

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, COURT NO. II**

**CP (IB) 3790/MB/2018**

Under Section 9 of the I&B Code, 2016

In the matter of

**Karix Mobile Private Limited**

Registered Office: Unit Nos. 1 & 2, First Floor,  
Pinnacle Building, Ascendas International Tech  
Park, Taramani, Chennai, TN – 600 113

Corporate Office: 3<sup>rd</sup> Floor, Prism Tower,  
MindSpace, Malad, Mumbai – 400 064

...Operational Creditor/ Petitioner

v/s

**Hungama Digital Media Entertainment  
Private Limited**

SF-B-07, 2<sup>nd</sup> Floor, Art Guild House, Phoenix  
Market City, LBS Marg, Kurla (west), Mumbai  
– 400 070

...Corporate Debtor

Order delivered on: 07.08.2020

**Coram:**

Hon'ble Shri. Chandra Bhan Singh, Member (Technical)

Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)

**For the Operational Creditor/Petitioner:**

Mr. Dakshesh Vyas a/w Naserali Rizvi, Advocates i/b Dua Associates AOR,  
Mumbai.

**For the Corporate Debtor:**

Mr. Nirman Sharma i/b Mr. Rohan Munj, Advocates.

*Per: Chandra Bhan Singh, Member (Technical)*

**ORDER**

1. This is an application being CP(IB)3790/MB/2018 filed by Karix Mobile Private Limited, Operational Creditor/Petitioner, under section 9 of Insolvency & Bankruptcy Code, 2016 (**Code**) against Hungama Digital Media

Entertainment Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**).

2. The Petitioner was incorporated on 08.08.2000 under the name "Air2Web India Private Limited" which was later changed as "Mgage India Private Limited", which again subsequently changed to "Karix Mobile Private Limited" with effect from 31.01.2018.

**SUBMISSIONS BY THE PETITIONER**

3. The Petitioner is a company incorporated under the provisions of Companies Act, 1956 and the petition is filed by Mr. Arup Kumar Gupta, Associate Director of the Petitioner.

4. The Petitioner has claimed an amount of Rs. 67,11,252.94/- plus interest @18%, p.a. aggregating to Rs. 87,42,898/- payable as on 07.07.2017 from the Corporate Debtor.

5. The Petitioner provided SMS services under Service Agreement dated 26.08.2011 (hereinafter called as **Agreement**), in accordance with Corporate Debtor's specifications and requirements.

6. The Petitioner has raised 14 invoices on the Corporate Debtor, which were required to be paid within 30 days from the date of the respective invoice. Following are the invoices raised by the Petitioner on the Corporate Debtor pursuant to the services provided by the Petitioner;

Date	Invoice Number	Amount
31.05.2015	MIPL/15/05/2174	Rs. 572574/-
31.07.2015	MIPL/15/07/3619	Rs. 1049580/-
31.08.2015	MIPL/15/08/4152	Rs. 1121902/-
30.09.2015	MIPL/15/09/4504	Rs. 419/-
30.09.2015	MIPL/15/09/4760	Rs. 889107/-
31.10.2015	MIPL/15/10/5345	Rs. 1104930/-
30.11.2015	MIPL/15/11/5595	Rs. 1200304/-
31.12.2015	MIPL/15/12/6262	Rs. 682596/-
31.01.2016	MIPL/15/01/0465	Rs. 85198/-
31.03.2016	MIPL/15/03/0373	Rs. 1009/-

30.04.2016	MIPL/15/04/0216	Rs. 684/-
31.05.2016	MIPL/15/05/0376	Rs. 1016/-
06.08.2016	16076796	Rs. 1140/-
02.09.2016	16086961	Rs. 792/-

7. Thereafter on 28.04.2016 and through some associated trail mails of the Corporate Debtor, the Corporate Debtor admitted the receipt of services related invoices and also acknowledged other issues.

8. On 04.08.2016 the Petitioner sent a mail to the Corporate Debtor and demanded outstanding payment of the invoices with interest. On account of non-payment from the Corporate Debtor, the Petitioner on 02.09.2016 through its advocate sent a legal notice to the Corporate Debtor. The Corporate Debtor replied to the said legal notice on 19.09.2016 denying receipt of services and the agreement entered into between both parties.

9. Thereafter on 09.08.2017, the Petitioner sent a demand notice-Form 3 to the Corporate Debtor. The Corporate Debtor replied to the said demand notice on 24.08.2017 denying the claim made by the Petitioner.

#### **SUBMISSIONS BY THE CORPORATE DEBTOR**

10. The Corporate Debtor filed reply to the petition denying the liability and raised the following contentions:

- a. The Petitioner and the Corporate Debtor entered into a service agreement on 26.11.2011, whereby the Petitioner agreed to provide its bulk messaging service to the Corporate Debtor for carrying out promotions and campaign management. The said agreement was valid only for 1 year from 01.07.2011 and expired on 30.06.2012 by efflux of time. Since then, neither the agreement dated 26.08.2011 has been renewed, nor the parties have entered into any new agreement.
- b. The Corporate Debtor has received the purported demand notice dated 09.08.2017, the Petitioner has failed to give details of the transactions on the basis of which the total amount mentioned in the said notice became due for payment by the Corporate Debtor.
- c. The Petitioner has not given details such as;
  - i. Details of transaction,

- ii. Services rendered by the Petitioner, if any,
- iii. Whether the services rendered by the Petitioner were satisfactory received by the Corporate Debtor.
- iv. Whether the agreement was in force throughout the period, when the services were purportedly rendered by the Petitioner and for which the invoices were raised.
- v. Whether the Corporate Debtor had raised work orders for each campaign, as is mandated by the agreement.
- vi. Whether the Corporate Debtor is liable under law for making any payment to the Petitioner.
- vii. Whether the invoices raised by the Petitioner were in fact due and payable by the Corporate Debtor.

The above points are required to be provided in the 'details of transaction' since the requirement of providing details of the transaction is also mandatory pre-requirement under Form-3 and therefore, sending purported demand notice without specifying the 'details of the transaction' which is the most important aspect of the demand notice, fails to achieve the purpose for which a statutory demand notice is required to be served upon the Petitioner. Hence, the Respondent mentions that the Petitioner has failed to comply with the mandatory pre-requirement of sending demand notice in Form No. 3 with 'details of transaction' as is intended by law, and therefore, the present application filed is without complying with mandatory pre-requirements and hence requires to be dismissed.

- d. The Petitioner has failed to provide 'details of the transaction' being most important aspect of the present petition and therefore the present petition requires to be dismissed on account of being 'incomplete' and not being in accordance with the Rules.
- e. The Corporate Debtor again disputed the claim of the Petitioner for recovery of monetary dues and also that of delivery of services. The Corporate Debtor in reply to the demand notice as well as in its reply to an earlier legal notice of Petitioner, has disputed having received the service from the Petitioner. The Respondent has also questioned that there is no document(s) authorizing the Petitioner to provide service for a period for which Petitioner has raised bills.

- f. The present Petition has been filed on the ground of alleged non-payment of 14 invoices of the Petitioner. There is no master service agreement under which separate invoices were raised. Therefore, each invoice represents distinct causes of action. In the circumstances, there needs to be separate petition for separate invoice and one single petition cannot cover claim under separate invoices.
- g. The agreement dated 26.08.2011, provides that all the disputes and claims arising under agreement and/or out of or in connection with the negotiation, execution, interpretation, performance and/or non-performance of this agreement shall be solely and finally settled as per the Arbitration and Conciliation Act, 1996. Without admitting, even if the agreement considered to be live and subsisting, the parties already having agreed to adjudicate their dispute, in connection with the said agreement, by way of Arbitration, the Petitioner has wrongly filed the present petition before this Tribunal and therefore, on this ground as well, the present petition deserves to be dismissed.

11. The Petitioner and the Corporate Debtor also filed rejoinder and sur-rejoinder. Both the parties have filed the written submissions also.

### **SUBMISSIONS BY THE PETITIONER IN REJOINDER**

12. The Petitioner in its rejoinder made submissions as follows;
  - a. The Corporate Debtor has admitted from time to time of having availed of the services of the Petitioner and that the liability towards invoices, which are the subject matter of the present petition, as their admitted liability in its books of accounts.
  - b. The Corporate Debtor has also suppressed the fact that in furtherance of its acknowledgement of liability towards the outstanding dues of the Petitioner and as acknowledgement in its emails dated 23.05.2016 and 05.07.2016, the Corporate Debtor has in fact paid the TDS on the invoices. The relevant Form 26AS evidencing the TDS paid by the Corporate Debtor against the various invoices during the relevant financial year is also annexed.
  - c. It is a settled law that the payment of TDS/taxes amounts to acknowledgement of liability.

## **FINDINGS**

13. The amount of operational Debt of about Rs.67.11 Lakh as on 26.07.2017, as per the details provided by the Petitioner is dependent upon an agreement dated 26.08.2011 signed between the parties. However, as per Annexure B, the Agreement signed between the parties was effective for a period of 1 year from the effective date of 01.07.2011. Here the Bench notes and it has also brought by the Corporate Debtor that all the Invoices raised, which are 14 in number, has been raised between 31.05.2015 to 02.09.2016. This clearly brings out the fact that the claim of the services provided by the Operational Creditor is not covered as per the agreement. As the agreement was only effective up to 30.06.2012 and all the Invoices relate to a period from 2015 onwards. Therefore, this Bench is of the view that the underlined basis which the Operational Creditor claims in form of an agreement does not exist.

14. This Bench notes that as per para 2.2 of the agreement the Petitioner i.e. AIR2Web (which subsequently became as Karix Mobile Pvt. Ltd.) was to provide its SMS gateway on a non-exclusive basis for M/S Hungama to send out bulk SMS to its customers in India.

15. This Bench also notes that as per clause 4.1 and 4.2 of the Agreement the Corporate Debtor was to provide a detailed Work Order specifying scope of work, i.e. number of promotional SMSs and Product and Services for which the SMSs going to be under the campaign. This bench further notes that as per para 4.2 of the Agreement, Hungama had the discretion to conduct due diligence of the arrangements and any other document entered into by Air2Web with the Telecom Companies in each of the Circle where Hungama's campaign was being undertaken. The relevant Para from the Agreement is as under:

**Clause 4.1.** *For each campaign, Hungama will provide Air2Web a detailed work order which will specify scope of work i.e. the number of promotional SMS and the products and services for which the SMSs are to be sent under the campaign.*

**Clause 4.2.** *HUNGAMA shall, in its own discretion, have the right to conduct a due diligence of all the agreements, arrangements and/or any other documents and other writing entered into by Air2Web with*

*the Telecom Companies in each of the circles where such Telecom Companies operate. Air2Web hereby agrees and undertakes that Air2Web will co-operate with HUNGAMA to assure a prompt and accurate due diligence as and when required by HUNGAMA on reasonable notice of seven working days during normal office hours.*

16. This Bench notes that all the Invoices raised by the Petitioner do not have any detail of any Work Order or the scope of work which were a mandatory element as per clause 2.3 and 4.1 of the agreement. This bench, therefore, is of the view that without the mandatory Work Order from the Corporate Debtor specifying the scope of work for each campaign it is not possible to specify whether the claim amount is correct or not, even if we assume that there were subsisting Agreement between the parties. This fact has been brought very clearly by the Respondent also who mentions that the Invoices as well as the Demand Notice dated 09.08.2017 do not have any details of transaction, services rendered by the Petitioner, Work Order for each campaign etc. which is mandatory as per Clause 2.3 of the Agreement.

**Clause 2.3.** *Hungama shall make available to Air2Web, the necessary details of each SMS campaign and details of its products and services which needs to be advertised and the scope of work, in individual capacity.*

17. This Bench also takes note of the fact that a Legal Notice dated 02.09.2016, much before the issue of Demand Notice, was sent to the Corporate Debtor. This Legal Notice was replied on 19.09.2016 by the Corporate Debtor disputing the claim of the Applicant. Therefore, the Bench observes that a dispute was raised by the Corporate Debtor about a year before the receiving of the demand notice. The bench also takes note that the Respondent has clearly mentioned in reply the Legal Notice that no details of the services or any valid Purchase Order details have been given by the Operational Creditor for the sum being demanded.

18. The Petitioner through its Rejoinder has mentioned that the Corporate Debtor has admitted that they have availed the services provided by the Petitioner and also the liability towards invoices, as their admitted liability in its books of accounts. This Bench has gone through the accounts which are attached with the petition and found out that none of these accounts are

acknowledged by the Corporate Debtor. Hence this submission made by the Petitioner has no foundation.

19. TDS has been paid by the Corporate Debtor which is an acknowledgement of the liability. In support of that, by Exhibit B the Petitioner has enclosed Form 26AS as supposedly proof giving details of TDS transaction. This bench went through all the details of Exhibit B and finds that the Tax has been deducted by Easy Pay Pvt. Ltd., Vodafone West Ltd., HDB Financial Services Ltd. Tata Communication Ltd., etc. and not by the Corporate Debtor i.e. Hungama Digital Media Entertainment Pvt. Ltd. Only at one place it shows that an amount of Tax of Rs.69/- has been deducted by the Corporate Debtor on a transaction dated 19.01.2017. Therefore, this Bench feels that there is no merit in the argument extended by the Petitioner that TDS has been deducted by the Corporate Debtor.

20. In view of the above, this Bench arrives at the conclusion that there is no Agreement between the parties for any service. No work order has been raised by the Corporate Debtor to show that the Respondent had engaged the services of the Petitioner. This Bench also concludes that, much before the issue of the Demand Notice on 09.08.2017, the Corporate Debtor had raised 'dispute' regarding the outstanding dues being claimed by the Applicant.

21. The above discussion clearly shows that there is a dispute even before the issue of demand notice dated 09.08.2017 and the said dispute clearly falls within the ambit of Section 5(6)(b) of the Code. Section 5(6) reads as below;

*'dispute' includes a suit or arbitration proceedings relating to-*

- (a) The existence of the amount of debt;*
- (b) The quality of goods or services; or*
- (c) The breach of a representation or warranty;*

22. When the section of law is applied to the facts of the case it is abundantly clear that there are pre-existing disputes relating to quality issues in respect of the services rendered by the petitioner.

23. The Hon'ble Supreme Court in the case of Mobilox Innovations Pvt. Ltd. v/s. Kirusa Software (P) Limited- 2017 (SCC Online SC 1154) held as below :-

*"40..... Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application"*

24. In the case on hand the contentions raised by the Corporate Debtor are neither spurious nor hypothetical nor illusory and in fact there is a serious dispute as to the services provided by the Petitioner. In the circumstance the petition deserves to be rejected in view of the existence of the dispute.

25. In view of the above discussions the Petition is "Dismissed".

26. The Registry is directed to communicate this order to both the parties.

SD/-  
Chandra Bhan Singh  
Member (T)

SD/-  
Suchitra Kanuparthi  
Member (J)