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**BEFORE THE ADJUDICATING AUTHORITY  
NATIONAL COMPANY LAW TRIBUNAL  
AHMEDABAD BENCH  
AHMEDABAD  
Court 2**

**C.P.(I.B) No. 696/NCLT/AHM/2019**

**Coram: HON'BLE Ms. MANORAMA KUMARI, MEMBER JUDICIAL  
HON'BLE Mr. CHOCKALINGAM THIRUNAVUKKARASU, MEMBER TECHNICAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH  
OF THE NATIONAL COMPANY LAW TRIBUNAL ON 18.02.2021**

Name of the Company: Biogenetic Drugs Pvt. Ltd.  
V/s  
Themis Medicare Ltd.

Section 9 of the Insolvency and Bankruptcy Code,  
2016,

| <u>S.NO.</u> | <u>NAME (CAPITAL LETTERS)</u> | <u>DESIGNATION</u> | <u>REPRESENTATION</u> | <u>SIGNATURE</u> |
|--------------|-------------------------------|--------------------|-----------------------|------------------|
|--------------|-------------------------------|--------------------|-----------------------|------------------|

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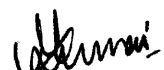
**ORDER  
(through video conferencing)**

None appeared on behalf of the parties.

The order is pronounced in the open court vide separate sheet.

  
**CHOCKALINGAM THIRUNAVUKKARASU  
MEMBER TECHNICAL**

Dated this the 18th day of February, 2021

  
**MANORAMA KUMARI  
MEMBER JUDICIAL**

**BEFORE ADJUDICATING AUTHORITY (NCLT)  
AHMEDABAD BENCH  
AHMEDABAD**

**C.P. No. (IB) 696/9/NCLT/AHM/2019**

**In the matter of:**

**M/s. Biogenetic Drugs Private Limited**

B-6, Felicity Tower

Sahakar Marg,

Below Harley Davidson Showroom

Jaipur 302 006

Rajasthan State

:

**Petitioner**

Financial Creditor

**Versus**

**M/s. Themis Medicare Limited**

Plot No. 69-A, GIDC Industrial Estate

Vapi 396 195

Dist. Valsad

**GUJARAT STATE**

:

**Respondent**

[Corporate Debtor]

**Order delivered on 18<sup>th</sup> February, 2021**

**Coram: Hon'ble Ms. Manorama Kumari, Member (J)**

**Hon'ble Mr. Chockalingam Thirunavukkarasu, Member (T)**

**Appearance:**

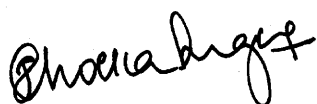
Petitioner : Mr. Naresh Kumar Sejvani, Advocate

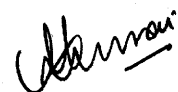
Respondent : Mr. Manan Bhatt, Advocate

**ORDER**

**Per se : Ms. Manorama Kumari, Member (Judicial)**

1. Mr. Vinod Sharma, authorised signatory, on behalf of **M/s. Biogenetic Drugs Private Ltd.** filed this Petition under Section 9 of The Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as "the Code"] read with Rule 6 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 [hereinafter referred to as "the Rules"], as operational creditor/applicant.
2. The applicant/operational creditor, a private limited company incorporated on 23.01.2004, having identification





No. U24232RJ2004PTC018909 and having registered office at 66, Mathur Vaish Nagar, Tonk Road, Jaipur, Rajasthan State, submitted that the respondent is indebted a total sum of **Rs. 28,35,880.00 (Rupees twenty-eight lacs thirty-five thousand eight hundred eighty only)** towards purchase of various pharmaceutical product.

3. It is submitted by petitioner that the corporate debtor from time to time placed series of purchase orders on the operational creditor for purchase of various pharmaceutical products and the same were duly supplied to the corporate debtor. That, towards such supplies made by the applicant, invoices worth Rs. 79,38,197.00 were raised out of which the corporate debtor made payment to the tune of Rs. 51,02,317/- thereby leaving balance outstanding amount of Rs. 23,35,880/- which amount till date despite service of demand notice has not been paid which clearly shows the inability of the corporate debtor to pay its debts and meet out the liabilities.
4. The applicant has further stated that looking to the dread and alarming situation, on 19.04.2011, operational creditor instituted a Civil Suit before the Hon'ble Court of Additional District Judge-I, Solan, Himachal Pradesh at Nalagarh for recovery of its outstanding amount of Rs. 28,35,880.34 which has been duly decreed in favour of the operational creditor vide order dated 10.04.2018. That, the plea of limitation taken by the corporate debtor is very much be satisfied from the date of the above order dated 10.04.2018 and amount became payable in accordance with such decree and, therefore, the date of default shall also be considered and, the operational creditor from the day one were very much vigilant of its outstanding dues and had taken appropriate legal recourse, however, despite passing of the orders by the Hon'ble Court, the corporate debtor is not in a situation to pay its debts or challenge the same and



making excuses on one pretext or other so as to avoid the liability. In such situation the operational creditor is left with no alternative just to invoke the provisions of Section 9 of the IBC so that resolution process of corporate insolvency can be initiated; therefore, this petition.

5. It is further submitted that according to the decree dated 10.04.2018 passed by the Hon'ble Court of Additional District Judge-I, Solan, fell due on 22.07.2007, however, the date of default has to be considered the date of decree only i.e. 10.04.2018.
6. In support of the claim, the applicant has annexed to the application copy of all the documents as required by the I & B Code.
7. The respondent/corporate debtor is a limited company registered under the provisions Companies Act, 1956, on 31<sup>st</sup> May, 1969 having identification No. L24110GJ1969PLC001590 and having registered office at GIDC, Vapi, Gujarat State. Authorised share capital of the respondent company is Rs.10,00,00,000/- and paid up share capital is Rs. 9,18,09,420 /-.
8. The respondent/corporate debtor filed affidavit in reply inter alia denying the debt and raising following objections: -
  - that, ex-parte decree cannot be executed through insolvency resolution process;
  - that, ex-parte decree is not final as an application seeking setting aside ex-parte decree is pending adjudication before competent civil court;
  - that, claim is time barred;
  - that, pre-existing dispute;




**Findings:**

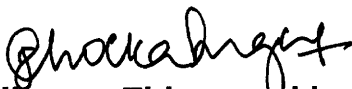
9. Heard learned counsels appearing for both the sides and perused the documents annexed to the application/reply.
10. It is admitted fact that instant application is filed by the applicant claiming themselves as financial creditor based on the Decree dated 10.04.2018 passed by the Learned Court of Additional District Judge-1, Solan, (Himachal Pradesh) at Nalagarh.
11. It is also a fact that on getting the decree in favour of the petitioner, the petitioner had ample opportunity to execute the said decree. Had the petitioner started execution proceedings of the decree in the year 2018, by now petitioner could have succeeded in the execution proceedings, but the same has not been opted by the petitioner. May be, most of the time, it is difficult to execute the decree provided by the Court as there would be long drawn litigation and delay while executing the decree.
12. It is important to note that IB Code is not a law for recovery of money unlike Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 and recovery of the debt due to banks and financial institutions, whose main purpose is to recover money of banks and other financial institutions.
13. The very intent of the IBC is the resolution of corporate debtor and maximisation of value of corporate debtor. Therefore, the legislature has provided section 65 of the IB Code to avoid abuse of the process of IBC, which deals with fraudulent or malicious initiation of proceedings with IBC, according to which, if corporate insolvency is initiated only for the purpose of recovery of the debt of the creditor, it is

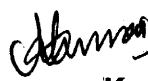
liable to be dismissed and may attract penalty ranging from rupees one lakh to rupees one crore.

14. Though in IBC the decree holders are classified as a creditor under Section 3 (10), but it does not spell whether a decree holder be classified as 'financial creditor' or 'operational creditor' for the purpose of filing application in the IBC. While dealing with the issue, it is found that there are various conflicting decisions of NCLT, NCLAT and Hon'ble Supreme Court of India on the issue that whether decree holder can execute their decree under IBC and if they can execute the decree, they will come under which category of creditor – financial or operational as decree holder do not have separate provision like section 7 for financial creditors or section 9 for operational creditors. However, it can be considered by taking into consideration of the nature of claim in the case and facts and circumstances of particular case.
15. In ***Urgo Capital Limited v. Bangalore Dehydration and Drying***, Hon'ble three judge bench of NCLAT held that decree holders can file for insolvency proceedings as the word creditor as defined under Section 3 (10) of the IBC includes decree and therefore if a petition is filed for execution of decree it cannot be dismissed on the fact that decree holder should file decree for execution in civil Court.
16. In ***International Asset Reconstruction Company Pvt. Ltd. v. Jayant Vitamins Ltd.***, NCLAT dismissed an application by a financial creditor for initiation of insolvency proceedings against corporate debtors stating that application for initiating insolvency cannot be accepted if execution of a decree is pending.



17. In **HDFC Bank Ltd. v. Bhagwan Das Auto Finance Ltd.**, a three judge bench of the NCLAT clearly and unequivocally dismissed an insolvency application solely on the ground that the IBC could not be used to execute an arbitral award or decree.
18. Under these circumstances, it is expedient to refer to the latest judgement of Hon'ble National Company Law Appellate Tribunal in the case of **Sh. Sushil Ansal Vs Ashok Tripathi and Ors.**, wherein it is reiterated that a decree-holder though covered under the definition of creditor under Section 3(10) of the Insolvency and Bankruptcy Code (IBC) would not fall within the class of financial creditors and therefore, a decree holder cannot initiate a corporate insolvency resolution process (CIRP) against a corporate debtor with an object to execute a decree.
19. Under the facts and circumstances and as discussed above the petition is not maintainable and deserves to be dismissed. In the result, company petition No. CP (IB) No. 696 of 2019 stands dismissed and disposed of without cost.
20. However, this will not stand in the way of the Petitioner approaching the appropriate forum seeking to enforce its claim against the Respondent, as this petition has been dismissed on the issue of maintainability taking into consideration the provisions of IB Code, 2016.

  
**Chockalingam Thirunavukkarasu**  
 Adjudicating Authority  
 Member (Technical)

  
**Ms. Manorama Kumari**  
 Adjudicating Authority  
 Member (Judicial)

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