

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

IB-517/(ND)/2021

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

M/s. Ingram Micro India Private Limited

Registered Office at: 5th Floor, Empire Plaza,
Building A, LBS Marg, Vikhroli West,
Mumbai - 400083

...Applicant/Operational Creditor

Versus

M/s. Fbonline Trading Private Limited

Registered Office at: Vardhaman Orchid Plaza,
Plot No. 4, 2nd Floor, West Enclave, Pitampura,
New Delhi 110034

...Respondent/Corporate Debtor

Coram:

SHRI. P.S.N. PRASAD, Hon'ble Member (Judicial)

SHRI. RAHUL BHATNAGAR, Hon'ble Member (Technical)

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Counsel for Applicant : Ms. Sonali Joon
Counsel for Respondent : Mr. Dhan Mohan

ORDER

Per: RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Date: 27.07.2022

1. This is an application filed by the Applicant M/s. Ingram Micro India Private Limited, seeking to initiate corporate insolvency resolution process ("CIRP") under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code") of the Respondent M/s. Fbonline Trading Private Limited for the alleged default on the part of the Respondent in clearing the debt of Rs. 1,21,35,589.75/- (Rupees One Crore Twenty One Lakh Thirty Five Thousand Five Hundred Eighty Nine and Paisa Seventy Five Only), including interest (Rs. 42,73,463.75) at the rate of 24% calculated annually till 19.07.2021 as alleged by the Applicant. The details of transactions leading to the filing of this application as averred by the Applicant/Operational Creditor are as follows:

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- i. That the Operational Creditor herein i.e., Ingram Micro India Private Limited is a Company duly incorporated under Companies Act, 1956, and is engaged in the business of distribution, marketing and sale of Information Technology Products.
- ii. That the Corporate Debtor herein i.e, Fbonline Trading Private Limited is a Company duly incorporated under Companies Act, 1956 vide CIN No. U51300DL2012PTC229949 and is engaged in the business of providing wholesale services of household goods including electronic items.
- iii. That based upon the reputation of the Operational Creditor, the Corporate Debtor approached the Operational Creditor in order to purchase Information Technology Products distributed, marketed and sold by the Operational Creditor for the day to day business activities of the Corporate Debtor and since January 2016, the Operational Creditor and the Corporate Debtor are engaged in business transactions as the Operational Creditor is providing

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goods to the Corporate Debtor in terms of purchase orders placed by them.

- iv. That during the course of the business with the Corporate Debtor, the Operational Creditor maintained a running current account with the Corporate Debtor and in this regard had issued various invoices.
- v. That an amount of Rs.78,62,126.00/- (Rupees Three Crore Thirty-Six Lakh Thirty-Two Thousand Three Hundred Eighty-Seven and Paisa Seventy) was pending towards the invoices raised by the Operational Creditor.
- vi. That as per the policy of Operational Creditor even though there was no provision of credit facility but at the request of the Corporate Debtor, credit facility of 90 days from the date of invoice was extended by the Operational Creditor to the Corporate Debtor.
- vii. That the Corporate Debtor had failed to pay the balance payment aggregating to Rs. 78,62,126.00/- (Rupees Seventy Eight Lacs Sixty Two Thousand One

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Hundred and Twenty Six) against the pending invoices.

viii. That the goods/products supplied by the Operational Creditor to the Corporate Debtor in terms of their purchase orders were of superior quality and no allegations ever raised by the accused pertaining to the quality and quantity of the products and accepted without any demur. That the Operational Creditor has been relentlessly following up with Corporate Debtor in order to recover balance payment/Operational Debt. The Corporate Debtor never raised any dispute against the Operational Debt due towards the Operational Creditor and always accepted the Operational Debt due upon him.

ix. That the confirmation and acknowledgement of the outstanding amount/Operational Debt, due upon the Corporate Debtor towards the Operational Creditor was clear and evident from the email trail dated 29th June 2019 to 5th December 2019, shared between the Operational Creditor and the Corporate Debtor.

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- x. That it was only after much persuasion from the Operational Creditor, the Corporate Debtor issued a cheque dated 21st July 2020 drawn on Kotak Mahindra Bank, 154 Lok Vihar, Pitampura, Delhi-110034 for an amount of Rs. 78,62,126.00/- (Rupees Seventy Eight Lacs Sixty Two Thousand One Hundred and Twenty Six Only) towards the disbursal of outstanding liability, which was presented by the Operational Creditor for encashment with their banker, HDFC Bank, Vikhroli Branch Mumbai. The above referred cheque on presentation before the bank was dishonoured and was returned unpaid vide return memo dated 24th July 2020, which was received by the Operational Creditor on 29th March 2020, with comments "Payment Stopped By Drawer".
- xi. That after receiving the of memo of dishonour, the Operational Creditor issued legal notices under section 138 of Negotiable Instruments Act, 1881, dated 24th August 2020 to the Corporate Debtor and its Directors on the addresses available with the Complainant, wherein the fact of dishonour / return

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of the cheque was intimated and the payment of the said cheque was demanded as per the provisions of the Negotiable instruments Act, 1881.

xii. That even after the legal notice under Section 138 of the Negotiable Instruments Act, 1881 dated 24th August 2020, was served upon the Corporate Debtor, the Corporate Debtor did not make payment towards the pending amount.

xiii. That even after repeated follow up by the Operational Creditor, the Corporate Debtor failed to comply with his obligations to pay the Operational Debt due upon him towards the Operational Creditor. Moreover, the Operational Creditor was left with no other choice but to initiate criminal proceeding against the Corporate Debtor under Section 138 of Negotiable Instruments Act, 1881 before the District Court. That the Operational Creditor initiated criminal proceedings against the Corporate Debtor vide complaint no. SS/815/2020 filed before Ld. Metropolitan Magistrate no. 5 , Vikhroli, Mumbai. That the case was first listed on 15th October 2020

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and summon were issued against the Corporate Debtor.

xiv. That the Operational Creditor requested several times to the Corporate Debtor to make the balance payment along with interest of unpaid pending amount/operational debt but when no response was received from the Corporate Debtor, the Operational Creditor was left with no other option except to send a demand notice under section 8 of Insolvency and Bankruptcy Code, 2016. A demand notice was sent by the Advocate of Operational Creditor to the Corporate Debtor dated 30th July 2021 under Section 5(1) (a) of Insolvency and Bankruptcy (Application to Adjudicating Authority), Rule 2016 at the registered Office of the Corporate Debtor and vide email dated 31st July 2021 to the registered email address of the Corporate Debtor available on the website of Ministry of Corporate Affairs demanding payment of unpaid operational debt amounting to Rs. 1,21,35,589.75/- (Rupees One Crore Twenty-One Lacs Thirty Five Thousand Five Hundred Eighty Nine and Paise

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Seventy Five) which includes the principal amount of Rs. 78,62,126.00/- (Rupees Seventy Eight Lacs Sixty-Two Thousand One Hundred Twenty-Six) and interest (inclusive of GST) of Rs. 42,73,463.75/- (Rupees Forty-Two Lacs Seventy-Three Thousand Four Hundred Sixty-Three & Paisa Seventy- Five) calculated @ 24% per annum from the date on which the principal amount became due till 19th July 2021.

xv. That the last payment of Rs.1,95,000/- (Rupees One Lacs Ninety Five Thousand) was received by the Operational Creditor from the Corporate Debtor on 06th March 2020. That the last seven invoices with Invoice no 63ID1901076591 dated 29th June 2019, Invoice No. 61ID1901035759 dated 29th June 2019, Invoice No. 58ID1900956345 dated 29th June 2019, Invoice No.661D1901183511 dated 06th July 2019, Invoice No. 31ID1900508833 dated 06th July 2019, Invoice No. 661D1901183897 dated 10th July 2019, Invoice No.53DD1902689728 dated 12th July 2019, are still outstanding and have remained partly unpaid till date.

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- xvi. That therefore, an Operational Debt of Rs. 1,21,35,589.75/- (Rupees One Crore Twenty-One Lacs Thirty-Five Thousand Five Hundred Eighty-Nine and Paise Seventy-Five), which includes the principal amount of Rs. 78,62,126.00/- (Rupees Seventy Eight Lacs Sixty-Two Thousand One Hundred Twenty-Six) and interest (inclusive of GST) of Rs. 42,73,463.75/- (Rupees Forty-Two Lacs Seventy-Three Thousand Four Hundred Sixty-Three & Paise Seventy- Five) calculated @ 24% per annum is due.
- xvii. That Corporate Debtor received the demand notice on 31st July 2021. The Corporate Debtor has neither paid the Operational Debt to the Applicant/ Operational Creditor nor has brought to the notice of the Operational Creditor the existence of any dispute on the record of pendency of any suit or arbitration proceedings filed before the receipt of the Applicants notice.
- xviii. That the Amount has become due by virtue of the bills/invoices raised by the Applicant on the Corporate Debtor for the services provided by the



Applicant/Operational Creditor to the Corporate Debtor and acknowledgement of such payable amount is full and final by the Corporate Debtor by accepting bills/invoices and not raising any dispute regarding it and the Applicant is an Operational Creditor under the code.

2. Consequent to the notice issued by this Tribunal, the Respondent filed its reply in which the following contentions are made:

i. That the petitioner has filed the present petition under Section 9 of I.B. Code, 2016 against the Corporate Debtor for principal amount of Rs.78,62,126.00 (Rupees seventy eight lac sixty two thousand one hundred twenty six) and interest inclusive of GST of Rs.42,73,463.75 (Rupees forty two lac seventy three thousand four hundred sixty three and seventy five paise) which is much below the threshold limit stipulated in the GoI notification for the jurisdiction of this Tribunal and the present petition is barred under the provisions of Section 4 of IB Code, 2016 and therefore, liable to be dismissed.

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- ii. That not a single document or agreement or any undertaking on behalf of corporate debtor has been filed for any interest as alleged in the said claim @ 24% p.a.
- iii. That the Corporate Debtor is a very reputed company in the market/field of the business community and not a single penny is/was due of any company till date even to the petitioner also.
- iv. That the present petition has been filed by the petitioner completely on misleading of facts, submission and documents, forged and fabricated documents manipulated/created by the petitioner only for the purpose to get a false order from this Tribunal to pressurize the Corporate Debtor and extract huge amount without any basis.
- v. That Section 4 of IB Code, 2016 provides jurisdiction of this Tribunal, to entertain an application the minimum amount due must be Rs. 1 crore and in the present case the alleged amount of debt is Rs.78,62,126.00 (Rupees seventy eight lac sixty two thousand one hundred twenty six only) therefore, the



present petition is below Rs 1 Crore and hence liable to be dismissed without any delay.

3. We have heard the Ld. Counsels for the both the parties and perused the averments made in the application as well as the documents enclosed with the application.
4. The present application has been filed by the Operational Creditor for initiating CIRP against the Corporate Debtor for a debt of Rs. 1,21,35,589.75/- (One crore Twenty-one Lakh Thirty-Five Thousand Five Hundred and Eighty-Nine and Seventy-Five Paisa) including interest of Rs 42,73,463.75/- (Forty-Two Lakh Seventy-Three Thousand Four Hundred and Sixty-Three and Seventy-Five Paisa) at 24% p.a. Since the principal outstanding amount i.e. Rs. 78,62,126.00/- (Rupees Seventy Eight Lacs Sixty-Two Thousand One Hundred Twenty-Six) claimed by the Operational Creditor is less than Rs. 1 Crore, the question before this Bench is whether the Principal and Interest amounts can be clubbed together to arrive at minimum threshold of Rs. 1 Crore as stipulated under Section 4 of IBC, 2016. To adjudicate this issue, this



bench has looked into various provisions of the IBC Code,2016.

5. The term “operational debt” is defined under 5(21) of the IBC, 2016 as-

“(21) **“operational debt”** means a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”

The definition of “operational debt” as defined under section 5(21) of the code does not specifically provide for inclusion of interest as operational debt.

Further, “Financial Debt” is defined under Section 5(8) of IBC, 2016 as-

“(8)“financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes -

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6. From the above discussion, it is clear that the “interest” can be claimed as the Financial Debt, but neither there is any provision nor there is any scope to include the interest to constitute as the Operational Debt or part of it.
7. A similar finding was given by the NCLT Chandigarh Bench in the matter of *M/s. Wanbury Ltd. Vs. M/s. Panacea Biotech Ltd. in CP No. 8/2016* dated 18.04.2017.

The relevant extracts are given below :

“15. I am, however, of the view that the issue here is to be determined, in view of the provisions of the ‘Code’ which has come into force w.e.f. 01.12.2016. Learned Counsel for parties have not disputed that the term ‘debt’ or operational creditor were not defined in the 1956, Act. This term is now defined in section 3(11) of the ‘Code’ as meaning ‘a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt’. We are presently concerned with the definition of term “operational debt” as defined



in section 5(21) of the Code. Section 5(20) defines “operational creditor” as meaning a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. Section 5(21) of the Code says that “operational debt” means a claim in respect of the provision of goods and services including employment or a debt in respect of the repayment of the dues arising under any law for the time being in force and payable to the Central Government or State Government or any local authority.

16. There is a marked difference between the definition of the term ‘financial debt’ and the ‘operational debt’. Under Section 5(8) the term ‘financial debt’ means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and that is an inclusive definition. In the definition of the term ‘operational debt’ under section 5(21) the word ‘interest’ has not been mentioned...”

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8. Further, as observed in the landmark judgement by NCLAT in *Krishna Enterprises Vs Gammon India Ltd Company Appeal (AT) (Insolvency) No. 144 of 2018*:

“4. It is submitted that the ‘debt’ includes the interest, but such submission cannot be accepted in deciding all claims. If in terms of any agreement interest is payable to the Operational or Financial Creditor then debt will include interest, otherwise, the principle amount is to be treated as the debt which is the liability in respect of the claim which can be made from the Corporate Debtor.”

In the present case, neither the invoices had any provision for payment of interest on delayed payments nor there was any specific agreement for payment of interest on delayed payments.

9. In the light of the above discussion, we are of the considered view that the Interest amount cannot be clubbed with the Principal amount of debt to arrive at the minimum threshold of Rs.1 Crore for complying with the provision of Section 4 of IBC, 2016. The actual debt in

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the present matter is Rs. 78,62,126.00/- (Rupees Seventy Eight Lacs Sixty-Two Thousand One Hundred Twenty-Six) which is below the threshold limit of Rs. 1 Crore of debt.

10. In the view of above, we conclude that the present application is not maintainable under section 4 of IB Code, 2016.
11. Accordingly, we hereby **dismiss** the present application filed under Section 9 of the IB Code, 2016.
12. A copy of this order may be served on the parties free of cost.

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(SH. RAHUL BHATNAGAR)

MEMBER (TECHNICAL)

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