

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

C.P.(IB)-198(MB)/2018

Under section 9 of the IBC, 2016

In the matter of

Tulip Chemicals Pvt. Ltd.

.... Petitioner/

Operational Creditor

v/s.

Sonal Plasrub Industries Pvt. Ltd.

.... Respondent/

Corporate Debtor

Order delivered on 16.11.2018

Coram: Hon'ble Shri. M.K. Shrawat, Member (Judicial)

For the Petitioner : 1. Mr. Gautam Bhandari - Practicing Company Secretary
2. Mr. Rishikesh Vyas – Practicing Company Secretary

For the Respondent: 1. Mr. M.H. Syed, Adv.

Per M.K. Shrawat, Member (Judicial)

ORDER

It is a Company Petition filed u/s 9 of Insolvency & Bankruptcy Code, 2016 submitted on 09.01.2018 by the Petitioner/Operational Creditor viz. Tulip Chemicals Pvt. Ltd. against the Corporate Debtor viz. Sonal Plasrub Industries Pvt. Ltd. on the ground that the Corporate Debtor having defaulted in payment of ₹2,78,772 as on 04.10.2018, however, with interest claim amount stated to be ₹4,62,852, against supply of chemicals to the Corporate Debtor during November and December 2014, hence this Company Petition for initiation of Corporate Insolvency Resolution Process (CIRP) under Insolvency & Bankruptcy Code.

2. The brief history of the case is that the Petitioner is in the business of trading in chemicals and the Corporate Debtor is a manufacturer of medicinal chemicals and botanical products. Both have been into business relationship since 2012-13 and the Petitioner

was continuously supplying chemical items to the Corporate Debtor. The Petitioner says that the last supply was made to the Corporate Debtor on 02.12.2014 and the terms of payment in the invoice was to pay on completion of 30 days from the date of delivery of materials.

3. As no payment was forthcoming after the last delivery of material from the Corporate Debtor, the Petitioner requested the Corporate Debtor to make the payment due to the Petitioner, which was ₹5,69,485 including balance outstanding. Thereafter the Corporate Debtor made a payment of ₹1,70,713 on 06.01.2015 and also issued three post dated cheques of ₹1,70,713 each, which were dishonoured when deposited in bank on the relevant dates. The Petitioner further submits that the Corporate Debtor almost stopped responding to their calls and after making several efforts, the Corporate Debtor during 2015-17 again issued few cheques towards payment of outstanding. Out of them, two cheques again dishonoured. After considering all payments received till October 2016, a balance of ₹2,78,772 remained outstanding.

4. The Petitioner has made several attempts to get cleared the outstanding amount, however, only promises made by the Corporate Debtor and failed to settle the outstanding amount for over two years, which made the Petitioner to take recourse of the Insolvency and Bankruptcy Code, 2016.

5. Accordingly, the Petitioner issued demand notice on Form No. 3 u/s 8 of the IBC upon the Corporate Debtor dated 06.09.2017 demanding the outstanding payment of ₹2,78,772 along with interest @24% of ₹1,84,080 aggregating to ₹4,62,852 as on 05.09.2017.

6. Upon receipt of the demand notice, the Corporate Debtor replied through its Counsel by an e-mail on 22.09.2017 that the material supplied vide Inv. No. 73 was of poor quality, hence payment was not made. The Petitioner submits that till that point

of time there was no communication received from the Corporate Debtor in respect to quality of material supplied to them. The Petitioner further submits that their invoices contain a clause that in case of any dispute regarding quality of material supplied, a third party test by a reputed laboratory is required to be carried out. It was not done in the case of alleged poor quality material supplied vide Inv. No. 73 as also the Corporate Debtor issued post dated cheques to settle the entire outstanding payment, which proves the claim made by the Corporate Debtor is merely a decoy. To substantiate the same, the Petitioner also states that the Corporate Debtor through Mr. Rajan Dalvi vide an email dated 18.12.2014 had acknowledged the outstanding payable to the Petitioner herein, which includes the payment pending for the alleged supply. Therefore, the Petitioner contends that the Corporate Debtor is deliberately raising fake dispute to avoid Corporate Insolvency Resolution Process (CIRP).

7. The Petitioner submitted bank certificate and bank statement from 07.09.2017 to 04.11.2017 confirming that no payment received from the Corporate Debtor during the period. The Petitioner also proposed the name of Interim Resolution Professional and his consent letter has also filed along with the Petition.

8. The Corporate Debtor in its reply submits that the basic outstanding payment claimed by the Petitioner is true, however, it was not paid by the Corporate Debtor due to the goods supplied i.e. PHOSPHORUS TRIBROMIDE and BENZYL BROMIDE vide challan No. 0073 dated 08.11.2014 was inferior and substandard quality, which was intimated to the Petitioner through courier on 18.02.2015. The Corporate Debtor also attached the courier receipt, intimation letter in respect of rejection of goods, Chemist report, specification reports, certificate of analysis, etc. along with the reply. The Corporate Debtor also states that upon intimation about the rejection of material supplied, the Petitioner had assured them to replace the same but failed to do so till date. The said material stated to be still lying with the Corporate Debtor. It is pleaded that the Debtor

company had paid substantial amount of ₹15,59,967 in respect of the other supplies, barring the defective supply, which itself proves that the Debtor company had no bad intention to make the payment to the Petitioner. The Petitioner had wilfully concealed all such facts that there was 'dispute in existence' and filed the Petition under I&B Code. The Corporate Debtor further states that there was no term agreed by them to pay interest on delayed payment as also the Petitioner never sent any notice for the delayed payment for earlier bills. The Corporate Debtor also submitted that the PDCs were issued to the Petitioner expecting that the rejected goods will be replaced and when the Petitioner failed to do so, the said PDCs were 'stopped payment' by the Corporate Debtor. Stop payment of cheques itself proved the pre-existence of the dispute.

8.1 The Corporate Debtor has also made an interesting submission that his intention was to avoid the litigation, therefore, made a suggestion to the Petitioner to remove the said chemicals because it is very hazardous also difficult to keep as a stock, hence if removed by the Petitioner, the impugned amount of ₹2,78,772/- could be paid. The Petitioner has not removed the defective material from the premises of the Debtor company so far. If he is interested to recover the said small amount of ₹2,78,772 it is his duty to take back its defective material. Communication made in this regard are referred by Ld. Counsel for Corporate Debtor.

9. The Petitioner has relied upon few judgments in respect of the law laid down about the "dispute in existence" such as -

(i) ***M/s. Paharpur Cooling Towers Ltd. vs. M/s. Ankit Metal & Power Ltd.*** (Company Appeal (AT), (Insolvency) No. 204 of 2017 decided on 09.11.2017), the Hon'ble NCLAT held as under:

"5. From the impugned order we find that the Respondents brought to the notice of the Adjudicating Authority certain dispute which were also supported by email dated 13th May 2015 which were marked as Annexure 4."

(ii) ***M/s. VDS Plastics Pvt. Ltd. vs. M/s. Pal Mohan Electronics (P) Ltd.*** (Company Appeal (AT), (Insolvency) No. 58 of 2017 decided on 14.09.2017), the Hon'ble NCLAT held that the Corporate Debtor wrote a letter previously before notice issued denying the liability and because there were series of correspondence between the parties prior to issue of demand notice the Appellate Tribunal dismissed the appeal.

(iii) ***Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd.*** (Civil Appeal No. 9405/2017 order dated 21.09.2017) wherein the Hon'ble Supreme Court has elaborately discussed the definition of "dispute" and held that the dispute should have been raised before issuance of demand notice.

10. On the Company Petition filed by the Petitioner, the Corporate Debtor prayed for dismissal of the Company Petition with cost on the ground that the impugned claim falls under the caption of 'existence of dispute' as on the date of giving notice u/s 8 of the Code, which was concealed and false Petition was filed by the Petitioner.

11. On hearing the submissions of either side, the short point for consideration is whether under the facts and circumstances of the case there was an existence of dispute prior to the issuance of notice u/s 8 of IBC. In my considered opinion, the Corporate Debtor has placed on record sufficient material to establish that there was existence of communication informing rejection of defective chemical due to which payment in respect of that very invoice was stopped. The Debtor company had also demonstrated that the chemicals supplied through several other invoices being satisfactory, payments were made. Naturally a question arises that if substantial payment had already been cleared by the Debtor company then why the impugned small amount remained outstanding. The answer is obvious that there was dissatisfaction due to which the Debtor had informed the Petitioner to remove the defective chemicals. The case laws cited, although by the Petitioner, supports this view considering the evidence on record in this case. Considering all the facts and

circumstances narrated above, this Company Petition is liable to be dismissed as 'dispute was in existence'.

12. Before we part with this order, it is worth to express an opinion that the Insolvency Code came into operation with the intention that if a Corporate entity is under financial stress and unable to come out of the heavy debts an attempt be made for its revival through financial restructuring. Prima facie this Code has not been legislated only for recovery of outstanding debt. A petition under this Code is not to be treated as a Civil Recovery Suit. Therefore, the procedure laid down under this Code is completely at variance from a Recovery Suit. Particularly in this case the attempt of the Petitioner is simply to recover the impugned small amount of debt, that too disputed one, without realising that the cost of insolvency proceedings is to be borne by the Petitioner at the initial stage, which may be higher than the debt amount itself. In such situation, a Petition u/s 9 of the Code is sometimes not economically viable for the Petitioner. Be that as it is, decision for initiation of a Petition is in the hands of an Operational Creditor.

13. Petition **dismissed**, to be consigned to records.

Sd/-

M.K. SHRAWAT
MEMBER (JUDICIAL)

Date: 16.11.2018
pvs