IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No. 1)
KOLKATA

C.P (IB) No. 227/KB/2020

An application 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:

Vasudha Pharma Chem Limited[CIN U24230TG1994PLC019021], a company incorporated under the Companies Act, 1956, having its registered office at 78/A,VengalraoNagar, Hyderabad – 500038.

...Operational Creditor

Versus

La Chemico Private Limited [CINU24231WB1983PTC036999**],** a company incorporated under the Companies Act, 1956, having its registered office at66/1A, Baithak Khana Road, P S - Amherst Street, Kolkata – 700009.

...Corporate Debtor

Date of Hearing: 18.10.2022

Date of pronouncing the order: 25.11.2022

Coram:

Shri Rohit Kapoor	:	***Member (Judicial)***
Shri Balraj Joshi	:	***Member (Technical)***

Appearances (through Video Conferencing/physical hearing)

For the Operational Creditor	:	Mr. Rishad Medora, Adv.
		Mr. Soumava Mukherjee, Adv.
For the Corporate Debtor	:	Ms. Ananya Manna, Adv

ORDER

Per Balraj Joshi, Member (Technical)

1. The Court convened *via* hybrid mode.

2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 ***('the Code')*** read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. S. Rajendra Prasad, Senior Manager (Secretarial & Legal) ***('Operational Creditor')***, duly authorised *vide* Board Resolution dated 29 March, 2019[1] for initiation of Corporate Insolvency Resolution Process ***('CIRP')*** against La Chemico Private Limited (***'Corporate Debtor'***).

3. The present Petition was filed on ***20 January, 2020*** before this Adjudicating Authority. The total amount claimed in default is Rs.52,28,549/- (Rupees Fifty Two Lakh Twenty Eight Thousand Five Hundred Forty Nine only) plus interest @24% per annum from the due date.

4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.1,00,00,000/- (Rupees One Crore only) with subscribed share capital of Rs.84,61,000/- (Rupees Eighty Four Lakh Sixty One Thousand only).

5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor***.

5.1 The Corporate Debtor had approached the Operational Creditor with a request for supply of Pellets on credit basis and the same was accepted by the Operational Creditor. At the time of negotiations and deliberations, the Corporate Debtor had promised and assured the Operational Creditor that it would clear the invoices within a period of 120 days, failing which the Corporate Debtor would be liable to pay interest on the outstanding amount.

5.2 Subsequently, the Corporate Debtor placed the Purchase Orders on the Operational Creditor from time to time. And the Operational Creditor had supplied the concerned materials. The same were received by the Corporate Debtor along with the relevant Invoice cum Delivery challans and the Corporate

[1]Annexure – E of the Petition, at Page 33.

Debtor has accepted the same at all points of time without any protest, demur or objection.

5.3 After receiving materials from the Operational Creditor in respect of a Purchase Order dated May 12, 2018, the Corporate Debtor has made only part payments aggregating Rs. 30,90,464/-(Rupees Thirty Lakhs Ninety Thousand Four Hundred Sixty Four only) and has failed to pay the balance invoiced amount in respect of materials supplied *vide* five separate Invoice-cum-Delivery Challans dated May 31, 2018, July 16, 2018, July 23, 2018, August 3,2018 and August 14, 2018 for Rs. 25,06,315/- (Rupees Twenty Five Lakhs Six Thousand Three Hundred Fifteen only), Rs. 12,53,157/-(Rupees Twelve Lakhs FiftyThree Thousand One Hundred Fifty Seven only), Rs.12,53,157/- (Rupees TwelveLakhs Fifty Three Thousand One Hundred Fifty Seven only), Rs.11,13,918/-(Rupees Eleven Lakhs Thirteen Thousand Nine Hundred Eighteen only) and Rs. 11,13,918/-, respectively aggregating to a sum of Rs. 72,40,465/- (Rupees Seventy Two Lakhs Forty Thousand Four Hundred Sixty Five only).

5.4 The Corporate Debtor has admitted and acknowledged its debt and liability towards the Operational Creditor *vide* an email dated June 24,2019 addressed to the Operational Creditor's agent, Luxmi Pharmaceuticals *[Page 71 – Annexure K – of the Petition]*. The Corporate Debtor had also handed over several cheques to the Operational Creditor from time to time towards payment of its dues, however, they have been dishonored. The Operational Creditor has also initiated legal proceedings against the Corporate Debtor under the provisions of the Negotiable Instruments Act, 1881.

5.5 On 23 September, 2019, the Operational Creditor sent a Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 as per Form 3 demanding payment of the unpaid operational debt due from the Corporate Debtor. The Corporate Debtor replied to the aforesaid Demand Notice dated September 23, 2019 *vide* its letter dated October 1, 2019 and the same was received by the Operational Creditor on October 9, 2019. Various frivolous and false allegations have been raised by the Corporate Debtor in the aforesaid letter dated 01 October, 2019 and the same are mala fide and after thoughts on the part of the Corporate Debtor.

6. ***Submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor***.

6.1 There is no record of default with the information utility against the Corporate Debtor. The Operational Creditor has also grossly suppressed materials facts of non-supply of goods before the Adjudicating Authority. The purported demand notice under section 8 of the Code, sent by the Operational Creditor does not disclose any cause of action against the Corporate Debtor.

6.2 The Operational Creditor is using the Code as a tool to extract and extort illegal demand from the Corporate Debtor. There are pre-existing disputes as to the quantity, non-supply of goods and delay in supply of materials. Instant Application is based on incorrect, vague and false statements.

6.3 There is no agreement regarding the terms of payment or for payment of interest between the parties. Issues involved in this instant Application is triable in nature and it cannot be adjudicated in a summary proceeding. The purported of the Operational Creditor is arising out of breach of contract, and question of breach of contract cannot be agitated in an application under section 9 of the Code.

6.4 The Corporate Debtor is a reputed profit making company, and the same would be evident from its last financial statement. The Corporate Debtor had placed an order on credit basis in favor of the Operational Creditor. Further, on taking assurances from the Operational Creditor, the Corporate Debtor participated in the tender process floated by the Government of West Bengal being NIT No. HST/4T-20-2018/ED/2018-20/054 dated 03 January, 2018 and was declared as the lowest bidder and got the contract to supply Essential General Drugs within Forty-Five days.

6.5 The Corporate Debtor had also submitted a bank guarantee of Rs.70,83,420/- to D.D.H.S, Government of West Bengal as security deposit *[Annexure – C]*.At the time of submission of tender, the quotation received from the Operational Creditor's agent, Luxmi Pharmaceuticals was @Rs.52,500/- per 27.5 Kgs but during the placement of order the Operational Creditor increased the rate

@Rs.59,000/- per 27.5Kgs and for such reason the Corporate Debtor has to suffer a loss of Rs.15,34,000/- for the total order *[Annexure – D].*

6.6 As per the Order No. 75 dated 12/05/2018 and as per the terms of the supply, the Operational Creditor was to deliver 1,100 kgs immediately (within 7 days) and the balance quantity of 4400 kgs were to be delivered by 18 August, 2018. The total order of supply was for 5500 kgs. (a Rs. 59,000 / - per 27.5 kg Pellets. It is pertinent to mention that according to terms and conditions of the purchase order, the payments were made to the Operational Creditor within 120 days by way of security post dated cheques.

6.7 However, but only 52% of the order was supplied by the Operational Creditor within August, 2018 and the balance raw materials are still not supplied to the Corporate Debtor, thus the Operational Creditor has violated the supply terms. The Operational creditor on or about 04 August, 2018 by way of a letter intimated the Corporate Debtor that there is a shortage of supply of Pantaprozole Sodium Sesquihydrate IP & Domperidone Pellets due to hike in price and for such reasons the above-mentioned raw materials cannot be delivered for minimum 6-8 months*[Annexure – E].*

6.8 Thus this letter clearly indicates that there was a delay in supplying of the raw materials by the Operational Creditor and thus due to such delay the Corporate Debtor failed to supply Pantaprozole & Domperidone Capsules to the D.D.H.S, Government of West Bengal and subsequently suffered huge loss and damages.

6.9 From the above facts it is clear that the Operational Creditor only supplied 2860 kg out of 5500kgs and the rest was never supplied to the Corporate Debtor. More importantly the value of 2640kgs of raw materials amounts to Rs. 66, 83,520/- including G.S.T, which was never supplied to the Corporate Debtor. The Operational Creditor failed to supply the materials within the stipulated time and for such delay on the part of the Operational Creditor, the Corporate Debtor failed to supply the finished products to D.D.H.S, Government of West Bengal.

6.10 Thereafter, on 22 May, 2019 the D.D.H.S, Government of WestBengal sent a show cause notice to the Corporate Debtor and also intimated them to state reasons for violating the terms of the tender/contract and also reasons for not honoring the terms of the tender/contract*[Annexure – F]*. The Corporate Debtor after receiving such show cause notice intimated the D.D.H.S, Government of West Bengal that the raw materials were not supplied by the Operational Creditor and the delay was solely on the part of the Operational Creditor and no violation has been occurred on the part Corporate Debtor.

6.11 The Corporate Debtor while placing the purchase order with the Operational Creditor had from time to time gave the Operational Creditor security deposit cheques amounting to Rs. 81,00,-000/- This shows good faith of the Corporate Debtor. The Corporate Debtor has paid an amount of Rs. 30, 90,465.70 for supply of only 52% of the raw materials ordered and the rest amount was not paid by the Corporate Debtor due to non-performance of the purchase order and also for the loss and damages suffered by the Corporate Debtor due to inabilityof the Operational Creditor.

6.12 The Corporate Debtor was shocked and surprised to see that when the Corporate Debtor stoppedthe payment due to excessive delay in delivering the rawmaterials and medicinal products and non-supply of2640 kgs of ordered materials, the Operational Creditor deposited the security cheques on or about 27May, 2019 which were lying with them without intimating or giving any notice to the Corporate Debtor. In view of the above facts, the cheques were dishonored and the Operational Creditor filed a petition under Section 138 of the Negotiable Instruments Act,1881 along Sections 406 and 420 of the Indian PenalCode, 1860 at Hyderabad Court.

6.13 The CorporateDebtor is apprehending that at any time theD.D.H.S,Government of Wet Bengal may invoke the bank guarantee, which will cause irreparable loss andprejudice to the business of the Corporate Debtor and if any money is deducted then the onus will be on the Operational Creditor for delay and nonperformance of the purchase order and failure of terms ofsupply.

6.14 The Corporate Debtor is a running company and has morethan 100 employees. The Corporate Debtor is alsoengaged in servicing various contracts entered into withseveral government and non-government entitiesfor supply of essential commodities viz. lifesaving drugs andmedicines.

6.15 The Corporate Debtor and the Luxmi Pharmaceuticals, in view of the negotiations between the Corporate Debtor and Luxmi Pharmaceuticals on 26 June, 2019, the Corporate Debtor was willing to pay an amount ofRs. 41,50,000 / - provided balance goods of 2640 kgs are supplied to the Corporate Debtor. In this regard; two emails both dated June 22, 2019 were issued by the CorporateDebtor which would clearlydemonstrate that the Corporate Debtor agreed to pay Rs. 41.50 lakhs only if the pending ordered quantityof 2640 kgs was supplied to the CorporateDebtor.

6.16 However, the OperationalCreditor hassurreptitiously disclosed an email of June 22, 2019 atpage 71 of the petition but has grosslysuppressed both the said emails in the purported petition*[Annexure – H]*. There are e-mails, which were exchanged between the Corporate Debtor and Luxmi Medichem Pvt. Ltd., wherethe Corporate Debtor specifically stated the delayon the part of the Operational Creditor and also stated that only 19% of the order was fulfilled on the part of the Operational creditor *[Annexure – I]*.

Analysis & Findings

7. We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor and perused the record.

8. Upon perusal of records at pages 51, 56 and 57 of the Reply, it is observed that there were disputes between the parties with respect to the supply and payment of the goods.Further, Due to non-performance of the contract by the Operational Creditor, and also due to inordinate delay in supply of raw materials, the Corporate Debtor could not deliver the finished products to the D.D.H.S, Government of West Bengal, because of which the Government of West Bengal imposed a penalty over the Corporate Debtor and the tender was cancelled automatically due to non-supply *[Annexure – G]*.

9. It is also apparent that not all the orders were supplied by the Operational Creditor within August, 2018 and the balance raw materials are still not supplied to the Corporate Debtor. The Operational creditor on 04 August, 2018 has also acceptedthat there is a shortage of supply of Pantaprozole Sodium Sesquihydrate IP & Domperidone Pellets due to hike in price and for such reasons the above-mentioned raw materials cannot be delivered for minimum 6-8 months.*[Annexure – E].*

10. Thus this letter clearly indicates that there was a pre-existing dispute between the parties with respect to supplying of the raw materials by the Operational Creditor. And on the grounds of such delay the Corporate Debtor failed to supply Pantaprozole & Domperidone Capsules to the D.D.H.S, Government of West Bengal. There has been contributory negligence on the part of the Operational Creditor as well.

11. We also rely on ***Innoventive Industries Ltd. v. ICICI Bank and Anr.,***[2]where the Hon'ble Supreme Court while explaining the provisions of Sections 7 or 9 observed and held:

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is preexisting- i.e. before such notice or invoice was received by the corporate debtor. ***The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code****."*

12. Further, in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited***[3] it was opined by the Hon'ble Apex Court that;

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on

[2] (2018) 1 SCC 407
[3]2017 (1) SCC onLine SC 353

nonpayment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2) (a)). ***What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. ……..***"

13. The Hon'ble Supreme Court in ***Mobilox*** (**Supra**) has observed that all that the Adjudicating Authority has to see at 'the stage of Admission' 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 or a moonshine defence unsupported by tangible materials/evidence***.

14. In view of the above, we note that there has been a pre-existing dispute in the matter and therefore C.P **(IB) No. 227/KB/2020**is ***rejected.***Needless to say that the Operational Creditor is at liberty to resort to other remedies that may be available to it under any other law.

15. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi	**Rohit Kapoor**
Member (Technical)	**Member (Judicial)**

The order is pronounced on 25th day of November, 2022

SA [LRA]