

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - I

ITEM No.301
CP(IB) 141 of 2018

Proceedings under Section 9 IBC

IN THE MATTER OF:

Lyka Labs Ltd

.....Applicant

V/s

Modi Lifecare Industries Ltd

.....Respondent

Order delivered on 22/02/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)

Mr. Sameer Kakar, Hon,ble Member(T)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

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SAMEER KAKAR
MEMBER (TECHNICAL)

-sd-

SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I**

CP (IB)-141 of 2018

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

In the matter of **M/s. Lyka Labs Limited**

Lyka Labs Limited.

4801/B & 4802/A, G.I.D.C.
Industrial Estate,
Ankleshwar -393 002

.....Operational Creditor

VERSUS

Modi Lifecare Industries Limited

27, GIDC, Opp. Creta Cold
Station, Near Torrent Power
Substation, Odhav, Ahmedabad
382 415

.....Corporate Debtor

Order pronounced on 22.02.2024

Coram:

Mr. Shammi Khan, Member (Judicial)

Mr. Sameer Kakar, Member (Technical)

Appearance:

For Applicant : Mr. Nausher Koli, Adv. a/w. Mr. Anip Gandhi,
: Ms. Samiksha Rajput, Adv.
For Respondent : Mr. Lakhya Sharma, Adv.

ORDER
[Per Bench]

1. The present Application is filed by M/s. Lyka Labs Limited (hereinafter referred to as 'Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IB Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against M/s. Modi Lifecare Industries Limited (hereinafter referred to as 'Corporate Debtor') for the initiation of the Corporate Insolvency Resolution Process (CIRP), to appoint the IRP and declare a moratorium.
2. A perusal of Part-I of the Form-V reveals that the application has been signed by one Mr. Yogesh Shah, Chief Financial Officer, duly authorized vide board resolution No. 17 dated 24.11.2017.
3. A perusal of Part-II of the Form-V reveals that the Corporate Debtor is Modi Lifecare Industries Limited, incorporated on 27.07.2009, under CIN No. U24230GJ2009PLC057623, having registered office at 27, GIDC, Opp. Creta Cold Station, Near Torrent Power Substation, Odhav, Ahmedabad -382 415.
4. On perusal of Part-III of the Form-V reveals that the applicant has not proposed the name of any Insolvency Professional.

5. On perusal of Part-IV of the Form-V reveals that total amount of debt claimed in the application is Rs. 5,95,04,537/- which is arising on account of royalty fees payable by the Corporate Debtor to the Operation Creditor. The same has become due on various dates, as explained in Annexure-I. The applicant claims interest at the rate of 18% on the due amount.

6. It is stated that the Applicant relies upon Article 1(D) of the Technical Guidance Agreement dated 14.09.2012, Sections 37 and 73 of the India Contract Act, 1872, reminders, and correspondence between the Operational Creditor and Corporate debtor.

7. The Applicant has issued statutory notice under Form 3 on 10.10.2017, demanding total payment of Rs. 5,95,04,537, which is annexed at page No. 27, relying on technical guidance dated 14.09.2012, more particularly Article 1(D), no invoices were attached along with the notice. However, the applicant has attached Annexure-A, being royalty receivable in terms of the agreement Annexure-I, at page Nos. 29 and 30 of the application.

8. A perusal of the technical guidance agreement reveals that the Respondent was to manufacture certain drugs and cosmetics for the domestic market, and in terms of the agreement, he was allowed to print on labels and cartons

the LAYKA's Logo on the packaging material and was to use the technical guidance.

9. In return, the Respondent was to pay certain royalty to the Operational Creditor, and such royalty payments were to be calculated as under:-

Sr No.	Period	Royalty Percentage	Minimum Royalty Amount
1.	01.12.2012 to 30.11.2013	5 %	1 Crore
2.	1.12.2013 to 30.11.2014	5%	2 Crore

10. The Respondent was to submit a statement to the operation creditor certified by its statutory auditor for the invoices raised during each month by the 5th of the following month to enable the Operational Creditor to raise its royalty fee bill on the Respondent. The Respondent was to make payment to the operational creditor within five days of receipt of the bill. It is also seen that all the supplies of the Respondent to the Government and against tender shall not be included in the computation of the royalty fee, and the Respondent was not print LYKA'S name and logo on labels and on cartons of the products made for such supplies.
11. Article 9 of the said agreement provides as under:-

Any alteration, modification to this Agreement shall be made in writing and should be signed by both the parties or their legal representatives and properly witnessed and authenticated and would be read as a part of this Agreement subsequently.

12. The Operational Creditor has placed at Annexure II, page 15, a letter dated 02.08.2013, whereby both parties agreed that, in view of the financial crisis faced by the Respondent, certain portion of the royalty payment was deferred.
13. It is stated by the operational creditor that thereafter the Respondent has not paid the minimum guaranteed amount, though it has paid the royalty as per the invoices raised by the operational creditor based upon the statements received from the Respondent regarding the actual sales.
14. A perusal of the statement, which is annexed to Annexure-I, reveals that the total amount claimed of such royalty is Rs. 5,95,04,537.
15. A reply was filed by the Respondent on 13.04.2018, vide No. 4058, through Mr. Sandip Modi, Managing Director and authorized signatory in the respondent Company. In reply the Respondent has raised the following issues.
 - A. Article 7 of the said agreement provides for arbitration.

- B. A meeting was held with the chairman of the operational creditor sometime in September, 2013 and by mutual oral understating it was agreed to allow the respondent company for continuation of royalty payment on actual basis with the result that the Applicant continued to do business with respondent on paying the royalty on actual basis.
- C. It is an admitted position that such understanding was not reduced to writing and this has been reiterated in the letter on 31.07.2017.
16. This Tribunal vide order dated 20.11.2019, rejected the present application and the same order is reproduced as below:-
- 9.3 *It is further submitted that against the Demand Notice issued by the Petitioner on **25.07.2017**, demanding payment of **Rs.84,72,740.00**, the Respondent duly replied vide its letter dtd:31.07.2017, reporting that all throughout the Respondent had paid royalty on actual basis as per the oral understanding reached between the parties. Thereafter, as per the communication dated 12.09.2017, the Respondent informed the petitioner that it had received the permission to **restart the production w.e.f. 01.09.2017** and the pending packing material stock of the petitioner shall be utilised within six months' time from the restart date which shall be 28.02.2018. It is submitted that thereafter the Respondent received a letter **dated 14.09.2017, whereby the demand was raised to Rs.5,95,04,537/-** on the basis of the turnover or 5% of the total sales, **which is contrary** to the petitioner's earlier letter of 18.05.2017, whereby*

demand was raised for arrear of Rs.84,72,740.00.

9.4 It is submitted that the Respondent vide its reply dated 30.09.2017 pointed out that it has restarted the production w.e.f. 01.09.2017 and it stands committed to the payment of royalty upon the sales for a period of six months upto 28.02.2018. However, thereafter the respondent was instructed by the Petitioner **to use the packing material** with the Petitioner's name or logo printed on or **before 30.09.2017** and directed the Respondent to hand over all the residual packing material.

9.5 Thereafter, the Respondent **filed a Civil Suit No.95/2018** before the City Civil Court at Ahmedabad, wherein vide order **dated 17.01.2018**, the Petitioner was directed to file reply to the injunction application. However, till date the Petitioner has not filed any reply to the injunction application or the suit itself and the **matter is pending for adjudication**. It is further submitted that when the Article 7 for dispute settlement in respect of the Technical Guidance Agreement **is subjudice before the City Civil Court, Ahmedabad**, in which **correspondence exchanged between the parties** with regard to the outstanding payment is also referred to and **relied upon in the plaint**, the present **petition does not deserve any credence** under the Code.

9.6 It is further submitted that the Petitioner has earlier raised **a demand for payment of arrears of Rs.84,72,740/-** as per letter **dated 18.05.2017** and has shown no justifiable cause on the part of the Petitioner to claim **Rs.5,95,04,537/-** on 14.09.2017 as **total amount of debt due** on

*account of royalty fees alongwith the running interest as full and final payment. It is also submitted that the Petitioner has not sent **invoice claiming the royalty from the Respondent**, despite the fact that Respondent has sent the sales figure for the months of October' 2017 to February 2018. Further, it is also submitted that Respondent has made payment as late as ON 12.09.2017, which shall be made good on the basis of the ledger account.*

17. This Tribunal vide order dated 20.11.2019 rejected the present application and the dismissal order was impugned before the Hon'ble NCLAT in Company Appeal (AT) (Ins) No. 168 of 2020 and by order dated 16.03.2023. The Hon'ble NCLAT has passed the following order:-

9. *We have heard Counsel for the Parties and after perusal of record are of the considered opinion that the impugned order' is sans reasons and is an example of violation of principle of natural justice because the Tribunal was obliged at least to give reasons in its order to agree with the contentions of the Corporate Debtor recorded in Para-12 if not the reasons for not being satisfied with the reasons given by the Appellant in support of the maintainability and success of its application.*
10. *Therefore, the present appeal is hereby allowed. The 'impugned order' is set aside. The matter is remanded back to the 'Adjudicating Authority' to decide it afresh by taking into consideration the pleadings and the evidences of the Appellant and pleadings and the evidence of the Respondent and then to pass a well speaking order in accordance with law.*

18. Post the said order of the Hon'ble NCLAT dated 16.03.2023, an additional affidavit has been filed by the Applicant under inward diary No. 3688 dated 21.09.2023, pursuant to the leave granted by this Tribunal vide order dated 23.08.2023. The Applicant has reiterated the facts as mentioned by them in the petition. The salient issues being brought forward through the additional affidavit are summarized as under:-

- I. The Applicant continues to claim the minimum guaranteed royalty amounting to Rs.5,95,04,537/- along with further interest.
- II. Post issued of demand notice under Section 8 of the IBC, 2016 dated 10.10.2017, the respondent has filed a Civil Suit bearing No. 95 of 2018 before the City Civil Court in Ahmedabad.
- III. It is the case of the Applicant that the said Civil Suit was filed subsequent to the filing of the present application. Further, the said Civil Suit was withdrawn by an order of Lok Adalat dated 08.02.2020.
- IV. It is the contention that no dispute is pending between the parties.

- V. It is further stated that neither party has invoked the arbitration clause in the subject agreement.
- VI. The contention of the respondent that the oral understanding arrived in September, 2013 is without basis and not supported by any documentary evidence as recorded in the Article 9 of the subject agreement.
- VII. The respondent, in its reply, also attempted to dispute its liability on the ground that was a mismatch in the amount claimed by the Applicant vide its letter dated 18th May 2017 and the Section 8 demand notice dated 10th October 2017. The said contention of the Respondent is wholly baseless as the amounts claimed by the Applicant vide each letter addressed to the Respondent, prior to the issuance of the demand notice under the IBC, pertained to a certain relevant period and did not in any manner indicate the entire amount due any payable by the Respondent to the Applicant for all years put together, as sought to be contended by the Respondent.
- VIII. To this Applicant states that mismatch is not a valid defence, as the Respondent has admitted the existence in execution of the agreement and cannot be a ground for rejection of the present application.

19. As to non-submissions of invoices, the Applicant states that they were unable to do so as the respondents failed to fulfil their contractual obligation of furnishing to the Applicant, sales figures duly certified by a Chartered Accountant.
20. It is the contention of the Applicant that invoices are only one of the several means of establishing the existence of a debt, and Rules 5 and 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 give an Operational Creditor the discretion to either deliver upon the Respondent a demand a notice in Form-3 or a copy of an invoice along with notice in Form-4.
21. A reply to the additional affidavit was filed by the Respondent through an additional affidavit, vide inward diary No. D-4156 dated 20.10.2023. In the reply affidavit the Respondent has raised the following issues:-
- I. It is stated that certain sample invoices were placed before the Hon'ble NCLAT through an I.A. No. 2659 of 2020, which are based upon the actual sales figure provided by the Respondent. As such, the contention that the sales figures were not provided by Respondent is not correct.
 - II. The Applicant has not raised the invoices, the present application is to extort money from the Respondent.
 - III. The Respondent further relies upon para No.6 of the letter dated 31.07.2017 which is reproduced below:

*“6. The biggest evidence of our informal agreement of paying the Royalty fee on actual basis, lies in the fact that we have continuously charged by you, by issuing the invoices, which are on actual basis only. You can please check that each that each and every invoice which your company has raised on us since beginning till date, in this regard **Copies of sample invoices enclosed.**”*

22. A rejoinder on behalf of the Applicant was submitted under diary No. D-4814 dated 01.12.2023. The same is considered.
23. The Respondent states that no correspondence between the parties took place from September, 2012 until the receipt of the demand notice dated 10.10.2017, raising the issue of alleged balance royalty fees payable or raising any invoices thereof by the Applicant. The Respondent further states that, as per the understanding between the parties, they were to pay royalty fees on an actual basis.
24. The Respondent states that, as per the demand notice dated 10.10.2017, the amount claimed by the Applicant was till 06.03.2015 is hit by limitation since the present application was filed on 08.03.2018.
25. It is stated that the provisions of law relied upon by the Applicant being Section 37 and Section 73 of the Indian Contract Act, 1872, are misplaced. Section 37 of the Indian Contract Act, 1872, deals with the obligation of parties to the

contract and specifically provides that the performance of the contract can be dispensed with or excused, and Section 73 of the Indian Contract Act,1872 deals with the compensation for the loss or damage caused by the breach of the contract, and no damage has been quantified in the present matter. It is further stated that the Respondent did not receive any notice dated 10.10.2017, and this fact has been brought to the notice of this Tribunal under the counter affidavit.

26. Learned Counsel for both sides were directed to file written submissions not exceeding more than three pages vide order dated 07.02.2024. However, none of them have filed any written submissions post the said order.

27. We have heard the Counsels appearing for both the sides and perused the documents.

28. After going through the documents the following issues are framed:

I. Whether there was a valid demand notice issued by the Applicant / Operational Creditor upon the Corporate Debtor.

a) The Applicant has placed on record the page No. 27 the Form-3 notice dated 10.10.2017. The Applicant has placed the postal receipt at page No. 52 and the

tracking report on page No. 53. A perusal of the same reflects that the demand notice was duly served to the Respondent on 13.12.2017, as such the contention of the Respondent that demand notice was not received is misplaced. A perusal of the demand notice and the application reveals that the Applicant has not annexed along with the invoices for an amount of Rs.5,95,04,537, but as only placed a calculation sheet, which is placed on Annexure1 at page Nos. 13 and 14. A perusal of the said annexure reveals that transactions between the parties commenced in December, 2012, and continued till June, 2017. No invoices were attached to the said Annexure neither the Applicant has attached along with the application any invoices and has not served the invoices upon the Respondent.

II. Whether the Applicant / Operational Creditor has issued invoices upon the Corporate Debtor for the royalty fee as claimed.

- b) As on the date of hearing no summary or invoices for which the present application is filed was placed before

us through which the Applicant has demanded a payment of Rs.5,95,04,537. The Applicant claims that the same are arising out of contractual obligations as per the technical guidance agreement dated 14.09.2012. It appears that invoices for the guaranteed royalty were never raised.

III. Limitation.

c) As regards the limitation, the last payment received by the Applicant from the Respondent is in the month of June, 2017 since the present application was filed on March, 2018. The Application is not suffering from any limitation.

IV. Effect of arbitration clause and Civil Suit bearing No. 95 of 2018.

d) Merely presence of arbitration clause in the agreement does not prohibit an Applicant to approach this Tribunal seeking commencement of Insolvency. As regards the Civil Suit filed by the Respondent, the same is said to have been withdrawn by an order of Lok Adalat dated 08.02.2020, as such no dispute is

presently pending between the parties either in arbitration or by way of Civil Suit.

29. Rule 5 of the IBBI (Application to Adjudicating Authority)

Rule 2016 stated as under:-

Demand notice by operational creditor. - (1)

An operational creditor shall deliver to the corporate debtor, the following documents, namely.-

(a) a demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in subsection (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

30. From the application, it is seen that the Applicant has not supplied the Respondent with a copy of the various invoices for which the amount has been claimed in the present application.

31. As per the judgment of Hon'ble NCLAT rendered in ***M/s. Agarwal Veneers V/s. Fundtonic Service Pvt. Ltd.***, in Company Appeal (AT) (Insolvency) No. 968 of 2020. The

relevant portion of the said judgment is reproduced as under:-

14. It is clear from the aforementioned provisions of the Code and also the Regulations therein that unless the Operational Creditor along with its Application furnishes a copy of the invoices, the bank statements and the financial accounts, the Adjudicating Authority is empowered to reject an incomplete Application.

15. Lastly, we address to the Contention of the Ld. Counsel for the Applicant that merely because the Corporate Debtor is a going concern and an MSME, the Adjudicating Authority ought not to have rejected the Application on this ground also.

31. It is also seen from Annexure 1 that certain bills / invoices were raised by the Applicant upon the Respondent based upon the actual sales figures and have been regularly paid by the respondent till the year 2017.
32. From 2012 to 2017, the applicant has not raised the invoices for the guaranteed royalty fees, and no correspondence has been placed before us to bring to our notice that the Applicant was seriously pursuing the guaranteed royalty fee payment with the respondent in terms of the Technical Guidance Agreement dated 14.09.2012.
32. It appears to us from the conduct of the Applicant that by acquiesce, the Applicant has consented to a royalty fee based upon the actual sales figure and has given up claim regarding guaranteed royalty fee payments. This is further strengthened by the fact that the Applicant has never

raised any invoices for the guaranteed royalty fee. As has been explained above.

33. In view of the above, the present application, i.e., **CP (IB) 141 of 2018**, is hereby dismissed. No order as to cost.
34. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

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SAMEER KAKAR
MEMBER (TECHNICAL)

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SHAMMI KHAN
MEMBER (JUDICIAL)

Vinit Patel/Steno