IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. IV)

CP (IB)3154/ND/2019

(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 TUBEROSE PRODUCTS
INDIA PVT. LTD.,

…A

Versus

MAK MEDICALS PVT. LTD.&Anr.

…Respondent/ Corporate Debtor

Order Pronounced On: 30/11/2021

Coram:
DR. DEEPTI MUKESH,
HON'BLE MEMBER (JUDICIAL)

Ms. SUMITAPURKAYASTHA,
HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES

M/s Tuberose Products India Pvt. Ltd.,
204, Triveni Complex,
E/10/11/12,Jawahar Park,
Laxmi Nagar, Delhi-110092

…Applicant/ Operational Creditor

Versus

1. **Mak Medicals Pvt. Ltd.**
4270 Pocket-B
5/6 Vasant Kunj, New Delhi – 110070

…Corporate Debtor

2. **Ministry of Corporate Affairs**
Government of India
'A' Wing ShashtriBhawanGarage
No. 14, Dr. Rajendra Prasad Road
New Delhi- 110001

…Respondent

Present:
For the Applicant: Mr. Rahul raj Malik, Adv.
Ms. Alisha Choudhary, Adv.

For the Respondent: Mr. Dharmendra Kumar, Adv.

ORDER

Per: Dr. Deepti Mukesh, Member (Judicial)

1. The instant Application is filed byM/s Tuberose Products India Pvt. Ltd.(for brevity '**the Applicant**') through Ms. Ritu Gupta authorized through board resolution dated 23.10.2021,under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity **'Code'**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 claiming to be an Operational Creditor for initiation of Corporate Insolvency Resolution Process ('**CIRP'**) against the M/s Mak Medicals Pvt. Ltd. (for brevity '**Corporate Debtor**').

2. The Applicant is a Private Limited Company, incorporated under the provisions of the Companies Act, 2013 and duly registered with the Registrar of Companies, Delhi,with CIN: U74999DL2018PTC337233. The registered office is located at204, Triveni Complex, E/10/11/12,Jawahar Park, Laxmi Nagar, Delhi-110092.

3. The Corporate Debtor is a Private Limited Company, incorporated under the provisions of the Companies Act, 1956 on 22.11.1996, duly registered with Registrar of Companies, Delhi with CIN: U24231DL1996PTC083431 and its registered office is located at 4270 Pocket –B 5/6 Vasant Kunj New Delhi - 110070. The Authorized share capital of the Corporate Debtor is Rs. 30,00,000/- and the Issued,

Subscribed and Paid-up share capital of the Corporate Debtoris Rs. 28,61,500/-. The Corporate Debtor is engaged in the business of manufacturing, selling and supply of medicinal swabs.

4. It is the case of the Applicant that on the basis of order placed via email or telephone, the Applicant had supplied flexible packaging laminate in roll ('goods') to the Corporate Debtorand raised various e-way bills from 16.08.2018 to 26.06.2019. There was a running account between the parties and part payments were made by the Corporate Debtor from time to time and the last part payment of Rs. 8,00,000 was made on 27.06.2019. The Corporate Debtor had issued a false legal notice dated 26.09.2019 stating that due to closure of factory and non-supply of goods, the Applicant is liable to pay Rs. 60,00,000/- towards financial loss and Rs. 50,00,000/- towards damages with interest @ 24% p.a.

5. Sincethe Corporate Debtor had failed to pay balance amount, the Applicant had issued demand notice dated 31.10.2018 under Section 8 of Code in Form-3 for payment of Rs. 5,62,991/- along with 18% interest, which was duly served on the Corporate Debtor. The tracking report is filed, which mentions 'Successfully Delivered'. The Corporate Debtor neither raised any dispute to said notice nor made any payment towards outstanding dues.Thus, the Applicant filed present Application under Section 9 of Code. As per Part IV of Form-V

of the Application, total amount claimed by the Applicant is Rs. 5,62,991/- along with 18% interest from the last date of invoice i.e. 26.06.2019.

6. The Corporate Debtorhas filed reply and made following averments:
   a) Prior to the filing of instant Application, the Corporate Debtor had raised dispute through email dated 07.09.2019 and also by issuing of legal notice dated 26.09.2019 and thereafter by filing pre-suit mediation application, which the Applicant never participated despite service of notice.
   b) The Corporate Debtor had also replied to the demand notice dated 31.10.2019 on 15.11.2019 and the same was not placed on record by the Applicant.
   c) Initially theCorporate Debtor was purchasing goods from Applicant's sister concern M/s ProactivePlast Pvt. Ltd ('Proactive'). In August 2018, director of Proactive Sh. Nitin Gupta informed that they would be billing / sending the goods in the name of Applicant Company and the Corporate Debtor should make payment in the name of Applicant. Thus, Applicant was merely a shell company formed to siphon off funds from Proactive and Proactive is now being managed by IRP appointed

by this Adjudicating Authority. The Corporate Debtor does not own any liability towards the Applicant.

d) As the purchase orders placed with the Applicant in the month of June 2019 were pending. The Corporate Debtor contacted Sh. Nitin Gupta on various occasions and on 9th July 2019 Sh. Nitin Gupta informed through WhatsApp message that he has locked down the factory and asked not to release any payment to Proactive/ Tuberose. Since the production of the Corporate Debtor was dependent on the supplies of the Proactive / Applicant, the plant of the Corporate Debtor remained closed for 1 month, whichresulted in financial loss to the tune of Rs. 60 lakhs approximately and also lossof various clients. Thus, the Corporate Debtor is not liable to pay any dues to the Applicant rather the Applicant and Proactive are jointly liable to pay Rs. 50 lakhs towards damages.

7. The Applicant’s right to file rejoinder was closed vide order dated 22.12.2020. Thereby an application bearing IA No. 1098/ND/2021 is filed by the Applicant to set aside the said order. The said application was allowed vide order dated 04.03.2021 and the rejoinder already annexed with the said application was taken on record.

8. The Applicant along with the rejoinder has annexed the telephonic conversation dated 02.12.2019 taken place between the officials of the parties and submits thatnone of the communication on record suggest any issue pertaining to quality of goods rather evidences the admission of debt by the Corporate Debtor. It is also stated that the Corporate Debtor in its reply to demand notice had placed a ledger account of the Applicant wherein no adjustment entry of Rs. 10 lakh was shown whereas the Corporate Debtor later changed the same ledger account to illegally fit an entry of Rs. 10 lakh on a foregone date which is annexed with the Corporate Debtor's reply to instant Application. Copy of ledger is annexed with rejoinder.

9. Both the parties were heard and liberty was granted to file a written submission.The Applicant has filed its written submissions and states that the goods supplied were of the quality demanded by the Corporate Debtor else the same would have been returned. Also, the Corporate Debtor was aware of the fact of supply of laminates by the Applicant.

10. Per contra, Corporate Debtor in its written submission reiterates that the Applicant is a sham company and in the telephonic conversation dated 2.12.2019 between the Nitin Gupta (Director of Proactive) and Sameer Makhija (Director of Corporate Debtor) there is no mention about the Tuberose and its directors or officials. Further the tax invoice

annexed in reply, has two columns, the left column titled ‘consigner (bill from)’ –Tuberose is mentioned and in the right column titled ‘dispatched from’- Proactive Plast is mentioned.Further the Corporate Debtor has relied on following judgements:

1) Hon’ble Supreme Court in **Arcelormittal India Pvt. Ltd. Versus Satish Kumar Gupta &Ors. (CA No. 9402-9405 of 2018)**dated 4th October 2018observed that *the corporate veil may be lifted where associated companies are inextriciablyconnected as to be, in reality, part of one concern.*

2) Hon’ble Supreme Court in **Workmen versus Associated Rubber Industry Ltd. ((1985) SCC114)** dated 19th August 1985 observed that *in certain exceptional cases the court is entitled to lift the veil of the corporate entity and to pay regard the economic realities behind the legal facades… .*

3) Hon’ble Supreme Court in **M/s Surrendra Trading Company versus JuggilalKamlapat Jute Mills Company Ltd. &Ors. (CA No. 8400/2017)** dated 19th Sep 2017 observed that*Under Section 9 (5) (2) (d) of IBC, “Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order reject the application and communicate such decision to the operational creditor and the corporate debtor, if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility”.*

4) Hon’ble National Company Law Appellate Tribunal, New Delhi in **Aparna Enterprise Ltd. Vs. SJR Prime Corporation Pvt. Ltd. (CA(AT) (Insolvency) No. 632/2020)** dated 15th February 2021 observed that *the provision of the Code cannot be invoked* *for recovery of outstanding amount as well as it cannot be misused to drop the curtain on a healthy organization.*

11. Heard submissions and perused the documents placed on record. In order to understand whether the dispute raised by the Corporate Debtor is genuine or can be categorised as moonshine, it is necessary to read the meaning of dispute as per the Code:

Section 5(6):dispute *includes a suit or proceeding relating to-*

a) The existence of the amount of debt;

b) The quality of goods and services; or

c) The breach of a representation or warranty;

12. Further the Hon'ble Supreme Court in the matter of "Mobilox Innovative Private Limited vs. Kirusa Software Private Limited", held as follows:

"40.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 the 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 requires 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. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

13. The tax invoice annexed by the Corporate Debtor in its reply reflects that the Applicant is the real owner of the goods and the same was sold to the Corporate Debtor. Also, it is an admitted fact that since August 2018 Corporate Debtor is making payment on the invoices raised by the Applicant. The claim raised by the Corporate Debtorvia legal notice dated 26.09.2019and alsoin reply to Section 8 notice is stated to be in consequence of closure of Applicant's factory.The amount claimed by the Applicant is with regard to the invoices raised from 16.08.2018 to 26.06.2019, which is prior to closure of factory. The ledger filed by the Corporate Debtor reflects that the last payment was made on 27.06.2019 by the Corporate Debtor. Furtherwithout submitting any relevant documentary proof, the Corporate Debtor submits that no supplies were made for the order placed in the first week of June 2019. On examination of the ledgers filed by both the parties in their respective pleadings, it is observed that even in the month of May 2019 an amount of Rs. 2,33,286/- was due from the Corporate Debtorwhich

is included in the amount claimed herein. Thus, the Corporate Debtor has defaulted in making payment for the goods supplied by the Applicant. Further the Corporate Debtor has neither asserted nor placed any documentary evidence showing any dispute with regard to the quality of goods supplied.

14. The Registered Office of the Corporate Debtor is situated in New Delhi and therefore this Tribunal has jurisdiction to entertain and try this Application.

15. The date of default is mentioned as 26.06.2019 as the last date of invoice. The present Application is filed in November 2019.Hence the debt is not time barred and the Application is filed within the period of limitation.

16. It is noted that after the order being reserved, the Corporate Debtor filed an application bearing IA No. 4223/ND/2021 seeking dismissal of petition under Section 9 (5)(ii)(b). However, the said application was allowed to be withdrawn. Thereafter, Corporate Debtor filed another application bearing IA No. 4415/ND/2021 seeking to propose settlement. The said application was also withdrawn in view ofno settlement arrived by the parties.

17. The instant IBApplication being complete in terms of Section 9 is admitted and CIRP is initiated against the Corporate Debtor.

18. The Applicant has not proposed the name Interim Resolution Professional (IRP), therefore this Bench appoints Mr. Hemant Sethi having Registration Number IBBI/IPA-002/IP- N01107/2021-2022/13628 (email: hemantmlsethi60@gmail.com, Address: Block No. 18, House No. 8-C, Ashok Vihar, Phase-1, Opp. Sports Complex, North west, National Capital Territory of Delhi- 110052), as the Interim Resolution Professional subject to condition that no disciplinary proceedings are pending against him. The IRP is required to file consent in Form 2 under Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 and make disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 within a period of one week from this order.

19. As a consequence of the above discussion Application is admitted in terms of Section 9(5) of IBC, 2016 and moratorium as envisaged under the provisions of Section 14(1) shall follow in relation to the Corporate Debtor prohibiting all of the actions mentioned under Section 14(1)(a) to (d).

20. The said IRP shall act strictly in compliance with the provisions of IBC, 2016. With a view to defray his expenses to be incurred and fees on account, the Operational Creditor is directed to deposit a sum of Rs. 2,00,000/- (Two Lakh only) to the account of IRP within 7 days from the date of this order.

21. The IRP shall duly file the status report appraising this Tribunal about the progress of CIRP unfolded in relation to the Corporate Debtor. In terms of Sections 17 and 19 of Code all personnel of the Corporate Debtor including its promoters and Board of Directors, whose powers shall stand suspended will extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

22. Copy of the order shall be communicated to the Applicant, Corporate Debtor as well as to the IRP appointed herein, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its recordsand also to RoC for updating the Master Data. RoC shall send compliance report to the Registrar, NCLT.

Application is disposed of in terms of above order.

SD/-	**SD/-**
Ms. SUMITA PURKAYASTHA, **MEMBER (TECHNICAL)**	**DR. DEEPTI MUKESH** **MEMBER (JUDICIAL)**