



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH (Court-II)  
KOLKATA**

**CP.(IB)/190(KB)2020**

*In the matter of*

The Insolvency and Bankruptcy Code, 2016

*In the matter of:*

M/s. Micromax Informatics Limited

....Operational Creditor

-Versus-

Vibrant Infocom Private Limited

.... Corporate Debtor

**Date of hearing: 22/02/2023**

**Order Pronounced on : 13/06/2023**

**Coram:**

***Smt. Bidisha Banerjee, Member (Judicial)***

***Shri Balraj Joshi, Member (Technical)***

**Appearances (via video conferencing / Physical)**

Mr. Shaunak Mitra, Adv. : For Operational Creditor  
Mr. Abhishek Sikdar, Adv.  
Ms. Sahili Dey, Adv.

Mr. Krishnaraj Thakar, Adv. : For Corporate Debtor  
Mr. Anupam Das Adhikari, Adv.  
Mr. Neil Basu, Adv.  
Mr. S. Biswas, Adv.  
Mr. Abhrajit Roychowdhury, Adv.



## **ORDER**

***Per: Bidisha Banerjee, Member (Judicial)***

1. The Court convened through hybrid mode.
2. The present Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'Code') read with Rule 6 (Application to Adjudicating Authority) of the Insolvency and Bankruptcy Rules, 2016, has been filed by Micromax Informatics Limited (hereinafter referred to as 'Operational Creditor') for initiation of Corporate Insolvency Resolution Process against Vibrant Infocom Private Limited (hereinafter referred to as 'Corporate Debtor') for default in payment of one alleged outstanding debt of Rs. 2,35,33,792.41 (Rupees Two Crore Thirty Five Lakhs Thirty Three Thousand Seven Hundred Ninety Two and Forty One Paisa Only) towards the supply of MICROMAX brand products ("Products") to the Corporate Debtor by the Operational Creditor.
3. The Facts narrated by the Operational Creditor are as under:
  - i. The Corporate Debtor was appointed as the Distributor of the Operational Creditor and as per the Business Transaction. The Corporate Debtor used to place orders upon the Operational Creditor for supply of products and the Operational Creditor was supplying the products to the Corporate Debtor on regular basis.
  - ii. The Operational Creditor supplied products to the Corporate Debtor and raised Invoices on the Corporate Debtor from time to time.
  - iii. The Operational Creditor was maintaining a running account of the transactions undertaken with the Corporate Debtor. The Corporate Debtor despite admitting the receipt of products and amounts due and payable, failed to make the payment of the invoices on their respective due dates.
  - iv. The Operational Creditor time and again intimated the Corporate Debtor about the delayed payments and requested the Corporate Debtor to release the outstanding payment.



- v. After much persuasion and follow up by Operational Creditor, the Corporate Debtor, in discharge of the admitted legal debt towards the aforesaid total outstanding amount had agreed to pay outstanding amount to the Operational Creditor.
- vi. Accordingly, the Corporate Debtor issued four cheques bearing no. 004859, 004860, 004861 and 004862 all dated 15.07.2016 for a sum of Rs. 50,00,000/- each, drawn on SBL, 34 Tollygunge Circular Road, Kolkata, West Bengal in favour of Operational Creditor towards part payment of the outstanding debts/dues of the Operational Creditor.
- vii. The said cheques were dishonoured on its presentation vide Returning Memos all dated 25.08.2016 with the remark "Account Closed"
- viii. The Operational Creditor also issued four separate Statutory Notices all dated 19.09.2016 under the provisions of Negotiable Instruments Act, 1881 and despite service of said Notices no response was given by He Corporate Debtor.
- ix. The Operational Creditor also filed four separate Complaints under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 against the Corporate Debtor, which are pending adjudication before the Ld. MM, Tis Hazari Court, New Delhi.
- x. That the total amount of debt due from the Corporate Debtor is Rs. 2,35,33,792.41 (Rupees Two Crore Thirty Five Lakhs Thirty Three Thousand Seven Hundred Ninety Two and Forty One Paise Only).
- xi. The Operational Creditor has also taken an indemnity Insurance policy to cover itself against any default on account of its Distributors for the products supplied to them from time to time. In this matter also, the Operational Creditor has taken an Insurance Policy bearing number 66192770 effective from 6th May, 2015 to 5th May, 2016 from M/s Iffco Tokyo General Insurance Company Limited.



- xii. Since, the due invoices were pertaining to the period 2015-16, the Operational Creditor has filed its claim with the Insurance Company vide notification dated 26.04.2016 and the Insurance Company after due Consideration of the claim of Operational Creditor and as per the terms of the said Insurance policy, has paid an amount of Rs. 1,89,68,786/- on 29.12.2017 i.e. 80% of the total amount due to be received from the Operational Debtor.
  - xiii. That as per clause 6.7.3.4 of the said Insurance Policy, the Operational Creditor (referred to "Insured" in the Insurance Policy) is under obligation to first reimburse to Insurance Company any amount recovered from the Corporate Debtor up to the extent of amount indemnified by the Insurance Company i.e. Rs. 1,89,68,786/- in the present matter.
  - xiv. That the Operational Creditor has tried all means to communicate with the Corporate Debtor to get the admitted outstanding dues cleared but to no effect.
  - xv. The Operational Creditor issued a Statutory Demand Notice dated 08.07.2019 under Section 8 of the Code read with Rule 5 (Demand Notice by operational creditor) of the Insolvency and Bankruptcy Rules, 2016, calling upon the Corporate Debtor to unconditionally repay the unpaid operational debt (in default) in full. within ten days from the receipt of the Notice. Hence this application.
  - xvi. The Corporate Debtor has failed to pay the admitted outstanding amount to the Operational Creditor despite service of the Statutory Notice and has not sent any reply the statutory notice.
4. Per contra the respondents/Corporate Debtor has averred as under:
- i. Vibrant Infocom Private Limited the CD is a company registered under the Companies Act, 1956. It is into the business of distributorship.
  - ii. Owing to its fair and ethical trade practices, has a fair amount of goodwill in the market. The representatives of the Operational Creditor approached the Corporate Debtor with a proposal to introduce the Operational Creditor and its products to the



State of West Bengal in 2008. The Corporate Debtor was enticed with tremendously lucrative income schemes.

- iii. In 2009 the venture of the Operational Creditor came to fruition when the Operational Creditor was able to convince the Corporate Debtor to enter into a "Micromax Product Distributor Agreement" with the Operational Creditor, whereby the Corporate Debtor will act as a Super Distributor and shall appoint Micro Distributors in various part of Kolkata and West Bengal. The Distributor Agreement was however unregistered and renewed between the parties from time to time.
- iv. The Corporate Debtor was made to believe that since the Corporate Debtor was amongst the first distributor joining the ranks of the Operational Creditor, the Corporate Debtor was given "Super Distributorship" of Micromax Products and parts/accessories for Kolkata and some other parts of West Bengal.
- v. The Corporate Debtor in terms of the agreement, against a Bank Guarantee of Rs.5 crores was enjoying a working credit limit for purchase of Micromax Products being phones and accessories. The Corporate Debtor in turn was to extend credit facilities to its Micro Distributors who would take products for retail sale.
- vi. The Operational Creditor time and again rewarded Corporate Debtor with various awards like "Best Distribution Pan India", "Certificate of Acknowledgement" in participating in company growth and "Best WOD Award" Width of Distribution (Coverage).
- vii. On rendering tremendous services to the operational creditor, the Corporate Debtor qualified for all foreign trip targets and schemes and the founders of the Operational Creditor, being satisfied with the Corporate Debtors' brilliant performance and business practices, accompanied the Corporate Debtor in all such foreign trips to dream destinations like Amsterdam, Las Vegas, Singapore amongst others.



- viii. On January 16, 2013, the Operational Creditor on very specific terms informed the Corporate Debtor that the Operational Creditor had not received the then new CTS 2010 cheques 05 blank leafs. The Operational Creditor, Area Sales Manager, Mr. Surjadip Ghosh vide email even confirmed that it had the old cheques and that the new ones were required on the very same day i.e. January 16, 2013.
- ix. Upon receiving the correspondence demanding the cheques, the Corporate Debtor under cover of letter dated January 16, 2013 issued and forwarded to the Operational Creditor 5 blank, undated cheques bearing number 004859, 004860, 004861, 004862 and 004863 with specific intimation that the cheques were strictly for security purposes. The Corporate Debtor in no uncertain terms also made it clear that the cheques could only be deposited for encashment with the prior written consent from the Corporate Debtor but not before reconciliation of accounts between the Corporate Debtor and the Operational Creditor. The letter dated January 16, 2013 (Annexure-C) was specific and unambiguous and the cheques were received by the representative of the Operational Creditor without any objection or demur.
- x. Till about 2016 the Operational Creditor and the Corporate Debtor did regular business.
- xi. One of the Directors of the Operational Creditor, namely Rajesh Agarwal, was arrested by the CBI in a bribery/Prevention of Corruption Act matter and lost face in the market. As direct repercussion of the arrest, the public issue of equity planned by the Operational Creditor was held back and remained unapproved by requisite authorities.
- xii. Due to the internal feud amongst its top management, the Operational Creditor lost track of the market situations and its 3G products had become outdated. By this time new and better 4G products and services were already launched as a result of which the Corporate Debtor along with other distributors pan India faced a crises of stocks which (a) were not upto the market standards, (b) over priced and (c) obsolete. The corporate debtor in particular already had with him unsold stocks amounting to Rs.11 crores approximately along with its Micro Distributors.



xiii. On August 31, 2015 at around 10:00 PM at night the Corporate Debtor along with several other distributors of the products of the Operational Creditor were directed to present themselves in the Crescent Tower, Minto Park Office of the Operational Creditor immediately. At around 10:30 PM that day without any prior intimation whatsoever in any form, old and obsolete stocks worth around Rs.9.24 crores were billed to the Corporate Debtor which was done forcibly and without the consent of the corporate debtor and without actual delivery in addition to being already saddled with earlier obsolete stocks worth around Rs. 11 Crores. Thus, mails (Annexure D) were addressed to the Managing Director of the Operational Creditor by the Corporate Debtor along with other distributors, inter alia, requesting that the old outdated stocks which were already with them be taken back and exchanged for fresh stocks.

5. The discernible facts:

- i. The averments demonstrate and establish a jural relationship between the applicant/OC & respondent CD.
- ii. The undated cheques issued by CD numbered 004859-63 in question were issued in 2013.
- iii. The last invoice raised by Operational Creditor was in January, 2016.
- iv. The cheques were placed on 15.07.2016 and dishonoured on 25.08.2016 for the reason "Account Closed" therefore default, if any, has occurred in August, 2016.
- v. The Section 8 notice was issued on 8.07.2019 i.e. after almost 3 years of raising invoice.
- vi. This application has been filed in September 2019, beyond three years from the default.
- vii. There is nothing on record to show any acknowledgement in writing between January, 2016 to September, 2019 that would give a fresh lease of life to the claim and cure the delay.

Hence, the petition is barred by limitation and hence ought to be rejected.



6. However, the Ld. Counsel appearing on behalf of the Operational creditor would rely upon the decision;

***Sabarmati Gas Limited Versus Shah Alloys Limited [2023 SCC Online SC 7]***

to contend that delay in preferring a Section 9 application under IBC is condonable.

The extract from the decision would be as under;

*“The decision in B.K. Educational Services Private Limited (supra) would thus reveal that Articles 137 and 5 of the Limitation Act, 1963 are applicable to applications filed under Sections 7 and 9 of IBC. It be right to apply accrues but the delay is condonable on sufficient grounds.”*

To understand whether Section 5 application would be permissible in all situations, Paragraphs 24 & 25 of the judgment is extracted hereunder for clarity:

*24. Obviously, Section 238A, IBC makes the provisions of the Limitation Act, 1963 applicable to computation of the period of limitation in regard to proceedings before the Adjudicating Authority and the other forums. This position is made explicitly clear in the decision of this Court in B.K. Educational Services Private Limited v. Parag Gupta and Associates at paragraphs 43 and 48 and they read thus:--*

*“43. It will be seen from a reading of Section 8(2)(a) that the corporate debtor shall, within a period of 10 days of the receipt of the demand notice, bring to the notice of the operational creditor the existence of a “dispute”. We have seen that “dispute” as defined in Section 5(6) includes a suit or arbitration proceeding relating to certain matters. Again, under Section 8(2)(a), the corporate debtor may, in the alternative, disclose the pendency of a suit arbitration proceedings filed before the receipt of the demand notice. It is clear therefore, that at least in the case of an operational creditor, “default” must be non-payment of amounts that have become due and payable in law. The “dispute” or pendency of a suit or arbitration proceedings would necessarily bring in the Limitation Act, for if a suit or arbitration proceeding is time-barred, it would be liable to be dismissed. This again is an important pointer to the fact that when the expression “due” and “due and payable” occur in Sections 3(11) and 3(12) of the Code, they refer to a “default” which is non-payment of a debt that is due in law i.e. that such debt is not barred by the law of limitation. It is well settled that where the same word occurs in a similar context, the draftsman of the statute intends that the word bears the same meaning throughout the statute (see Bhogilal Chunilal Pandya v. State of Bombay 1959 Supp (1) SCR 310, AIR 1959 SC 356, 1959 Cri LJ 389, Supp SCR at pp. 313-14). It is thus clear that the expression “default” bears the same meaning in Sections 7 and 8 of the Code, making it clear that the corporate insolvency resolution process against a corporate debtor can only be initiated either by a financial or operational creditor in relation to debts which have not become time-barred.*

*48. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. “The right to sue”, therefore accrues when a default*



occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.”

*25. “The decision in B.K. Educational Services Private Limited (supra) would thus reveal that Articles 137 and 5 of the Limitation Act, 1963 are applicable to applications filed under Sections 7 and 9 of IBC. It be right to apply accrues but the delay is condonable on sufficient grounds.”*

7. A plain reading of the aforesaid extract would exemplify and demonstrate that the decision propounds that a Section 5 application seeking condonation of delay is entertainable for “sufficient cause” and “sufficient cause” is a cause for which “ a party cannot be blamed” for which extension of the period when the party was statutorily prevented from initiating action against the company in default was sought for, and not otherwise.
8. In the aforesaid backdrop and in absence of any factor giving rise of any “sufficient ground” that statutorily prevented the party from initiating action against the company in default, this Tribunal holds that the instant petition under Section 9 of IBC is a belated one and as such not entertainable and thus rejects it.
9. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**Balraj Joshi**  
**Member (Technical)**

**Bidisha Banerjee**  
**Member (Judicial)**

Order signed on 13<sup>th</sup> of June, 2023.



*zia*