IN THE HIGH COURT OF BOMBAY AT GOA

COMPANY PETITION NO. 20 OF 2014

M/S COMPAREX INDIA PVT. LTD ... Petitioner

Versus

M/S ZURI HOSPITALITY PRIVATE LIMITED ... Respondent

Mr. Amit Prasad and Mr.Rohit Bras De Sa, Advocates for the Petitioner.

Mr. S. S. Kantak, Senior Advocate with Mr. M. Salkar and Mr. Arush Upmanyu, Advocates for the Respondents.

Coram:- F. M. REIS, J.

Date:- 11th September, 2015

ORAL ORDER

Heard Shri Prasad, learned Counsel appearing for the Petitioner and Shri Kantak, learned Senior Counsel appearing for the Respondents.

2. The above Company Petition filed by the Petitioner under Sections 433, 434 and 439 of the Companies Act, 1956, seeking winding up of the Respondent-Company.

3. It is the case of the Petitioner that the Respondent-Company was desirous of purchasing Microsoft Enterprise license and, as such, placed a firm purchase order upon M/s. PC-WARE India Pvt. Ltd. for procurement of such Microsoft Software Licenses under Microsoft Enterprise Agreement. The payment terms under the purchase order were monthly instalments of Rs,2,62,312/- each

over a period of three years w.e.f. 01.10.2011. Subsequently, the Petitioner was appointed as new large account reseller in place of M/s. PC-WARE India Pvt. Ltd. and accordingly a change of channel partner (CoCP) form was executed between the Petitioner Company, M/s. PC-WARE India Pvt Ltd, M/s. Microsoft Corporations and M/s. Zuri Hospitality Pvt. Ltd., (Respondent-Company) herein whereby all the rights and obligations under the aforesaid purchase order read with related agreements were conferred upon the Petitioner-Company. After the aforesaid execution of the CoCP, the Respondent-Company continued to pay to the Petitioner few of the instalments but, thereafter, the Respondent-Company has refused to make such payment claiming it has terminated the contract and does not need the softwares any longer. It is further the case of the Petitioner that the Respondent-Company has no right to terminate the agreement after the supply and installations are completed especially when the Respondent-Company has used the software for over a period of one year. The Respondent-Company has neglected to make the payment of the outstanding dues after being served with the statutory notice for winding up. It is further the contention of the Petitioner that as such the Respondent-Company is deemed to be unable to pay its outstanding dues and, as such, filed the above Petition for winding up of the Respondent-Company.

4. The Respondent-Company filed an affidavit in reply. It is the contention of the Respondent-Company that the Petition is entirely misconceived in facts and not maintainable and that the Petitioner had not approached this Court with clean hands. It is also contended that the Respondent-Company is not a creditor of the Petitioner and, as such, the Petitioner is not, prima facie, entitled to

present the Petition for winding up under Section 439 of the Companies Act, 1956. It is further their case that the claim of the Petitioner is not admitted by the Respondent-Company but has always been bonafidely disputed at all points of time and further such dispute has been placed on record by the Petitioner. It is also their case that even assuming without admitting the liability, the allegations made by the Petitioner do not constitute a ground for a Company Petition for winding up. It is also contended that there is no law which contemplates that a going concern which has no outstanding dues and employs about 270 employees, who are paid their salaries regularly and has a turnover of Crore of Rupees every year is to be brought to a grinding halt by filing such winding up Petition. The Respondents have also pointed out in their affidavit in reply that the Respondent-Company is an ISO 22000 certified eminent hospitality company which owns and operates a five star luxury hotel, with state of the art amenities, in Bangalore and forms part of a renowned multinational conglomerate whose global spread extends across Asia, Africa and Europe. It is also contended that the audited balance sheet of the Respondent for the financial year 2013-2014 is in the process of being finalised and, therefore, the financial figures for the financial year 2012-2013 have been highlighted and pointed out that the turnover of the Respondent-Company for the financial year 2012-2013 was INR 35,49,65,875/-. The Respondent-Company have also made averments in the affidavit to point out that the Respondents is a respectable Company corporate and has a sizable income and acceptability in their business.

5. It is further their case that from 25.09.2008, the Respondent-Company

entered into an enterprise agreement with Microsoft Operations Pvt. Ltd. for usage of certain specified software products on a licensed basis and, consequently, PC-Ware India Pvt. Ltd., was appointed as the authorised reseller on behalf of Microsoft in order to deliver the products to the Respondent-Company. The said Agreement was subsequently renewed from 01.10.2011. It is further their case that the Respondent-Company placed upon PC-Ware a purchase order dated 08.11.2011 for procuring certain products. The PO provided for payment of the licence fee on monthly basis and as per the explicit and unequivocal understanding between PC-Ware and the Respondent reflected in the PO, the agreed amount stated in the PO i.e. INR 92,77,617/-, was a cumulative price to be paid in instalments over an extended period of three years. However, it is their case that it was valid until the months from 08.11.2011 to 09.12.2011. The PO did not impose any lock in upon either of the parties beyond the terms nor did it impose any contractually binding obligation upon either of the parties to renew the PO upon such expiry. It is further their case that the understanding of the PO, the period was thereafter to be extended for three years would require to be renewed on monthly basis in order to remain valid and binding. It is further their case that after the merger, the authorised reseller was changed from PC-Ware to the Petitioner and the said change was put on record by an Agreement dated 04.05.2012. It is further their contentions that after being dissatisfied with the utility of the products and the unavailability of the arrangement with the Petitioner, the Respondent was left with no alternative but to communicate to the Petitioner its desire to discontinue its association with the Petitioner as well as with Microsoft. The first instance of such communication was as early as October, 2012 wherein the Respondent had explicitly conveyed its desire to terminate the Agreement. The aforesaid communication was followed by series of correspondence being exchanged by the Petitioner and the Respondent over 12 months in respect of the same subject matter. It is further submitted that due to the continual and unremedied dissatisfaction with the working of the products, the Respondent was left with no option but to terminate the Agreement with Microsoft under its emal dated 31.12.2012. It is also their case that there is no privity of contract with the Respondent since the Agreement was between the Respondent and Microsoft. It is further their case that the aforesaid notice on 07.12.2013, which is a winding up notice is repeating and reiterating the false and frivolous allegations and wrongful claims against the Respondent. It is further their case that the whole conduct of the Petitioner was with malafide intention attempting to put before this Court a contractual dispute regarding recovery of monies in the guise of winding up Petition. The allegations made by the Petitioner are accordingly denied by the Respondent-Company in their affidavit in reply and further pointed out that the Respondents replied to the legal notice and put forth justification for denying each and every allegation of the Petitioner which is a matter of record. It is further contended that the Respondent is a healthy and commercially solvent entity which is able to pay its bonafide debts and, accordingly. It is prayed that the Petition be rejected.

6. The Petitioners filed an affidavit in rejoinder and pointed out that the financial statement produced by the Respondent-Company according to the Petitioners disclose that the Respondent-Company has suffered loss of

Rs.1,56,554,000/- and the earnings per share of the Respondent-Company had reduced from Rs.1.24 (profit) to Rs.9.54(Loss) for the financial year 2012-13. It is further pointed out that a clear inference of commercial insolvency of the Respondent-Company is demonstrated from the admitted fact that the Respondent-Company has been delaying in making payments of an aggregate loan of Rs.20.41 Crores due to the banks for the period from 18 to 86 days. It is also pointed out that the assets of the Respondent-Company have been mortgaged to the bankers for securing loans, advances and overdraft facility which for obvious reasons are procured for the purposes of meeting the operating losses which the Respondent-Company suffered. The allegations made in the affidavit in reply have also been disputed by the Petitioner by filing their rejoinder and producing documents thereto.

7. Shri Prasad, learned Counsel appearing for the Petitioner has pointed out that in terms of the Agreement, the purchase made by the Respondents was to be paid by specified instalments and in view of the default committed by the Respondent-Company in effecting such payment, a statutory notice for winding up was served on the Respondents and the very fact that the amounts have not been paid would itself disclose that the Respondent-Company are unable to pay their debts. Learned Counsel further pointed out that the defence raised by the Petitioner is fictitious and without any legal basis only to delay the payments to the Petitioners as the Respondent-Company is financially insolvent. Learned Counsel further submits that the alleged termination is totally misplaced and further that the amount are payable to the Petitioner in terms of the said Agreement. Learned Counsel has taken me through the Agreement to point out that specific term therein which clearly

disclosed that the allegations of the Respondents are totally baseless and without any foundation. Learned Counsel further pointed out that on the basis of the reply itself, there is an admitted amount payable to the Petitioner which is much more than the amount as specified in the Act and, consequently, the failure on the part of the Respondent-Company to pay the amount would itself disclose that the Respondent-Company is unable to pay their debts. Learned Counsel further pointed out that the inconsistent defences raised by the Respondents would itself disclose that such contentions are not bonafide and are only made to make a semblance of dispute for illegal considerations and illegal motives. Learned Counsel further pointed out that considering the poor financial status of the Respondent-Company, the Petitioner has made out a case for winding up of the Respondent-Company.

8. On the other hand, Shri S. S. Kantak, learned Senior Advocate appearing for the Respondent-Company pointed out that the financial status of the Respondent-Company would itself disclose that there is no justification for winding up. Learned Senior Advocate further pointed out that on account of default in the services rendered by the Petitioner, the Agreement was terminated by the Respondent-Company by sending an email and, consequently, the question of claiming any amounts by the Respondents, would not arise. Learned Senior Advocate further pointed out that the claim, if any, is to be made by M/s. PC-Ware India Pvt. Ltd., and not by the Petitioner as, according to him, the Petitioner is not entitled to claim any amounts from the Respondent-Company. Learned Senior Advocate further pointed out that as the Respondent-Company have raised a

bonafide dispute, there is no reason for any winding up of the Respondent-Company. Learned Counsel has thereafter taken me through the Agreement to point out that the service Agreement between the parties was to make payments on monthly basis which itself shows that as the Respondents were not satisfied with the services rendered by the Petitioners, the Respondents were free to terminate the Agreement. Learned Senior Advocate has further pointed out that as there is a bonafide dispute with regards the alleged claim, the question of winding up of the Respondent-Company is not at all justified.

In support of his submissions, the learned Counsel has relied upon the Judgment reported in ***2011 All SCR 871*** in the case of ***MM/s. IBA Health (I) P. Ltd. vs. M/s. Info-Drive Systems Sdn. Bhd., 2002(1) ALL MR 465*** in the case of ***H. Q. Chemicals Ltd. vs. Care Formulators Pvt. Ltd., 2006(1) ALL MR 105 (S.C.)*** in the case of ***Mediqup Systems Pvt. Ltd. vs. Proxima Medical System G.M.B.H., 2013 (2) ALL MR 188*** in the case of ***Deutsche Bank AG, London vs. Pearl Engineering Polymers Limited, 2012(3) ALL MR 294*** in the case of ***Katare Spinning Mills Limited vs. Kotak Mahindra Bank Limited*** and ***2013(1) ALL MR 51*** in the case of ***Meghraj Capital Advisors Pvt. Ltd. vs. Samira Constructions Ltd.***

9. I have considered the submissions of the learned Counsel. I have also gone through the records. On perusal of the relevant terms of the Agreement, which are material to examine the rival contentions, would disclose that clause 6 of the Agreement contemplates that for the initial or renewal order, Enrolled Affiliate may pay up front or elect to spread its payment over the applicable Enrollment

term. If spread payments are elected, unless indicated otherwise, Microsoft will invoice the Enrolled Affiliate's Reseller in three equal annual instalments. The first instalment will be invoiced upon Microsoft's acceptance of this Enrollment and on each Enrollment anniversary date. Subsequent orders are invoiced upon acceptance of the order and the Enrolled Affiliate may elect to pay annually or upfront for Online Services and upfront for all other Licenses. These terms clearly stipulate that it is for the purchaser such as the Respondent-Company herein to make the payment upfront or to spread the payment in monthly instalments. The termination of the cause terms clearly provides that any termination of the causes of the Enrollment would be subject to the "termination of clause" Section of the Agreement.

10. Clause 7(e) of the Agreement provides thus :

> **"7. End of Enrollment term and termination.**
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
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> (e) **Early termination.** If an Enrolled Affiliate terminates its Enrollment as a result of a breach by Microsoft, or if Microsoft terminates this Enrollment because Enrolled Affiliate has ceased to be Customer's Affiliate, then Enrolled Affiliate will have the following options for Licenses, excluding Subscription Licenses:
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> (i) It may immediately pay the total remaining

amount due, including all installments, in which case, Enrolled Affiliate will have perpetual rights for all Licenses it has ordered (for the latest version of Products ordered under Software Assurance coverage in an initial or renewal term); or

(ii) It may pay only amounts due as of the termination date, in which case Enrolled Affiliate will have perpetual Licenses (for the latest version of Products ordered under Software Assurance coverage in an initial or renewal term) for (1) all copies of Products for which payment has been made in full, and (2) a proportional number of copies of Products it has ordered for which payment has been made.
For subscription Licenses, in the event of a breach by Microsoft, Microsoft will issue Reseller a credit for any amount paid in advance that would apply after the date of termination.

11. The other clauses which would be relevant is clause 2(c) of the Enterprise Agreement which reads thus :

"2 How the Enterprise and Enterprise Subscription programs work.

(a) ...

(b) ...

(c) Choosing and maintaining a Reseller. Each Enrolled Affiliate must choose and maintain a Reseller authorized in the Enrolled Affiliate's location.

(i) When ordering through a Reseller. Orders under an indirect Enrollment will be made to the Reseller. Microsoft will invoice the Reseller according to the terms in the applicable Enrollment. The Reseller and Enrolled Affiliate will determine Enrolled Affiliate's actual price and payment terms."

12. The termination clause at no. 7 of the said Agreement, reads thus :

7. Term and termination

(a) Term. This agreement will remain in effect unless terminated by either party as described below. Each Enrollment will have the term provided in that Enrollment.

(b) Termination without cause. Either party may terminate this agreement, without cause, upon 60 days written notice. In the event of termination, new Enrollments will not be accepted but any existing Enrollment will continue for the term of such Enrollment and be governed by this agreement.

(c) Termination of cause. Either party may terminate an Enrollment if the other party materially breaches its obligations under this agreement, including any obligation to submit the terminating party must give the other party 30 days notice and opportunity to cure. If Microsoft gives such notice to an Enrolled Affiliate, Microsoft also will give Customer a copy of the notice and Customer agrees to help resolve the breach. If the breach affects other Enrollments and cannot be resolved between Microsoft and Customer within a reasonable period of time, Microsoft may terminate this Agreement and all Enrollments under it. If an Enrolled Affiliate ceases to be Customer's Affiliate, Customer must promptly notify Microsoft and Microsoft may terminate its Enrollment. If an Enrolled Affiliate terminates its Enrollment as a result of a breach by Microsoft, or if Microsoft terminates an Enrollment because Enrolled Affiliate ceases to be Customer's Affiliate, then Enrolled Affiliate will have early termination options described in an Enrollment.

(d) Modification or termination of an Online Service for regulatory reasons. Microsoft may modify or terminate an Online Service in any country where there is any current or future government requirement or obligation that (1) subjects Microsoft to any regulation or requirement not generally applicable to businesses operating there, (2) presents a hardship for Microsoft to continue operating the Online Service without modification, and/or (3) causes Microsoft to believe these terms or the Online Service may be in conflict with any such requirement or obligation. For example, Microsoft may modify or terminate an Online Service in connection with a government requirement that would cause Microsoft to be regulated as a telecommunications provider.

(e) Program updates. Microsoft may make a change to this program that will make it necessary for Customer and its Enrolled Affiliates to enter into new agreements and Enrollments at the time of an enrollment renewal.

13. On perusal of the said terms, it specifically provides that the payments of the installments towards the services rendered to the Respondent-Company were to be paid to the Reseller who is the Petitioner herein. In such circumstances, the contention of Shri Kantak, learned Senior Advocate appearing for the Respondent-Company that the Agreement is only with Microsoft and the payments are not payable to the Petitioner, cannot be accepted. The terms of the Agreement clearly provide that such payments were to be made to the Petitioner.

14. The next aspect to be examined is as to whether the claim of the Petitioner to the tune of Rs.66,08,282/- is the admitted debt payable to the Petitioner. In this connection, the Petitioner is claiming that they cannot be compelled to terminate the credit facility extended to the Respondent-Company as stated in the legal notice which is dated 18.10.2013 and, as such, entitled for a sum of Rs.66,10,309/-. The Respondent-Company nevertheless are raising the contention that they have terminated the Agreement as on December, 2012 on account of deficiency in the services rendered but, however, it is contended by the Petitioner that the Respondent-Company were not entitled to terminate the Agreement and, as such, no valid letter of termination was issued to the Petitioner. The Petitioner further pointed out that on account of defaults committed by the Respondent-Company, they were forced to terminate on the basis the legal notice dated 18.10.2013. This aspect whether the alleged termination by the Respondent-Company is valid or not and whether the Petitioner is entitled to claim the amount based on the contractual terms after the termination in October, 2013, are disputed questions of fact which would have to be examined by filing appropriate proceedings in accordance with law. But the fact remains that as per the case put forth by the Respondent-Company itself, the alleged termination was in December, 2012. As per the terms of the Agreement as referred to herein above, such termination would be effected by issuing a two months notice. The Petitioner cannot be deprived of receiving the amount upto the month of February 2013. In this connection, I called upon the learned Counsel appearing for the parties to point out the amounts due as on February, 2013. Learned Counsel appearing for the Petitioner has filed a statement of account, inter alia, claiming that the amount due

as on 28.02.2013 would be a sum of Rs.16,24,239/-. This amount which is otherwise seriously disputed by the Respondent-Company. But, however, Mr. Kantak, learned Senior Advocate appearing for the Respondent-Company submitted that such calculation has been arrived at by alleging that the instalments were payable from August, 2012. But, however, Mr. Kantak, learned Senior Counsel appearing for the Respondents has brought to my notice that as per the averments of the Petitioner themselves in the above Petition, it discloses that since October, 2012, the Respondent-Company has failed to honour their commitment towards the payment of the monthly instalment of Rs. 2,62,312/-. This contention is seriously disputed by the learned Counsel appearing for the Petitioner by submitting that as on October, 2012, the amounts payable for the months of August-September, 2012 were also due and, as such, the amounts works out to Rs.16,24,239/-. In support of such contention, the learned Counsel appearing for the Petitioner has taken me through the correspondence on record. But, however, considering that the amounts claimed for August-September, 2012 are also seriously disputed by the Respondent-Company based on the averments brought to my notice in the Petition, I find that the admitted amounts payable by the Respondent-Company to the Petitioner, prima facie, would work out to be the sum payable from October, 2012 to February, 2013. In this connection, the learned Counsel appearing for the Petitioner stated that the amount payable for the said period, would work out to Rs.10,99,615/-.

15. The remaining amounts claimed by the Petitioner as such are disputed which would have to be recovered by the Petitioner after filing appropriate

proceedings in accordance with law. On the basis of the material on record and considering the submissions of both the parties, I find that the admitted amounts payable by the Respondent-Company to the Petitioner prima facie work out to Rs.10,99,615/-. Admittedly, the said amount was not paid by the Respondent-Company after a statutory notice of winding up was served on the Respondent-Company and, as such, on the basis of the material on record, the Respondent-Company can be regarded as a creditor of the Petitioner for the purpose of winding up. Considering the averments of the Respondent-Company themselves, as far as such amount is concerned, it cannot be said that the Respondent-Company has substantially disputed the debt to that extent and there is no reasonable cause or existence of any bonafide dispute which can be adjudicated only by trial in the Civil Court as far as such amount is concerned. But, however, as far as the remaining amounts are concerned, the Respondent-Company has seriously disputed such amount and there is a substantial defence raised by the Respondent-Company to such claim. To ascertain the rival claims with that regard, the claim of the Petitioner would have to be adjudicated in appropriate proceedings. The contention of Mr. Kantak, learned Senior Advocate appearing for the Respondent-Company that the financial health of the Respondent-Company is sound and there is no question of winding up cannot be accepted considering that the financial statement produced by the Respondent-Company would suggest that the Respondent-Company was running a loss. In any event, the fact remains that after the statutory notice was issued, even the amount which is legally recoverable from the Respondent-Company was not paid by the Respondent-Company despite of such notice. The Apex Court in the Judgment reported in ***AIR 2009 SC 1695*** in the case of ***M/s.***

Vijay Industries vs. M/s. NATL Technologies Ltd., has observed at para 33 thus :

> "33. Section 433 of the Companies Act does not state that the debt must be precisely a definite sum. It has not been disputed before us that failure to pay agreed interest or the statutory interest would come within the purview of the word 'debt'. It is one thing to say that the amount of debt is not definite or ascertainable because of the bonafide dispute raised thereabout or there exists a dispute as regards quantity or quality of supply or such other defences which are available to the purchaser, but it is another thing to say that although the due as regards the principal amount resulting from the quantity or quality of supply of the goods stands admitted but a question is raised as to whether any agreement had been entered into for payment of interest or whether the rate of interest would be applicable or not. In the latter case, in our opinion, the application for winding up cannot be dismissed."

16. Taking note of the observations of the Apex Court herein above, in the instant case, despite receiving the legal notice, that no payment has been made to liquidate the amount payable by the Respondent-Company has not been disputed. Admittedly, the software was purchased by the Respondent-Company pursuant to the Agreement and even assuming that the alleged termination has to be accepted, a sum of Rs.10,99,615/- was due by the Respondent-Company to the Petitioner.

17. Consequently, in case of the default of the payment of the said amount or any part thereof within the time specified herein the petitioner would be entitled for the relief in the above petition. It is however, contended by the learned counsel appearing for the Petitioner that the winding up petition would enure for the benefits of all the creditors and as such, the question of making such order would not be justified.

18. But however, the Division Bench of this Court, Principal Seat at Mumbai, in the case of **Videocon Industries Limited Vs Intesa Sanpaolo S.P.A., in Appeal (L) No. 29 of 2014 in Company Petition No. 528/2012** has observed at paras 42 and 43 thus :

> "42. When we so indicated at the conclusion of the arguments, learned counsel for Videocon, however, submits that in any view of the matter the learned Company Judge erred in directing Videocon to pay the amount to the Bank. It is submitted that at the most the amount could have been directed to be deposited in Court but not paid over to the Bank. It was vehemently submitted that the winding up petition is for the benefit of all the creditors and any amount paid after filing of the winding up petition would enure for the benefit of all the creditors and, therefore, the impugned direction given by the learned Judge requiring Videocon to pay 38 Million Euros to the Bank is contrary to the settled legal position.
>
> 43. The argument is fallacious for the simple reason that after Videocon pays the amount to the Bank, the winding up petition would stand dismissed and, therefore, there would be no order of admission of the winding up petition or

> publication of the advertisement for inviting other creditors to come forward with their claims. That stage would not at all arise if Videocon makes the payment. It is only if Videocon fails to make payment even after three adjudications that Company Petition would stand admitted, which would be followed by publication of the advertisement for inviting claims from the other creditors. We, therefore, do not find any merit in this contention also."

19. Taking note of the said observations and considering that the admitted amount due to the Petitioner prima facie works out to be a sum of Rs.10,99,615/-, I find that the Respondent should be directed to pay such amount within a period of three months from today and on failure to do so, the consequence would follow.

20. In view of the above, I pass the following :

O R D E R

(i) The Petitioner are directed to pay a sum of Rs.10,99,615/- in this Court within three months from today.

(ii) In case the Respondent -Company fails to deposit the said sum of Rs.10,99,615/- or any part thereof within the said period, the petition shall stand admitted and the Petitioner shall proceed to publish the notice in two newspapers one in “The Navhind Times” and other in regional language Marathi “Gomantak”.

(iii) In case the amount is deposited within the said period stipulated herein above, the petition shall stand accordingly dismissed with liberty to the Petitioner to recover the legal dues from the Respondent in accordance with law.

(iv) The petition stands disposed of accordingly.

F. M. REIS, J.

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