BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

TCP No. 260/IBC/NCLT/MB/MAH/2017

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

In the matter of

M/s. Inject Care Parenterals Private Limited
..... Operational Creditor
(Petitioner/Applicant)

v.

M/s. Vexta Laboratories Private Limited
..... Corporate Debtor
(Respondent)

Order delivered on : 01.12.2017

Coram :
Hon'ble M.K. Shrawat, Member (J)
Hon'ble Bhaskara Pantula Mohan, Member (J)

For the Petitioner :
Adv. Neville Deboo – Advocate for the Petitioner.

For the Respondent :
Mr. Sanjay Dubey, Advocate i/b. Mishra & Co. – Advocates for the Petitioner/Operational Creditor.

Per: Bhaskara Pantula Mohan, Member (J)

ORDER

1. This petition is originally filed with the Hon'ble Bombay High Court under S. 433 and S. 434 of the Companies Act, 1956 on 29.06.2016 but thereafter with the enforcement of the Insolvency and Bankruptcy Code, 2016 (hereinafter as **Code**) w.e.f. 01.12.2016 and vide a notification viz. 'Transfer of Pending Cases with High Court' dated 07.12.2016 this Petition got transferred to this Bench of NCLT for further proceedings under provisions of the Code.

2. Hence, consequentially M/s. Property Solutions (India) Private Limited (hereinafter as **Operational Creditor**) has furnished Form No. 5 under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "Operational Creditor" on 11th July, 2017 by invoking the provisions of Section 9 of the Code.

3. In the requisite Form, under the Head "Particulars of Corporate Debtor" the description of the debtor is stated as, M/s. Vexta Laboratories Private Limited (hereinafter as **Debtor**) having registered address at, Shop No. 20 and 21 A, First Floor, Yashodam Shopping Complex, Gen. A. K. Vaidya Marg, Goregaon (E), Mumbai – 400063.

4. Further under the Head "Particulars of Operational Debt" the total amount in default is stated to be ₹ 53,31,736/. In additionally the Operational Creditor has claimed interest of 24% p.a. on the said outstanding amount until the said amount got paid.

5. Brief Background :

5.1. The Operational Creditor is a pharmaceutical company and it is engaged in business of manufacturing of Dry Powder Injection.

5.2. In the year 2013-2014 the Debtor has approached the Operational Creditor and ordered for supply of this Dry Powder Injections of 1000 mg each to it. The Debtor has ordered the same to export to Russia.

5.3. Accordingly the Operational Creditor has supplied the goods to total value of ₹ 2,24,90,977/-. This supply has been done in period from 02.10.2013 to 31.03.2014.

5.4. The Debtor thereafter made the payment towards the bill raised by the Operational Creditor time to time except the outstanding amount claimed under this application/petition.

6. Submissions by the Operational Creditor :

6.1. The Learned Advocate for the Operational Creditor has submitted that, the Operational Creditor has raised 8 invoices towards the goods supplied by it to the Debtor.

6.2. Further that, upon these invoices the last payment was received from the side of Debtor on 05.11.2014 amounting to ₹ 4,00,000/- against the invoice which was raised on 20.03.2014.

6.3. Also that, thereafter the Debtor has not made any payment towards the balance amount and consequentially the Operational Creditor has issued a Statutory Notice U/s. 433 and 434 of the Companies Act, 1956 dated 09.02.2016 stating therein that, no-reply to that notice will attract the legal consequences. The said notice was duly received by the Debtor on 15.02.2016. To that effect the R.P.A.D. slip is also attached with the Application/Petition.

6.4. But the Debtor has chosen not to repay the money and hence, the Operational Creditor has filed a Petition for winding-up of the Debtor with the Hon'ble High Court on ground of inability to pay the Debts.

6.5. It is further submitted that, the Debtor has for the first time in the proceedings before NCLT raised the dispute with regards to the claimed amount in its reply to this Application/Petition.

6.6. It is submitted that, as per the Debtor's statement the Ministry of Health, Russia has rejected the consignment of goods supplied by the Operational Creditor is not with in the norms of Russian Government and Ministry has refused to take that consignment.

6.7. Further this fact has never been communicated from the side of the Debtor to the Operational Creditor.

6.8. It is also submitted that, the Operational Creditor has filed a Petition with the Hon'ble Gujrat High Court which was withdrawn by him.

6.9. Further that, as on date of filing of the Petition/Application there is no subsequent or parallel proceedings pending before any Judicial Authority filed by the Operational Creditor against Debtor as regards this claimed amount. The Operational Creditor is not aware if the Debtor has filed any suit/complaint against him.

6.10. The dispute raised by the Debtor is not bonafide dispute and it is an afterthought which was brought on record in its reply to this Application/Petition.

6.11. The Learned Advocate also finally submitted that, the Application/Petition U/s. 9 of the Code is fit for admission; as the Debtor has made only the part payment to the invoices raised by the Operational Creditor hence, default in making the total payment which is evidenced form the record. Consequentially this Application/Petition may be admitted.

7. Submissions by the Debtor :

7.1. The Learned Advocate has submitted that, the Operational Creditor moved this Application/Petition on false, frivolous grounds.

7.2. It is further submitted that, there is deficiency of service on the part of Operational Creditor. Moreover the Operational Creditor is very negligent in supplying the goods as demanded by the Debtor.

7.3. It is also submitted that, the Ministry of Russia rejected the consignment as the goods are not in conformity with the prescribed quality in the opinion of the Ministry of Health, Russia.

7.4. Further that, the Carrier Agent of the Debtor has informed the said denial to the Debtor through a letter dated 04.04.2014. Thereafter the Debtor has issued a Debit Note in favour of the Operational Creditor on 07.04.2014.

7.5. It is also submitted that, the Debtor has filed a Civil Suit bearing no. 2069/2017 in the City Civil Court at Dindoshi on 10.04.2017 against the Operational Creditor claiming damages arisen out of rejection of consignment by Russian Government.

7.6. It is further submitted that, the Debtor has neither received the notice U/s. 434 of the Companies Act, 1956 nor Demand Notice U/s. 8 of the Code. And as the Demand Notice under the Code has not been issued this Application/Petition is not maintainable.

7.7. Finally it is submitted by the Learned Advocate that, the Debtor is a Solvent Company and about 50 employees are earning their bread and butter over the business of Debtor. Hence, this Application/Petition may not be Admitted.

8. **Findings :**

8.1. We have considered the submissions made by both sides. We have also perused the Petition filed before Hon'ble High Court and subsequently filed Form – 5 as per the Code. We have also gone through the reply filed by the Debtor alongwith Rejoinder of the Operational Creditor and Sur-rejoinder filed by the Debtor.

8.2. On perusal of all the documents we came to conclusion that, the Operational Creditor has duly supplied the goods as ordered by the Debtor and raised the invoices to that effect.

8.3. The seller-buyer relation between the Operational Creditor and Debtor is from October, 2013 onwards. Since 02.10.2013 to 31.03.2014 the Operational Creditor has supplied the goods to the Debtor. And it is admitted fact that, the Debtor has made the regular payment upto invoice raised on 24.01.2014. Further the Debtor has partly made the payment towards invoice raised on 20.03.2014 but thereafter there is no payment from the side of the Debtor towards Operational Creditor.

8.4. This fact proves that, there is Default as defined U/s. 3 (12) of the Code on the part of Debtor.

8.5. Further that, the Operational Creditor has also established that the nature of Debt is an 'Operational Debt' as defined U/s. 5 (21) of the Code.

8.6. As considered the dispute raised by the Debtor is concerned, we have perused the said letter which was issued by the carrier agent of the Debtor and on perusal of it we came to conclusion that in support of that letter there is nothing on record which will prove that the Ministry of Health, Russia has refused the goods of the Operational Creditor.

8.7. Further that, we have also perused the Debit Note issued by the Debtor but there is also nothing on record which will prove that, the said Debit Note has been received by the Operational Creditor.

8.8. As regards the suit filed by the Debtor in City Civil Court, Dindoshi we are of the opinion that, as the suit is filed in month of April, 2017, that is after the transfer of the Winding-up Petition from Hon'ble High Court to this Bench of

NLCT and also after the enforcement of the Code hence, it is a tactic of the Debtor to defeat the present Application/Petition U/s. 9 of the Code.

8.9. Hence, according to the examined facts and circumstances of this case we come to conclusion that, there is no dispute pending between the Operational Creditor and Debtor prior to the triggering of Corporate Insolvency Process. Regards to the question of dispute raised from the side of Debtor we are of the opinion that, the said dispute is not a bonafide dispute, as, the same has not been brought to the knowledge of Operational Creditor at the right time and hence, it is mere an afterthought and a tactic. Hence, this Application/Petition deserves **Admission** on these grounds.

8.10. Further that, regards to the question of issuance of Notice is raised by the Debtor, we have perused the Notice sent by the Operational Creditor U/s. 434 of the Companies Act, 1956 and also the R.P.A.D. slip to that effect and we are of the opinion that, the Notice U/s. 434 of the Companies Act, 1956 is duly received by the Debtor.

8.11. As regards the question of issuance of Demand Notice U/s. 8 of the Code it is admitted fact that, the Operational Creditor has not issued the Demand Notice U/s. 8 of the Code after transfer of Winding-up Petition from the Hon'ble High Court as against the Debtor.

8.12. Accordingly, we have perused the decision of Hon'ble NCLAT in *Era Engineering Ltd. v. Prideco Commercial Projects Pvt. Ltd. (Company Appeal) (AT) (Ins) No. 31/2017* wherein it is held as follows :

> *"8. Admittedly, no notice was issued by Operational Creditor under section 8 of the I & B Code, 2016.*
> *Demand notice by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of any expiry period of tenure of 10 days there was no question of preferring an application under section 9 of I & B Code, 2016."*

8.13. Hence, in the light of above judgement we are of the opinion that, this matter also deserves **Rejection** in absence of issuance of Demand Notice U/s. 8 of the Code.

8.14. Accordingly, this Petition/Application under S. 9 of the Code is **Rejected** as the defect in this Petition/Application is not a curable defect and time cannot be granted as per the Proviso of S. 9 (5) of the Code which provides 7 days' Notice for Removal of defect. Nevertheless, the said defect makes the very Petition/Application as incomplete that too a ground for rejection under the Code. Needless to mention that, the Operational Creditor can issue a Fresh Demand Notice as per the Provisions of the Code and thereafter can approach this Tribunal again to seek appropriate reliefs.

8.15. Hence, this Petition/Application is accordingly **Dismissed**. However, in the facts and circumstances of the case there is no order as to cost.

9. Ordered Accordingly. To be consigned to Records.

Sd/-
BHASKARA PANTULA MOHAN
MEMBER (JUDICIAL)

Sd/-
M. K. SHRAWAT
MEMBER (JUDICIAL)

Dated : 1st December, 2017

Avinash