

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

C.P. (IB) 736/MB/2023

Under section 9 of the Insolvency and
Bankruptcy Code, 2016

In the matter of

Adishank Chemicals Pvt. Ltd.

Having address at E2, MIDC, Anand Nagar,
Thane- 421501

..... Petitioner/ Operational Creditor

Versus

Baerlocher India Additives Pvt. Ltd.

Having address at: - Eco Star, 5th Floor, 501,
502, 503, Vishweshwar Nagar, Off. Aarey
Road, Opp. Vakratunda Corp. Park,
Goregaon East, Mumbai- 400063

..... Respondent/Corporate Debtor

Order Delivered on :- 04.01.2024

Coram:

**Mr. Anil Raj Chellan
Member (Technical)**

**Mr. Kuldip Kumar Kareer
Member (Judicial)**

Appearances:

For the Operational Creditor : Adv. Nausher Kohli

For the Corporate Debtor : Adv. Amir Arsiwala a/w Adv. Abdullah Qureshi & Adv. Arjun Sathees

ORDER

Per: - Mr. Kuldip Kumar Kareer, Member (Judicial)

1. The present petition has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") by **Adishank Chemicals Pvt. Ltd.** (hereinafter called as "Operational Creditor") praying inter-alia for initiation of Corporate Insolvency Resolution Process (CIRP) against **Baerlocher India Additives Pvt. Ltd.** (hereinafter called as "Corporate Debtor") by invoking the provisions of Section 9 of the Insolvency and Bankruptcy Code (hereinafter called " the Code") for resolution of an unresolved Operational Debt of Rs. 1,35,20,600/- as on 31.03.2023.

The submissions of the Operational Creditor are as follows:

2. The Operational Creditor has been carrying on business with Corporate Debtor since years thereby supplying them with the material/ s and the Corporate Debtor has regularly raised the purchase orders towards upon the Operational Creditor towards the purchase of the materials. The goods have been duly received and consumed by the Corporate Debtor in the past, without raising any dispute in respect of the price, quality and quantity.

3. Vide Purchase Order No. 3100007983 dated 23rd June, 2022 (“Purchase Order”), the Corporate Debtor placed an order on the operational Creditor for the supply of goods.
4. As per the Purchase Order, the dispatch schedule was to be conveyed by email and the terms of payment was 30 days credit. The Purchase Order clearly mentions the delivery date as against each Material. The date of delivery as mentioned is the last date by when the delivery is to be made. The Corporate Debtor was to give 10 days’ notice prior to the requirement, for dispatch.
5. The Operational Creditor vide their email dated 24th July, 2022 informed Mr. Ritesh Kumar, Purchase Manager of the . Corporate Debtor, that the Operational Creditor have not received any call up from the Corporate Debtor about the Purchase Order and requested to send call-up immediately to dispatch -the material, as a minimum period of 10 days advance call-up was agreed to between the parties. However, there has been no response to the said email dated 24th July, 2022.
6. Thereafter, the Operational Creditor vide their email dated 10th August, 2022 informed Mr. Jayen Modi, Managing Director of the Corporate Debtor that 20 M.T. of the material was to be picked up/ lifted by Corporate Debtor in July, 2022 and the balance 20 M.T. in August, 2022, however till then the Operational Creditor had not received any call up from the Corporate Debtor. The Operational Creditor once again requested to send call-up at the earliest to process the material, as a minimum period of 10 days advance call-up was agreed to between the parties. However, there has been no response to the email dated 10th August, 2022.

7. The Operational Creditor have time and again tried to telephonically contact Mr. Jayen Modi, Mr. Deepak Selvam and Mr. Ritesh Kumar, representatives of the Corporate Debtor for taking the delivery of the Material, but there was no response. On 22nd August, 2022, Mr. Mukesh Mehta, Head of Purchase of Corporate Debtor, spoke to the Operational Creditor and assured the Operational Creditor that within three to four days he shall revert and inform the Operational Creditor regarding the supplies. The Operational Creditor vide their email dated 22nd August, 2022 recorded the same in writing and also informed that the Operational Creditor are incurring losses and holding costs as the Corporate Debtor are not picking up the material. However, there has been no response to the said email dated 22nd August, 2022.
8. The Operational Creditor thereafter vide their email dated 3rd September, 2022 once again requested for a reply to their emails and to inform the Operational Creditor, the Corporate Debtor's schedule for lifting the total material. However, there has been no response to the said email dated 3rd September, 2022.
9. The Operational Creditor states that despite the aforesaid the Corporate Debtor has till date not made any payment nor picked up the material, thereby causing great losses to the Operational Creditor.
10. The Operational Creditor states that against the principal . outstanding amount of Rs. 1,26,49,600.00, further simple interest @ 15 % is applicable and hence a total outstanding amount of Rs.1,35,20,600 is due and payable as on 31st March, 2023 by the Corporate Debtor to the Operational Creditor. The Operational Creditor states that in spite of repeated requests and reminders calling upon the Corporate Debtor to make the payment of the

outstanding amount, the Corporate Debtor has failed and neglected to make the outstanding payment.

11. The Operational Creditor has in any event kept the material ready since the delivery date as per the terms and conditions of the Purchase Order. Therefore, the Corporate Debtor is liable bound and liable to pay the dues under the aforesaid Purchase Order as per the Computation of Default enclosed herewith. It is imperative to note that the material has been manufactured and are ready since the delivery date. However, the Corporate Debtor has neither picked up the material with the result that the Operational Creditor has not paid the required GST on the same. Hence the Petition.

Reply filed on behalf of the Corporate Debtor:-

12. In reply, the Corporate Debtor has submitted that save what has been explicitly admitted herein, the Respondent denies each and every contention, allegation, averment and/or submission of the Petitioner made in Company Petition No. 736 of 2023.
13. The Corporate Debtor further submits that the Petitioner's present Company Petition is based solely on the Purchase Order bearing P.O. No. 3100007983 dated 23.06.2022 vide Email dated 23.06.2022. However, when negotiating the price of the goods of the said Purchase Order, the Petitioner vide Email dated 21.06.2022, clearly stipulated that their revised offer for 2 tankers (Approx. 40 M.T.) of DI PHENYL ISO DECYL PHOSPHITE (DPDP) (Material) is valid only until 6 pm of 21.06.2022. Given the fact that the said Purchase Order was issued by the Respondent after the Petitioner's Offer expired, the said Purchase Order stands invalid in accordance with the terms

stipulated by the Petitioner itself. Consequently, there exists no valid contract between the parties and therefore, the Respondent owes no liability to the Petitioner.

14. Moreover, as per the terms of the aforesaid Purchase Order, the Delivery Schedule of the Materials was to "be communicated via email 10 days prior to the requirement". After the issuance of the aforesaid Purchase Order, the Respondent never communicated the delivery schedule to the Petitioner. It is an admitted fact the Petitioner never delivered or attempted to deliver the goods sought in the aforesaid Purchase Order to the Respondent. Furthermore, the terms of the Purchase Order categorically state that payment will become due 30 days after the delivery of the goods, and as the Respondent was not delivered the goods under the said Purchase Order, no payment under the said Purchase Order has become due and payable. Therefore, as such, no Operational Debt, as defined under Section 5(21) of the Code, has arisen in the present matter.

15. The Corporate contends that the Petitioner had complete knowledge of the 10-day notice condition of the aforesaid Purchase Order and the same is admitted by the Petitioner in the Petition itself when the Petitioner states that they continuously sent follow-ups to the Respondent for a call-up in the matter as a "minimum period of 10 days advance call-up was agreed to between the Operational Creditor and the Corporate Debtor". Despite the clear understanding of the 10 days' notice condition, the Petitioner has chosen to produce/arrange the required goods and continuously followed up with Respondent to pick up the goods.

16. The Corporate Debtor states that the Petitioner thereafter sent a Legal Notice dated 08.12.2022, calling upon Respondent to pick up the goods within 7 days from the receipt of the said legal notice, failing which the Petitioner threatened that they would be "free to sell the material in open market for recovery of their costs and losses suffered by them". The Respondent replied to the aforesaid Legal Notice vide Reply Letter dated 21.12.2022 wherein the Respondent contended that as per the agreed terms of the aforesaid Purchase Order, the Petitioner would require a prior intimation/call-up from the Respondent for processing the goods, however, no such intimation/call-up was provided by the Respondent in the matter. Furthermore, the Respondent also explicitly stated that since the goods processed by the Petitioner were rather generic in nature and not of a specific grade, customized for the Respondent's needs, it could be easily sold in the open market. And hence, the Petitioner was free to and, in fact, should have sold the goods in the open market. However, the Petitioner instead claims to store the goods, incur cost and continuously follow up with the Respondent to pick up the goods and preferred the present Company Petition all in order to maliciously gain undue pecuniary benefit from the Respondent.

17. The Corporate Debtor further submits that the entire claim of the Petitioner in the present Company Petition is solely based on the invalid and disputed Purchase Order dated 23.06.2022. Despite the existence of dispute as narrated herein above in relation to the aforesaid Purchase Order, the Petitioner proceeded to issue a Demand Notice dated 05.04.2023 under Section 8 of the Code demanding the outstanding payment in respect of the allegedly unpaid operational debts due from the Respondent and threatened to file an application before this Hon'ble Tribunal for initiating a Corporate Insolvency Resolution Process under Section 9 of the Code against the Respondent.

18. The Corporate Debtor states that the Petitioner, in the present Company Petitioner, has claimed a simple interest at the rate of 15% over the alleged outstanding principle of Rs.1,26,49,000/-, increasing the claim amount to Rs.1,35,20,600/-. However, it is trite law that if the contract between the parties does not provide for interest, no interest can be claimed.
19. The Corporate Debtor further submits that the Respondent is a solvent and an on-going concern and has a reputation in the market. The Petitioner as a provider of goods and services, is not in a position to assess the viability of the business of the Respondent. In the end, the Corporate Debtor has prayed for the dismissal of the Petition.

Analysis and Findings:-

20. We have heard the Counsel for the parties and gone through the record.
21. During the course of arguments, the counsel for the Operational Creditor has pointed out that the Corporate Debtor placed a purchase order dated 23.06.2022 and (Exhibit-B) for a net amount of Rs. 1.26 crores in respect of supply of goods manufactured by the Operational Creditor. However, the Corporate Debtor never took the supply of the goods though it was bound to lift the goods, as agreed to by the parties and this constitutes a default on the part of the Corporate Debtor. The counsel for the Operational Creditor has further argued that as the Corporate Debtor failed to lift the goods, a Demand Notice dated 08.12.2022 (Exhibit-H) was issued to the Corporate Debtor whereby it was called upon to pick up the material within a seven days failing which the Operational Creditor would be free to sell the material in the open market for the recovery of their costs and losses occurred by the Operational

Creditor. The counsel for the Operational Creditor has further pointed out that in response to the notice dated 08.12.2022, the Corporate Debtor sent a reply (Exhibit-H-1) wherein only a fake defence has been raised which does not tantamount to a pre-existing dispute. It has also been pointed out that Demand Notice (Exhibit-I) dated 05.04.2023 was also issued to the Corporate Debtor and in its reply, it has only been mentioned that dispatch schedule was to be communicated via e-mail ten days prior to the requirement. Therefore, according to the counsel for the Operational Creditor, there is no pre-existing dispute between the parties and since the Operational Creditor has not disputed the placement of the purchase order, the Corporate Debtor cannot run away from its liability to pay the price of the goods and as the Corporate Debtor has committed default in lifting the material and paying the price of the good, the instant petition deserves to be admitted.

22. On the other hand, the counsel for the Corporate Debtor has argued that the present petition deserves to be dismissed as there is no supply of goods nor any invoices were raised and, therefore, the claim raised through the petition, in respect of which the default is alleged to have been committed, cannot be treated as an Operational debt. No supply of goods ever took place. Even in the notice dated 08.12.2022, the Corporate Debtor was only called upon to pick up the goods. The Counsel for the Corporate Debtor has further pointed out that no invoices have been relied upon by the Operational Creditor and the interest have also been wrongly claimed as there is no stipulation in the purchase order with regard to payment of interest. Therefore, according to the counsel for the Corporate Debtor, the Petition is not maintainable and is liable to be dismissed. In support of his contention the Counsel for the Corporate Debtor has relied upon *Bungo Steel Furniture Private Limited Vs Union of India (AIR-1967 SC-378)* whereby it was held that normal rule for

computing the damages for non-acceptance of finished goods would be the difference between the contract price and the market price of such goods at a time when the contract is broken and if there is no available market at the place of delivery, the market price of the nearest place or the price prevailing in the controlling market may be taken into consideration. In the light of what has been held in the cited judgment, it has been urged by the counsel for the Corporate Debtor that at the most the Operational Creditor is entitled to claim damages for non-acceptance of goods which it had agreed to purchase from the Operational Creditor vide purchase order (Exhibit-B) and any claim for damages cannot be equated with an operational debt and, therefore, the Petition deserves to be dismissed.

23. We have weighed the contentions raised by the counsel for the parties and gone through the records carefully.
24. Admittedly, in this case, the goods were not supplied to the Corporate Debtor in pursuance of purchase order dated 23.06.2022. It has been claimed by the Operational Creditor that the Corporate Debtor did not accept the delivery of the goods which were manufactured in pursuance of the aforesaid purchase order and, therefore, the Corporate Debtor was liable to pay the price of the goods and the non-payment of the said amount tantamount to a default in respect of an operational debt. Now, the question arises as to whether in the given scenario, non-acceptance of goods on the part of the Corporate Debtor amounts to an operational debt or not.
25. In our considered view, non-acceptance of the goods by the Corporate Debtor cannot be equated with the default in respect of an operational debt. Section 5 (21) of IB Code, 2016 defines the operational debt as a “claim in respect of the provisions of goods and services including employment or debt in respect

of payment of dues arising under any law for the time being in force payable to the Central Government, any State Government and any Local Authority.” The goods were never supplied to the Corporate Debtor nor any invoices were raised. In its notice dated 08.12.2022, the Operational Creditor asked the Corporate Debtor in para no. 7 to pick-up the goods within seven days of the receipt of the notice, failing which, the Operational Creditor would free to sell the material in open market for recovery of their cost and losses suffered by them and also stated that the Corporate Debtor would be sued for the recovery of balance amounts, if any. The Operational Creditor has not produced on record any evidence that the goods were sold in the open market or not and further whether any loss was suffered by the Operational Creditor on account of non-acceptance of supply of goods by the Corporate Debtor. Therefore, under the facts and circumstances of the present case, it emerges that it is not a case of an operational debt in respect of which a default has been committed by the Corporate Debtor. Since the goods were not supplied/delivered for whatever reasons, even if attributable to the Corporate Debtor, no case of default of operational debt is made out.

26. As stated by the Operational Creditor in the notice dated 08.12.2022, the goods could be sold in the open market to any third party and loss, if any, could be recovered from the Corporate Debtor in appropriate proceedings for retracting from its commitment to accept the goods in pursuance of purchase order dated 23.06.2022. The Counsel for the Corporate Debtor has relied upon *Bungo Steel Furniture Private Limited Vs. Union of India (Supra)* whereby it was held that the normal rule for computing damages for non-acceptance of goods would be the difference between the contract price and the market price of such goods at the time the contract was broken. Therefore, it is evident that the claim of the Petitioner does not appear to be covered under

the definition of operational debt as defined under 5 (21) of the Code. It also appears that the claim of the Petitioner in this case arises out of breach of contract by the Corporate Debtor by not honoring its commitment in purchasing the goods from the Petitioner for which it had placed the purchase order dated 23.06.2022. Therefore, the appropriate remedy available with the Petitioner is to sue the Corporate Debtor for damages on account of breach of contract and any claim for damages on account of breach of contract has to be filed with an appropriate authority/forum for crystalizing the quantum of such damages after recording evidence in detail which cannot be done in summary proceedings. In this context, a reference can also be made to the law laid down by the *Hon'ble Supreme Court in Union of India Vs. Raman Iron Foundry, 1974 AIR SC, pg. 1265* whereby it was held that a claim for damages for breach of contract is not a claim for a sum presently due and payable. It was further held in this very case that the damages are compensation which a court of law gives to a party for injury which it has sustained but the said party does not get damages or compensation by any reason of any existing obligation on the part of the person who committed the breaches. The said party gets compensation as a result of the fiat of the court and, therefore, no pecuniary liability arises till the court has determined that the party complaining of breach is entitled for damages and further that till the determination of liability of the party breaching the contract is done, there cannot be any liability of the Respondents. It was also held in very case that the only right the parties aggrieved by breach of contract has is the right to sue for damages. Therefore, in our considered view, the claim of the Petitioner in this case cannot be said to be an operational debt as the Petition gets only a right to sue for damages and on this short ground, the instant petition under Section 9 of the Insolvency and Bankruptcy Code is liable to fail.

27. As a result of the foregoing discussion, the Petition under Section 9 of the Insolvency and Bankruptcy Code is **hereby dismissed** with no order as to costs.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)
Sushil

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)