

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision : December 24, 2014*

+ **FAO(OS) 540/2014**

SHENZHEN ONEPLUS TECHNOLOGY CO LTD Appellant

Represented by: Mr.Kapil Sibal, Sr.Advocate
instructed by Mr.Pravin Anand,
Ms.Amisha Nagarajan, Mr.Nischal
Anand and Mr.Aman Taneja,
Advocates

versus

MICROMAX INFORMATICS LIMITED Respondent

Represented by: Mr.Rajiv Nayar, Sr.Advocate
instructed by Mr.Kirat Singh Nagra,
Ms.Jyoti Pawar and Mr.Kartik Yadav,
Advocates for R-1
Mr.Ashwani Mata, Sr.Advocate
instructed by Mr.M.S.Ananth,
Mr.A.Banarjee and Mr.Raghav
Kapoor, Advocates for R-2 & R-3

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE R.K.GAUBA

PRADEEP NANDRAJOG, J.

1. We shall be referring to the parties as under:-
 - (a) Micromax Informatics Ltd. (The Plaintiff) : **Micromax**
 - (b) Shenzhen OnePlus Technology
Co.Ltd. (Defendant No.1) : **OnePlus**
 - (c) Cyanogen Inc. and CyanogenMod
LLC (Defendants No.2 & 3) : **Cyanogen**

2. Micromax is the protagonist and OnePlus is the antagonist. And with due apology to Cyanogen : it is the villain.
3. Little did OnePlus know, when it executed two agreements with Cyanogen, one having effective date February 01, 2014 called ‘TRADEMARK LICENSE AGREEMENT’, and the other having effective dated February 28, 2014 called ‘COLLABORATION AND LICENSE AGREEMENT’ that the two agreements contained the seed for the litigation, the offshoot whereof is the present appeal.
4. Cyanogen is the registered proprietor of the trademark ‘*CyanogenMod*’. Under the trademark license agreement it granted OnePlus a limited license to use the mark in connection with mobile telecommunication devices sold as ‘*OnePlus One*’ Product for a period of two years with additional three months sell off period throughout the world, excluding the territory of the People’s Republic of China (but including Taiwan, Hong Kong and Macau). Under the collaboration and license agreement Cyanogen, the owner of a software programme for Android called CyanogenMod (name given to the software programme) agreed with OnePlus that for the mobile telecommunication devices manufactured by OnePlus it would permit the use of its software programme on the terms and conditions contained in the said agreement for a period of two years with a further three months sell off period. The term of this agreement would be January 31, 2016, for the reason it would be co-terminus with the expiry period of the trademark license agreement. The second agreement is terminable as per Article VII, which pithily stated, does not entitle either party to terminate the agreement without a cause. It is terminable only if a

material breach thereof is not cured within 30 days of receipt of a written notice or either party becoming insolvent or voluntarily files for bankruptcy or proposes dissolution, composition or financial reorganization. Upon termination, all rights under the agreement revert to Cyanogen. The rights conferred under this agreement in favour of OnePlus are throughout the world except the territory of the Republic of China (excluding Taiwan, Hong Kong and Macau).

5. Since both parties were to gain by sale of mobile telecommunications devices by OnePlus using the software developed by Cyanogen and the brand name of the Cyanogen : CyanogenMod, both parties, and if we may use the expression by borrowing the same from the collaboration and license agreement, indulged in guerrilla marketing campaign. They bound themselves to do so as per clause 2.3 of the Collaboration and License Agreement as per which both parties were to engage in a guerrilla marketing campaign. In other words, the brand value of OnePlus was tied with the umbilical cord, to that of Cyanogen and vice-versa. The reputation of one would become the reputation of the other and vice-versa. Money spent by one in enhancing its brand value would automatically enhance the brand value of the other and vice-versa.

6. There was no problem between OnePlus and Cyanogen. Telecommunication devices such as Mobile Phones were manufactured by OnePlus and inter-alia sold in India and the operating software in the microchip embedded in the body of the telecommunication device was that of Cyanogen, till when Cyanogen assumed the role of a villain (perceived through the eyes of OnePlus) by executing an agreement, having effective date September 26, 2014, with Micromax called the '*Ambient Services and*

Applications Distribution Agreement'. As per the agreement, Cyanogen Core OS (version) and Ambient Services (version) were licensed to Micromax for the duration of the agreement to territories specified in the agreement under the caption Exclusive Territory, which reads as under:-

“Exclusive Territory : Notwithstanding the non-exclusive license granted by Cyanogen to Company in Section 3.2 of the Principal Terms, the Parties agree that for the following countries in the Territory : India, Bangladesh, Sri Lanka, Nepal, Pakistan and Myanmar, such countries shall (a) be exclusive to Company for Ambient Services and (b) have limited exclusivity to Company for Core OS such that Cyanogen will not collaborate directly with another OEM (or agent acting on behalf of such OEM) for the purpose of integrating Core OS with devices distributed by such OEM (or agent of such OEM) in the aforementioned countries.”

7. It appeared in public domain somewhere in the first week of November, 2014 that Cyanogen had entered into an agreement with Micromax for telecommunication devices to be sold in India by Micromax with the software provided by Cyanogen and this software would henceforth be exclusive to Micromax in India. In the era of consumerism, it is a fashion to be wearing the dress with the latest design, to be wearing one of the limited edition of the latest watch, to be just about possessing what is the latest in the market : and which would obviously include the latest telecommunication device with the latest technology embodied therein; and therefore commenced a debate on the twitter and the blogs : whether telecommunication sets of OnePlus would be a good bargain – and the centre point of the debate was OnePlus not having the right to the software updated versions developed by Cyanogen.

8. The market gossips aroused justified concerns in OnePlus, and started

an exchange of e-mails between one Mr.Kirt McMaster and Carl Pei of OnePlus and Cyanogen. The briefly worded and sometimes one liner e-mails exchanged, in the third and fourth week of November, 2014, would reveal that Cyanogen and OnePlus were taking positions to break an impasse, for the reason the contractual relationship between the two was global, except the territory comprising the People's Republic of China and that between Cyanogen and Micromax was exclusive to India, Bangladesh, Sri Lanka, Nepal, Pakistan and Myanmar. We can understand the positioning of OnePlus because it did not want the relationship with Cyanogen to break because a complete breaking thereof would have disrupted sale of its telecommunication devices in other countries. At the same time, OnePlus wanted to preserve its stake in the telecommunication market in India, which we are given to understand is substantial. The problem which Cyanogen obviously faced was that it did not disclose to Micromax its prior commitments, having their field of operation in India, with OnePlus.

9. The contents of the e-mails would show that Cyanogen did not make a clean breast of its agreement with Micromax and therefore OnePlus carried on the dialogue with whatever knowledge it could pick up from the market gossips, and we only wish that Micromax and OnePlus discussed the issue with lawyers by their side, keeping in view the language of the Ambient Services and Applications Distribution Agreement which Cyanogen entered into with Micromax. Our reason for the same would become clear as we proceed to prima facie consider the issues which arise for consideration concerning said agreement.

10. Fearing an action against it by Micromax or Cyanogen, OnePlus filed

a suit on the Original Side of this Court which was registered as CS(OS) No.3688/2014 seeking a declaration that it can lawfully carry on trade for its telecommunication devices under the trademark CyanogenMod covered by the trademark licence agreement dated February 01, 2014 and 'CM 11S' Operating System Software covered by the collaboration and licence agreement dated February 28, 2014. It also prayed for an ante suit injunction against Cyanogen and Micromax.

11. Micromax filed a suit, probably emboldened by fact that OnePlus was not granted any ex-parte ad-interim injunction in the suit filed by it, in which the impugned order dated December 16, 2014 has been passed by the learned Single Judge, disposing of IA No.24485/2014, in which an interim order was prayed for pending hearing of the suit. In the suit, which is registered as CS(OS) No.3761/2014, Micromax has impleaded OnePlus as defendant No.1 and Cyanogen Inc. and CyanogenMod LLC as defendants No.2 and 3 respectively. The injunction claimed is against OnePlus, restraining it from using the softwares and operating systems under the Ambient Services and Application Distribution Agreement dated September 26, 2014 which was executed between it and Cyanogen.

12. The suit and the application seeking interim injunction came for hearing before the learned Single Judge on December 05, 2014. OnePlus as also Cyanogen appeared through counsel on said date. Obviously everybody was keeping an eye on the cause list of this Court. The matter was adjourned to December 10, 2014, on which date it was adjourned to December 15, 2014 for parties to try and resolve the dispute, but it being indicated in the order that arguments have been heard on December 10, 2014 and orders would be pronounced on December 15, 2014 if by December 14,

2014 the parties could not settle the dispute and inform the Court. No settlement being arrived at, the impugned order was passed on December 16, 2014.

13. At the outset we may record that the learned Single Judge did not have the benefit of the pleadings of either OnePlus or Cyanogen. It appears that counsel for Micromax literally breathed down the neck of the learned Single Judge to hear arguments on IA No.24885/2014, prayer wherein was opposed by OnePlus aggressively. This explains the impugned decision being pronounced without pleadings being completed. As per the impugned decision an injunction had been granted in favour of Micromax and against OnePlus as prayed for. The goods in the market of OnePlus have been permitted to be sold.

14. The distillate of the concentrate of the impugned decision is : (i) Clause 4 of the agreement between Micromax and Cyanogen (which we have reproduced in paragraph 6 above) confers an exclusive right in favour of Micromax for the Ambient Services using Core Operating Systems developed by Cyanogen in India, (ii) dispute between OnePlus and Cyanogen can be resolved in Courts of Northern District of California (USA) and thus issues concerning the two agreements between OnePlus and Cyanogen not being capable of adjudicated upon in India, and (iii) the e-mails exchanged between OnePlus and Cyanogen would reveal that Cyanogen conveyed to OnePlus that it had determined the licence granted to OnePlus and OnePlus agreeing to the same, meaning thereby OnePlus acquiescence in it having no right under the agreements with Cyanogen.

15. Exhaustively dealing with the contention advanced, but the concentrate of the distillate whereof would be as above, the learned Single

Judge disposed of IA No.24485/2014, and in our opinion the learned Single Judge ought not to have decided the interim application finally, for the reason neither opportunity was granted to either OnePlus or Cyanogen to file their written statement nor opportunity was granted to the two to file a reply to the interim application. Neither got an opportunity to file the documents on which they were to rely. If there was so much pressure from Micromax, the learned Single Judge could have granted a week's time or so for reply to be filed to the interim application because a written pleading would have thrown light on various issues which probably arose for consideration, and have missed the eye of the learned Single Judge.

16. In appeal, we would be adverting only to two issues. (i) To highlight the issues which arise for consideration between the parties, and for which the benefit which we have of is the written stand of OnePlus, in the form of the pleadings of the facts stated, before enumerating the grounds of appeal. (ii) Whether case was made out for grant for an ad-interim injunction, and we contradistinguish the same as against an interim injunction. On the second issue we need to speak a word. Sometimes an issue may be so pressingly urged before a Court that it may be compelled to form a tentative view on the spur of the moment, with the pit fall of there being lack of adequate time granted to the opposing party to file its pleadings and hence not full facts being brought to the notice of the Court and due to the pressure of time, the hearing being limited, resulting in issues of law and fact being missed out. In such circumstance it is always advisable to pass what would be in law an ad-interim measure or a pro tem measure; to be followed by a proper hearing : guided by the pleadings of the parties and the respective documents relied upon by the parties, followed by an order disposing of the

application seeking an interim measure pending adjudication in the suit.

17. At the forefront of the issues which would arise for consideration keeping in view the pleadings of the parties would be : what are the rights conferred upon Micromax by Cyanogen under the agreement dated September 26, 2014 entered into between Cyanogen and Micromax. For unless these rights are spelt out with clarity, it would be near impossible to determine whether they have been infringed. The next issue would be, what are the rights created in favour of OnePlus under the two agreements which it entered into in February, 2014 with Cyanogen. Alone then could one opine whether there is any conflict of the rights. If a conflict of rights was found, the third issue would require to be considered : what is the effect of Cyanogen conferring rights upon OnePlus prior to it creating rights in favour of Micromax and whether the principle of law that no person can convey a title better than his to somebody else would be attracted. To put it pithily, the question would be : whether having created a non-exclusive right in the territory of India in favour of OnePlus up to an identified point of time, whether Cyanogen could confer a right on Micromax which would be in breach of Cyanogen's agreement with OnePlus, which question would subsume the question whether or not, till the period of validity of the two agreements between Cyanogen and OnePlus could at all Cyanogen confer an exclusive right to operate in India in favour of Micromax. This subsumed question would arise on the principle of law that if the owner of a property permits limited use of his property for a duration of time to a second party, upon transferring the ownership in the property to a third party, the limited right limited to the period of the use of the property in favour of the second party would operate as a clog on the ownership of the third party. Issues in

equity would arise inter-se Micromax and OnePlus for the reason concededly Micromax had not determined the agreement with Cyanogen as per the terms, and upon the condition precedents occurring, under the two agreements between Micromax and Cyanogen. Further issues in equity would arise concerning telecommunication devices manufactured by OnePlus for sale in India and it being left with the inventory without the operating software. Further issues in equity would arise concerning money spent by OnePlus in the guerrilla marketing envisaged under its agreement with Cyanogen resulting in a good will being created in the brand name of Cyanogen and whether in such a case would it be possible to hold that damages would be adequate remedy if there is breach by Cyanogen of its obligations under the two agreements with OnePlus. On facts, issues would arise whether OnePlus has acquiesced in the two agreements being revoked and it being left with no right under the two agreements.

18. As we were given to understand during hearing of the appeal, Cyanogen Operating System (OS) is built on Android, which is known for its revolutionary personalized features, intuitive interface, speed, enhanced security and several other features. CyanogenMod is an enhanced open source for smart phones and tablets computers based on Android Mobile Operating Systems as we were further given to understand. It offers features and options not found in official firmware distributed by vendors of these devices. CyanogenMod is developed as free an open source software based on the Android Open Source Project with added original and third-party code. The CMOD Enhancements developed from time to time by Cyanogen during the duration of its agreement with OnePlus have to be made available to OnePlus as we were given to understand the CMOD Enhancements given

to OnePlus are a part of Core OS provided to Micromax, being inbuilt in the Core OS.

19. The agreement dated September 26, 2014 between Micromax and Cyanogen refers to the subject matter of the softwares, in the following words ‘*Core OS (version) : as set forth in the applicable Launch Addendum. Ambient Services (Version) : as set forth in the applicable Launch Addendum.*’ The launch addendum in Schedule D of the Agreement reads as under:-

This Device Launch Addendum is entered under and subject to the Ambient Services License Agreement effective (INSERT DATE) between (INSERT COMPANY NAME) (Company) and Cyanogen Inc. (the “Agreement”).

Upon execution of this Addendum, (INSERT COMPANY NAME) and Cyanogen agree to the Launch the Device as set forth below. No Launch may proceed until the both parties confirm final acceptance in writing. All Launches are subject to the terms and conditions of the Agreement.

<i>Device</i>	<i>Device Specifications</i>	<i>Device Image (optional)</i>

20. Regretfully the proforma conceived of when the draft agreement was prepared has not been filled up when the final agreement was drawn up and signed by the parties, and thus as of now, one is left guessing as to what are the devices, device specifications and device images contemplated by the parties as per the agreement. The Core OS version and Ambient Services

Version, referable to the Launch Addendum, are obviously vague, in the absence of the relevant columns of the Device Launch Addendum being filled up. The only guidance we have is in Schedule B where ‘*Ambient Services*’ have been defined to mean the version of services owned, control and/or curated by Cyanogen which are integrated with Core OS and which exclude Cyanogen Applications and Third Party Applications. ‘Core OS’ has been defined in the agreement to mean that version of CyanogenMod which is indicated on the cover page to the agreement and which is provided ‘as is’ in respects and without any representations and warranties by Cyanogen. We have no further guidance.

21. Thus, unless, through the pleadings of the parties, this aspect of the matter was got clarified, it would be difficult to proceed ahead to discuss as to what are the rights conferred upon Micromax by Cyanogen and thereafter to then discuss whether said rights would be violated if OnePlus can continue to exercise its rights under the agreements executed with Cyanogen in February, 2014.

22. During arguments we were given to understand that there are differences between the software on the OnePlus One device and the Cyanogen software made available to Micromax. We were informed that few items such as single sign-on module, which is an account creating and management application which is not a part of Core OS, is available to Micromax and not OnePlus. We were also given to understand that a theme showcase application which has a different look on Micromax vis-a-vis OnePlus is another feature of difference, though it may be a part of application but not a part of Core OS. We were further given to understand that based on the requirements of OnePlus, the software provided to it has at

least one enhancement/value added software, called AudioFX, which is not available to Micromax. By no means, aforesaid differences are exhaustive for the reason, in appeal, we thought it would not be proper for us to note all differences stated orally before us because it would be better if the same come in the form of pleadings of the parties.

23. In view of what we have noted and opined in paragraphs 18 to 22 above, a proper debate needs to take place at the judicial fora i.e. before the learned Single Judge as to what are the features of the software available to OnePlus under Cyanogen and what are the features available to Micromax under Cyanogen. Further, proper pleadings are required to throw light on what the parties and this would include third parties, would understand with reference to Clause 4 of the agreement between Cyanogen and Micromax, contents whereof we have noted in paragraph 6 above. The expression '*Cyanogen will not collaborate directly with another OEM for the purpose of integrating Core OS with devices*' in the clause need to be properly interpreted on the issue : whether the intention was to bind Cyanogen for the future (will not collaborate) and therefore past obligations of Cyanogen in India, Bangladesh, Sri Lanka etc. would be protected.

24. Whilst it may be true that disputes between OnePlus and Cyangone have to be resolved in the Courts of Northern District of California, but that would not mean that in a dispute between Micromax and OnePlus, the agreement between OnePlus and Cyanogen cannot be looked into by a Court in India. It is trite that while interpreting a contractual obligation between 'A' and 'B' a Court would not ordinarily interpret the contract to compel either 'A' or 'B' to be in breach of its agreement with 'C'.

25. The learned Single Judge has not discussed whether Cyanogen,

having conferred up to an agreed point of time, a right on OnePlus which is non-exclusive, could Cyanogen create a right in favour of Micromax, sans the clog on its right i.e. if Micromax while selling its software in India being not in a position to restrain OnePlus from using its software in the telecommunication devices manufactured by OnePlus and sold in India, could it pass on a better right to Micromax. The issue needs a proper debate, with case law researched, after pleadings are completed.

26. Whether damages would be adequate remedy for the breach, if any, committed by Cyanogen by implicitly terminating its agreement with OnePlus, in the facts of the instant case would not be a simple exercise and it needs a debate whether the principle of law that for breach of contract of sale of goods and which would include a software is capable of remedied only by money in the instant case. The reason being, as noted in paragraph 5 above, clause 2.3 of the Collaboration and Licence Agreement entered into between Cyanogen and OnePlus obliging both parties to engage in guerrilla marketing campaign and for which OnePlus obviously spent money. The brand value of OnePlus got tied with an umbilical cord to that of Cyanogen and vice-versa. What monies were spent in the guerrilla marketing campaign would obviously be pleaded in the pleadings and supported by documents. Further, it is not a case where tangible goods tradable in the market in the same form as Cyanogen sold to OnePlus were the subject matter of the discussion before the learned Single Judge. What was sold by Cyanogen to OnePlus was a software programme, which by itself would be useless thing to possess, unless it had a compatible hardware. The said compatible hardware would have junk value if a compatible software programme was not loaded on to it. The issue of damages would thus

embrace whether or not it was capable of being quantified viewed as highlighted in the preceding part of the present paragraph.

27. It needs a serious debate as to whether OnePlus has acquiesced in the contract being terminated, and for which we note that before the learned Single Judge certain e-mails exchanged in the month of November between Cyanogen and OnePlus were placed. In the appeal, public statements on its blog by Cyanogen, have been filed, and one of which is dated December 04, 2014. Making a commitment to its users Cyanogen has written as under:-

“Over a year and half ago, we founded Cyanogen Inc. with an unfailing commitment to build a mobile OS by the users, for users. We have come a long way in a short period of time and are continually amazed by the innovation fostered by our engineering and product teams and the exceptional contributions by the CM community. We couldn’t have accomplished so much in a short period of time if it were not for the commitment and vision we collectively share to redefine mobile computing. With that said, we wanted to address a couple points of inaccurate information that have come out over the past week. We had not commented earlier as we believe in treating our partners and users with the utmost respect.

We are proud of the work we did on the OnePlus One Through our collaboration with OnePlus, we demonstrated the power of strong hardware and software tuned for exceptional performance. To clarify misinformation out there, the OnePlus One will get OTA firmware updates for all global devices, including global devices for our users in India. Rather than have misinformation continue to circulate out there, we felt it important to bring this matter to rest.

As we look to the future, we want to continue to push the envelope and take the Cyanogen OS to new heights. Our strategic partnership with Micromax and the new YU brand of

devices will enable us to bring high quality, amazing experiences to our users in India. Our commitment is and always remains to be a user-centric company, and we will support our users wherever our OS is distributed.”

28. We have only referred to one such commitment of Cyanogen to bring home the point of relevance of pleadings with reference to the e-mails exchanged between the parties and what was put on its blog by Cyanogen before concluding whether OnePlus has acquiesced in its contract with Cyanogen being rescinded by Cyanogen. It is trite that acquiescence is the result of a conscious decision taken to acquiesce in something and since a valuable right of a party is lost by acquiescence, the same has to be inferred after giving a right to the party concerned to explain its previous statements, conduct or action.

29. Even if one was to take the view that OnePlus has acquiesced in the contract being terminated, what about the application of the clause of three months sell of period. The learned Single Judge has not adverted to the same. The three months sell of period was obviously envisaged to enable OnePlus to sell the telecommunication devices which it had manufactured and on to which the software programme of Cyanogen had been loaded, because the parties were aware that the same should not become junk. This issue also needs a proper consideration after parties complete their pleadings.

30. Having highlighted the issues which arise for consideration between the parties, which would be the first of the two issues which, as written by us in para 16 above we were obliged to highlight, we proceed to discuss the second issue : Whether case was made out for grant of an ad-interim

injunction as contradistinguished from an interim injunction with the caveat and the rider spoken by us in paragraph 16 above.

31. An ad-interim injunction is normally issued when a very strong prima-facie case is made out by the plaintiff and the injury to the plaintiff is writ large if the defendant is not restrained from doing the activity which causes the injury to the plaintiff. In such a case the balance of convenience would obviously be in favour of the plaintiff. Since interim injunctions affect the right of a defendant, the principle of natural justice would warrant the defendant to be heard before an order adverse to the defendant's right is passed. A delicate balance has to be struck between the right of the plaintiff and the right of the defendant at the stage of granting an ad-interim injunction. Only if a Court were to find that so grave and so irreparable is the injury that even a day's delay cannot be brooked, and so strong is the prima facie case made out, only then would a Court be justified in granting an ad-interim injunction and thereafter proceeding to consider whether to confirm the same or not after hearing the defendant. It would be a situation akin to a post decisional hearing.

32. Guided on the principle of law above, in view of the facts noted by us hereinabove, it would not be a case to grant an ad-interim injunction, for the reason we were informed that the mobile telecommunication devices launched in India by Micromax are sold at around ₹8000/- (Rupees Eight Thousand only) per piece and that by OnePlus at around ₹22,000/- (Rupees Twenty Two Thousand only) per piece. The consumer of one product is a mid-segment consumer and the consumer of the other product is a high-end consumer and thus prima-facie neither competes nor eats into the territory of the other.

33. The grievance of the appellant that the hurried hearing (and that for the parties to be blamed for putting pressure on the learned Single Judge) was to be limited to grant of a pro tem measure and not decide the injunction application finally, in the facts noted by us hereinabove, merits acceptance, for the reason in the instant case unless the parties were given an opportunity to file their pleadings it was not proper to decide the injunction application finally.

34. We dispose of the appeal setting aside the impugned order dated December 16, 2014, simultaneously restoring IA No.24485/2014 with a direction that within two weeks from today, and we are giving two weeks because from tomorrow this Court breaks for the winter recess, reply to the application as also the written statement shall be filed not only by OnePlus but even by Cyanogen along with the documents on which they rely.

35. IA No.24485/2014 would be listed for directions before the learned Single Judge on January 07, 2015 and shall be heard and decided afresh.

36. Parties shall bear their own costs in the appeal.

(PRADEEP NANDRAJOG)
JUDGE

(R.K.GAUBA)
JUDGE

DECEMBER 24, 2014
Mamta/skb