Learned Counsel appeared in behalf of Respondent. The Respondent has filed a reply to the Petition.

Submission by the Respondent

10. In and around December 2013 Microsoft had approached the Respondent and had proposed to the Respondent for migration of the Respondent's website "www.bollywoodthehungama.com" ("**Website**") from the existing cloud service to Microsoft Azure. The Respondent mentions that Microsoft had assured that the deal would be beneficial to the Respondent both in terms of product and cost. Microsoft and the Respondent, therefore, agreed to engage with each other on this understanding. Further the Respondent mentions that for hosting the Website on Microsoft Azure, Microsoft required the Respondent to subscribe to Microsoft Azure service. The Operational Creditor is an Agent/ reseller of the Microsoft product (Microsoft Azure). Microsoft had introduced another party to the Respondent i.e. Mactore for the task of making the website for the Respondent on which the music program of the Respondent could be hosted. The issues relating to Mactore as mentioned by the Respondent is as under:

- i. Mactore failed to realize that its failure to built up the website was solely attributable to the codes developed by Mactore. Instead, the Respondent mentions, Mactore kept on scaling up the number of servers, presuming that it would serve the purpose;
- ii. Respondent mentions that Mactore without application of mind pulled the backend dump from the existing server and put it on Microsoft Azure rather than doing it stage wise.
- iii. As per the Respondent, in addition to the recurring issues, there were new issues cropping up at every development stage which Mactore failed to mitigate and rectify;

- iv. It is for these reasons, the Respondent mentions, the new website, being developed by Mactore was sub-standard and not at all up to the Respondent's expectations;
11. The Respondent submits that while it was agreed that the Microsoft shall subscribe to Microsoft Azure service solely for the purpose of hosting the new website, however, Microsoft allocated the Respondent's Azure credits to Mactore for the development of the new website. The never-ending development of the new website and scaling up of servers lead to consumption of the entire allocated Azure credits and subsequently going into overage i.e over usage of credit. The Respondent had constantly communicated to Microsoft and the Operational Creditor of its displeasure with the manner in which the development was undertaken by Mactore. Without even having the new Website hosted on Microsoft Azure, the Respondent mentions that it had incurred huge cost towards Microsoft Azure license which was wrongly utilized and consumed for the development of the new website.
12. The Respondent submits that Microsoft had allowed Mactore to wrongly use and consume the Microsoft Azure license credits towards development of the new website for procurement of the Microsoft Azure license solely for hosting the new Website. The Operational Creditor was aware of the entire understanding between the Respondent and Microsoft and chose to remain a silent spectator. The Respondent never utilized the Microsoft Azure license credits for the intended purpose and was wrongfully used and consumed by Mactore for the development of the new Website.

13. The Respondent mentions that the Operational Creditor approached the Respondent stating that the Respondent was exceeding the allocated credit limit of the Microsoft Azure license. Further, under the garb of overage charges, the Operational Creditor misguided the Respondent to procure fresh Azure license so as to transfer the overage credits to the new account, which the Respondent reluctantly agreed. However, despite the prolonged development of the new website Mactore could not fix the issues and flaws. The Respondent had time and again communicated its dissatisfaction on the manner of development of the new website to Microsoft and also to Mactore and to the Operational Creditor.
14. Dissatisfied with the recurring issues and flaws in the development of the new website and considering that only for development of the website more than one year was wasted, the Respondent finally decided to discontinue the present development program. The Respondent engaged a third-party vendor on its own to develop the new website. The same was communicated to by the Respondent to Microsoft and to the Operational Creditor, an Agent of the Microsoft.
15. The Respondent had procured the Microsoft Azure license with the sole intent to host the new website on Microsoft Azure. Due to the failure of Microsoft to deliver to the Respondent fully operational new website within time, the Respondent had to incur additional cost to get the new website developed by third party and hosted the same on third party servers. It was Microsoft's commitment to develop and deliver fully functional

new website to the Respondent and also to bear the entire cost of development of the new website. The Operational Creditor was well aware of the Respondents understanding with Microsoft pertaining to development of the website. It was agreed that the cost for development of the new website was to be borne by Microsoft alone and the cost towards the Azure license was to be borne by the Respondent only for to the extent of hosting the new Website.

16. The Respondent submits that Microsoft chose, of its own will, to make available the Respondent's Microsoft Azure credit account to Mactore to develop the new website while being fully aware that the Respondent had subscribed to Microsoft Azure solely for the purpose of hosting the new website. Microsoft failed to deliver to the Respondent fully functional new website for hosting on Microsoft Azure. Therefore, the Respondent could never utilize or consume the Microsoft Azure account credits for the purpose it was intended for. The Operational Creditor under the garb of offsetting the so-called overage charges misguided the Respondent and suggested to procure a fresh Microsoft Azure license so that the additional costs of overages will be absorbed under new Azure license. The Respondent further mentions that throughout the entire period, from the Respondent procuring the Microsoft Azure license to the Respondent getting the new website developed by third party, the Respondent was already bearing the cost of third-party server, which the Respondent mentions should have been reimbursed to the Respondent as it

had to bear the cost due to non-delivery of the committed fully functional new website by Microsoft.

17. Further the Respondent submits that the Mactore began the development of the new website around December 2013 after carrying out feasibility study of the existing website at a macro level without deep diving into the complete website issue. Consequently, upon commencement of development of the new website, it came to the Respondent's attention that Mactores was not able to develop the designs of the new Website. When the review for the homepage design was undertaken, the Respondent expressed its displeasure as the design did not translate the essence as well as the content of the Respondent's website. The visual appeals of designs were not up to the mark which was communicated to Microsoft by the Respondent. The Respondent from time to time by emails dated 22.11.2014 and 26.11.2014 informed Microsoft its dissatisfaction on Mactore's performance. Since Mactore had failed to analyse the existing website of the Respondent on a micro level, Mactore were unable to complete the development of the new website and take the new website live in the stipulated time period of 6 months. The time period stretched from 6 months to additional 12 months since the new website had bugs including design flaws, data migration flaws as well as the site loading time issue. Even at the end of Microsoft Azure License's initial Term, Mactore could not satisfactorily deliver the fully functional website to the Respondent. Therefore, the Respondent by emails dated 23.12.2014 again informed Microsoft about Mactore unacceptable performance. Mactore

was expected to deliver the fully functional website to the Respondent for commercial use on or before December 2014.

18. As per the terms of Enterprise Agreement executed between The Respondent and Microsoft, the Respondent's subscription to the Microsoft Azure license falls under indirect enrolment. The terms of indirect enrolment is reproduced hereunder for ready reference.

“Indirect Enrolment. Orders under an indirect Enrolment must be submitted to an authorized Reseller. The Reseller and Enrolled Affiliate determine pricing and payments terms, including applicable taxes. Enrolled Affiliate pays the Reseller directly and Microsoft invoices the Reseller, according to the term in the Enrolment.”

As per the above terms, the Operational Creditor is the Reseller and the Enrolled Affiliate is the Respondent. As per the terms of Indirect Enrolment the Operational Creditor should have made payments to Microsoft only after the Operational Creditor received payments from the Respondent. The Operational Creditor overzealously and of its own whim made payments to Microsoft. Therefore, the claim of the Operational Creditor that the Operational Creditor has already paid to Microsoft for procurement of the additional Microsoft Azure license is indecorous. The Operational Creditor ought not to have made any payments to Microsoft before receiving any payments from the Respondent. The Operational Creditor, without application of mind, upon receiving purchase order from the Respondent hurriedly made payments of its own will to Microsoft. It is solely

the Operational Creditor's fault that it has made payments to Microsoft without conferring with the Respondent about the payments.

Findings

19. This Bench heard the arguments of both sides and perused the records. The Operational Creditor has enclosed a copy of the Demand Notice in Form 3 dated 15.02.2017 on the Respondent in terms of section 8 of the IBC.
20. The Operational Creditor also sent Notices for repayment of money dated 19.01.2017; 07.04.2017 and 10.05.2017 to which the Respondent replied vide 01.03.2017, 05.05.2017 and 23.05.2017 by disputing the work done by the Mactore.
21. The Respondent from time to time by emails dated 22.11.2014 and 26.11.2014 informed Microsoft about its dissatisfaction with Mactore's performance. This Bench notes that this dissatisfaction with performance was informed to Microsoft much before the Demand Notice of the Operational Creditor of 15.02.2017.
22. The Mactore was expected to deliver the fully functional website to the Respondent for commercial use on or before December 2014. However, the failure of Mactore in timely development of the website led to use of Microsoft Azure License and also caused overage. The Respondent did not utilize or consume the Microsoft Azure credits for hosting the new Website at all and the over usage was mainly on account of development of the website and not the running of the website. The development of

the website and all associated work/activity relating to this was the responsibility of Microsoft and its associates and any usage of credit points of Microsoft Azure for the purpose of development cannot be billed to Hungama, the Respondent in this case.

23. This is the case about development of website by Mactore by using Microsoft Azure platform provided by Operational Creditor who in turn is a distributor/reseller of Microsoft Azure a product of Microsoft. The Respondent before 2013, was using the Cloud Services for hosting its website. However, Microsoft approached the Respondent in December 2013, for migrating the music website from Cloud to Microsoft Azure platform. For this purpose two steps were required which are as under: -

- i. First, Development of website which had to be done by Mactore, an associate of Microsoft.
- ii. Second, delivery of fully operational website to Hungama.

The dispute is that over usage was made by the Respondent. While it was agreed that the Respondent shall subscribe to Microsoft Azure service for the purpose of hosting the new Website, Microsoft allocated the Respondent's Azure credits to Mactore for the development of the new Website. Even after this, website development was not completed and the website remained non operational. Therefore, no benefit in terms of new website has accrued to the Respondent. This issue/dispute was raised by the Respondent through its mail dated 22.11.2014 and 26.11.2014. This clearly shows that dispute have been raised

well before the Demand Notice was sent by the Operational Creditor to the Respondent.

24. The Respondent had to incur additional cost to get the new website developed by third party and hosted the same on third party servers. It was Microsoft's commitment to develop and deliver fully functional new website to the Respondent and also to bear the entire cost of development of the new Website.
25. Dispute in this company petition has arisen from the use of "Microsoft Azure License" of Microsoft which is an Intellectual property of Microsoft. Embee Software Pvt. Ltd. (Embee) is only a reseller appointed by Microsoft for the purpose of dealing of Microsoft's Software and recovery of license fee for the use of Microsoft Azure Licence. Mactore has been appointed by Microsoft for the development of the Respondent website so as to make it compatible to the Microsoft Azure Platform. The output/delivery required by the Respondent i.e. by Hungama, is a fully operational website hosted upon Microsoft platform. What has happened in this case is that Mactore has used the Microsoft Azure credit for the development of Respondent's website and all the operational debt being claimed is the Microsoft Azure credit that has been used by Mactore for the development of the website which is still undelivered.
26. In view of the above, the claims of the Operational Creditor seem to be bogus and frivolous. It is evident from the record that claims of the Operational Creditor were disputed by the Respondent on several occasions and the Microsoft Azure Credit

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has not been used by the Hungama, the Respondent for the running of the website but has been only used by Mactore for the development of the website which is still not complete.

27. Considering all the facts of the case, the petition bearing **CP (IB) 1196/MB/C-II/2017** filed by **Embee Software Private Limited**, the Operational Creditor, under section 9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Hungama Digital Media Entertainment Private Limited**, the Respondent, is **Dismissed**.
28. CP (IB) 1196/MB/C-II/2017 is Dismissed accordingly.

Sd/-

CHANDRA BHAN SINGH
Member (Technical)
24.06.2020
SAM

Sd/-

SUCHITRA KANUPARTHI
Member (Judicial)