

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. IV)
Company Petition No. IB- 990/ND/2018

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

M/s MICROMAX INFORMATICS LIMITED

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

KUMAR DISTRIBUTORS PRIVATE LIMITED

...RESPONDENT/ CORPORATE DEBTOR

ORDER PRONOUNCED ON: 12.01.2022

CORAM:

DR. DEEPTI MUKESH
HON'BLE MEMBER (JUDICIAL)

MS. SUMITA PURKAYASTHA
HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES:

Micromax Informatics Limited
Having registered office at:
21/14A, Phase-II, Naraina Industrial Area
Delhi-110028

Applicant/Operational Creditor

Vs.

IB- 348/ (ND)/2020

Kumar Distributors Private Limited
Having registered office at:
J-156, 3rd Floor, Saket
New Delhi-110017

Corporate Debtor

ORDER

Per- Sumita Purkayastha, Member (Technical)

1. This is an application filed by M/s Micromax Informatics Limited the applicant/operational creditor seeking (for brevity Operational Creditor) to initiate CIRP against the Respondent company/Corporate Debtor (for brevity Corporate Debtor) M/s Kumar Distributors Private Limited., under Section 9 of IBC 2016 for the alleged default on the part of the Corporate Debtor having an outstanding balance of Rs. 77,99,040.17/- towards the supply of Micromax brand products to the corporate debtor. The details of transactions leading to the filing of this petition as averred by the applicant are as follows:-
 - a. The Operational creditor entered into a Micromax Smartphone Distributor Agreement dated 13.12.2013 with the corporate debtor towards the supply of Micromax brand products.
 - b. Pursuant to the execution of the said agreement, the corporate debtor used to place orders upon the operational creditor for supply of products and was supplying the products to Corporate Debtor on regular basis. Further in view to the same, the



operational creditor was maintaining a running account of the transactions undertaken with the corporate debtor.

- c. It is submitted that in terms of the agreement, the operational creditor supplied products and raised Invoices on the corporate debtor from time to time.
- d. Further the corporate debtor issued 1 cheque bearing no. 475403 dated 14.07.2017 for a sum of Rs. 77,99,040 drawn on State Bank of India in favor of the operational creditor. Further the said cheque was dishonored on its presentation vide Returning memo dated 24.10.2017.
- e. It is further submitted that the operational creditor issued statutory notice dated 20.11.2017 under the provisions of Negotiable Instruments Act, 1881 and despite service of the said notice no response has been given within the statutory period by the corporate debtor. Furthermore, the operational creditor filed a complaint under section 138 read with sec 142 of Negotiable Instruments Act, 1881 against the corporate debtor and the same is pending before the Ld. MM, Tis Hazari District Court, New Delhi.
- f. The applicant sent demand notice under Section 8 of the code on 20.07.2018 calling upon the corporate debtor to pay the total amount of Rs. 77,99,040.17/- to which the corporate debtor had

not replied too. The Copy of demand notice along with postal receipts and the tracking reports has been annexed.

2. The Corporate Debtor in its reply to the application submits that:

a. It is submitted by the corporate debtor in respect to 1 cheque issued bearing no. 475403 dated 14.07.2017 for a sum of Rs. 77,99,040/- is totally false and was given at the time of signing the agreement in 2013, which was blank cheque. Further it is stated that in 2013, the State Bank of India was having branch at SCB Branch, Dak Bunglow, Patna which is apparent from the copy of the cheque filed on record. Furthermore, the said branch was shifted in 2017 and is now operating from Alankar Place Branch, Boring Road, Patna.

It is stated that the conduct shows that the operational creditor has misused the cheque which was given in the year 2013. It is further submitted that the corporate debtor has never been served with any proceedings if pending before Ld. Tis Hazari Courts, Delhi as no legal notice was ever received or served upon corporate debtor by the operational creditor.

b. It is stated that after orally terminating the terms and conditions of the agreement dated 13.12.2013, discussion took place with representative of the petitioner company about the mediation as to how the stock shall be cleared by the operational creditor. Further it was assured in each meeting

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that stock shall be cleared and taken back by the operational creditor and the corporate debtor vide email dated 25.04.2017 reiterated that the stock shall be cleared and taken back by the operational creditor.

c. Further the corporate debtor sent an email dated 20.06.2017 intimating the operational creditor about the sales of the preceding day and further it is stated that the difference between the sale price is 5.73 lakhs and the corporate debtor requested the operational creditor to take back the rest of the stock.

d. Further on 21.06.2017, the corporate debtor sent an email and stated that the material was sold in loss and a loss of Rs. 5.93 lakhs and Rs. 1.93 lakhs were incurred respectively.

e. Furthermore, again on 28.07.2018 the corporate debtor sent an email to operational creditor requesting the operational creditor to take back the un-sold lying stock and to settle all the claim of the respondent and further stated that the corporate debtor suffered losses due to frequent changes in the policy of the operational creditor and the stock as promised in the email dated 05.07.2017 sent by the operational creditor.

3. In this regard, the applicant has denied the allegations made in the reply of the corporate debtor and further submitted in rejoinder and written submissions that:

- a. In terms of the clause 4.2 of the agreement, the product sold to the Distributor shall not be returned to the operational creditor during the continuation of the agreement or any time thereafter/termination of the agreement.
- b. That the email dated 05.07.2017 has been denied by the operational creditor. Further the corporate debtor has not filed any certificate under section 65B of the Indian Evidence Act, 1872 and all documents filed by the corporate debtor are forged and fabricated electronic record. Even otherwise the said email would not construe a dispute within meaning of the Code for the following reasons:

1. the relationship between the operational creditor and corporate debtor is governed by the Agreement which can only be modified by written instrument signed by 2 authorized representatives;
2. the agreement clearly states that the time is the essence of payment and products once sold shall not be returned;
3. the corporate debtor under clause 5.4.2 is prohibited to seek any adjustments, set off of any amounts nor Counter Claims;
4. the products once purchased have to be paid and if the corporate debtor has any claims or has a



purported issue of not taking return of products which is in the teeth of the agreement, the same would not constitute a dispute and the corporate debtor could have agitated independent remedies against it.

5. The corporate debtor has till date not issued any Dispute Notice or Arbitration Notice under the agreement;
 6. Even the mail dated 05.07.2017 does not absolve the liability under the 18 Invoices and merely states that the attempt to liquidate the material would be made and if such attempt is not made, the same would not be a dispute as the same would not attend, modify or alter the terms of the agreement.
4. The corporate debtor has filed the written submissions and stated the following:
- a. That it is evident from the petition that a sum of Rs. 20,41,800.42 is due and payable by the operational creditor to the corporate debtor. Thus, the operational creditor has misused the cheque which was given as security and is further evident from the fact that the statement of account as maintained by the operational creditor is not correct and the corporate debtor has raised the triable issue.

b. It is submitted that the corporate debtor in the counter affidavit shows that as on 18.01.2018, a sum of Rs. 4,90,92.85 is due and payable by the operational creditor to the corporate debtor and the said account statement was sent by operational creditor to the corporate debtor.

5. Heard the parties and perused the case records.

6. The case of the respondent is that the contract was terminated orally by the applicant and the said materials were to be collected by the applicant. However, admittedly, there is nothing on record to show that the contract was terminated between the parties.

7. The materials were supplied by the applicant in terms of the agreement and as per the agreement the materials were not returnable to the applicant and in case of any defects the respondent had to inform the applicant within 3 days from the date of delivery. The respondent has not placed any documents to show that any dispute was ever raised by it regarding quality or quantity of materials supplied.

8. The respondent has not denied receiving of goods from the applicant and there is nothing on record to show that the agreement was terminated between the parties.

9. The claim of applicant is arising out of the provisions of goods and services, hence, is an operational debt and there is no pre-existing dispute between the parties.

10. Considering the documents on records and submissions made, it is clearly established that the default in payment of the operational debt has occurred by the corporate debtor. Though the corporate debtor has raised dispute regarding termination of agreement but has not placed on record any document which proves the claim was disputed even after. There is no merit in the so-called dispute raised by the corporate debtor as mere reply filed by the corporate debtor to the present application, is unable to establish any pre-existing dispute of genuine nature.

11. This leaves no doubt that the default has occurred for the payment of the operational debt to the applicant and the so called dispute raised by the corporate debtor is merely a moonshine dispute as laid down in "**Mobilox Innovative Private Limited vs. Kirusa Software Private Limited**", the Hon'ble Supreme Court observed:

"It is clear, therefore that once the Operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility . It is clear that such notice must bring to the notice of operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which required 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 defence which is mere bluster."

12. Therefore, in the given facts and circumstances, it can be concluded that the applicant has established its claim which is due and payable by the corporate debtor. The present application is admitted.
13. The applicant has not proposed the name of an IRP, therefore, this bench appoints Mr., Kamall Ahuja, as the Insolvency Resolution Professional of the corporate debtor. The registration number of the IRP being IBBI/IPA-002/IP-N01025/2020-2021/13389 and email id.nclt.srassociate@lawmax.in. IRP above named is appointed subject to the condition that no disciplinary proceedings are pending against him. The specific consent is required to be filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 and made disclosures as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016.
14. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Kamall Ahuja to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful



shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

15. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.

16. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.



SUMITA PURKAYSATHA
MEMBER (T)



DR. DEEPTI MUKESH
MEMBER (J)