

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

C.P. (IB) No. 515/KB/2019

In the matter of:

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

And

In the matter of:

Jupiter International Limited, having CIN: U51109WB1978PLC031668, a Company incorporated under the Companies Act, 1956, having its registered office at 20A, Ashutosh Choudhary Avenue, Kolkata-700 019, West Bengal

...Operational Creditor/Petitioner

Versus

Phyto Biotech Private Limited, having CIN:U01407WB2009PTC133772, a Company incorporated under the Companies Act, 1956 and having its registered office at 9, Swarup Khettry Road, New Alipore, Kolkata- 700 053, West Bengal (formerly at 1/12, Nitai Nagar, Purbalok, Near Metro Cash & Carry Mall, Kolkata- 700 099, West Bengal.

...Corporate Debtor/Respondent

Coram:

Shri Jinan K.R., Hon'ble Member (Judicial)

Shri H.C. Suri, Hon'ble Member (Technical)

For Petitioner:

C. S. Deepak Kumar Khaitan, Practising Company Secretary.

For Respondent:

Kumarjit Bannerjee
Sanchari Chakraborty
Siksha Aggarwal

Date of pronouncement of Order: 04/02 /2020

ORDER

Per Shri Jinan K.R. Hon'ble Member (Judicial)

1. This is a Petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "I & B Code") by Jupiter International Limited (hereinafter referred to as the Operational Creditor/Petitioner) for initiating Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") against Phyto Biotech Private Limited, (hereinafter referred to as the Corporate Debtor/Respondent).
2. Brief facts of the Petitioner's case are as follows:
 - a) The Operational Creditor has been supplying goods to the Corporate Debtor since August 2018. The total amount of goods supplied by the Operational Creditor to the Corporate Debtor as per the purchase order no. PBPL/SOL/002/18-19 dated 27.07.2018 amounts to Rs. 61,91,640/- (Rupees Sixty One Lakhs Ninety One Thousand Six Hundred and Forty only) out of

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which payment has been received for Rs. 14,00,000/- (Rupees Fourteen Lakhs Only) in September, 2018 and hence the actual outstanding principle amount is Rs. 47,91,640/- (Rupees Forty Seven Lakhs Ninety One Thousand Six Hundred and Forty Only) and the total amount of debt including interest at the rate of 12% per annum is Rs. 50,09,055/- (Rupees Fifty Lakhs Nine Thousand and Fifty Five Only).

- b) The date of first default arose on 21.08.2018.
- c) The Operational Creditor followed up with the Corporate Debtor from time to time for payment of the amount of debt, but the outstanding payment was not received from the corporate debtor. Not finding any suitable outcome from the discussions and assurances, the Operational Creditor issued a demand notice dated 07.01.2019 under section 8 of the I & B Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by speed post to the Corporate Debtor.
- d) The Applicant has produced and relied upon various documents to prove its case. Following are the documents relevant for the consideration of the case in hand:- copy of purchase order, copies of invoices and e-way bill, copy of Demand Notice dated 07.01.2019 in Form-3 along with its enclosures and the postal receipts and relevant track report showing service of such notice upon the Corporate Debtor, bank account statement where deposits are made or credit received by the Operational Creditor in respect of the debt of the Corporate Debtor indicating that no payment has been received by the

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Operational Creditor from the date of last payment received in the month of September, 2018, Copy of relevant accounts from the Bank maintaining accounts of the Operational Creditor confirming that there is no repayment of the relevant unpaid operational debt and an affidavit affirming that no notice of dispute has been received by the Operational Creditor.

e) In spite of all the efforts taken by the Operational Creditor herein, the Operational Creditor has remained unsuccessful in recovering the claim from the Corporate Debtor and hence these present proceedings.

3. Notice of the Company Petition was served on the Corporate Debtor upon which the Corporate Debtor entered appearance and filed Affidavit in Reply wherein it submitted as follows:

a) The proceeding purportedly initiated by the Operational Creditor is not maintainable either in law or in facts or in present form. The application has been filed in gross suppression of material facts and as such on that ground only the same should be dismissed with exemplary cost.

b) It is submitted that the consignment of the Multi-Crystalline PV Module (325 WP) (hereinafter, the consignment) was procured by the Corporate Debtor from the Operational Creditor for back to back sale of one Envision Jaipur Sales Pvt. Ltd. (hereinafter, Envision). The Operational Creditor was at all times aware of the back to back sale arrangement of the subject consignment and had undertaken the supply with the express knowledge of onward sale to Envision. The said Operational Creditor had full knowledge about the onward

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sale and the fact that the Corporate Debtor has not procured the instant consignment for its captive use which is evident from the tax invoice issued in respect of the subject consignment which clearly mentions Envision as the final recipient of the goods in question.

- c) Upon receipt of the aforementioned consignment at its depot, Envision raised various disputes relating to the quality and specification of the Multi-crystalline PV Module. Envision addressed letters communicating such issues to the Corporate Debtor and the Corporate Debtor duly communicated such fact to the Operational Creditor and requested the Operational Creditor to resolve the issues. To the best of knowledge of the Corporate Debtor, the Operational Creditor had undertaken several rounds of discussions and negotiations with Envision to resolve the issue. However, it appears that upon failure of such discussion, the Operational Creditor with *malafide* object and ulterior motive has suppressed the said facts.
- d) It is evident from the aforementioned course of events that a pre-existing dispute within the meaning of Section 5 (6) of the IBC has arisen in the instant case.
- e) It has been suppressed by the Operational Creditor that a purported criminal proceeding was initiated by the Operational Creditor against the Principal officers/Key managerial personnel of the Corporate Debtor for the alleged non-payment of the sum of Rs. 47,91,640/- being the subject matter of the instant

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proceedings and upon investigation, the said complaint was closed as being malafide, purported and bereft of any merit.

- f) The said application is missing in necessary details and particulars and does not contain the requisite documents stipulated under section 9 of the I & B Code.
 - g) Apart from the aforementioned submissions, the Corporate Debtor has denied all the submissions made by the Operational creditor except what forms the matter of record or are admitted.
4. The Operational Creditor filed an Affidavit in Rejoinder to the said Reply wherein it has denied all the contentions of the Corporate Debtor the brief of which is as follows:
- a) The Corporate Debtor has not been able to provide any evidence in support of whatever statements it has made. It is submitted that the Corporate Debtor in paragraph 3 (c) of the Reply that the subject goods were procured from Operational Creditor. It is further submitted that there is no mention of the back to back agreement in the said purchase order as issued by the Corporate Debtor. The Corporate Debtor has not denied the said purchase order.
 - b) The Operational Creditor has delivered the goods as per the instructions of the Corporate Debtor and accordingly the name of Envision Jaipur Sales Private Limited has been mentioned in the invoices. The address of delivery mentioned in the purchase order is same as mentioned in the invoices. The Operational Creditor has raised invoices on the Corporate Debtor i.e. 1021/S/114 and 1021/S115 and not on Envision.

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- c) No dispute has been raised by the Envision and till date no copy of any such communication has been given to the Operational Creditor or annexed to the Reply. It was for the first time raised in the said Reply. It is denied that there is any pre-existing dispute.
- d) It is further submitted that had there been quality issues, the cheques would not have been released by the Corporate Debtor . Copy of the dishonored cheques have been marked and annexed as **Annexure-A** to the Rejoinder.
5. Heard the Ld. Practising Company Secretary and Ld. Counsel appearing for the Corporate Debtor and perused the records.
6. The main contention raised by the Corporate Debtor herein is that the transaction in question was a back to back sale arrangement wherein the good were delivered to one Envision Jaipur Sales Private Limited, therefore the Corporate Debtor is not liable to pay the said amount.
7. It appears from the perusal of the said purchase order that it was issued by the Corporate Debtor wherein the delivery address was that of Envision Jaipur Sales Private Limited and, therefore, the consignment was delivered on the Envision Jaipur Sales Private Limited on the behest of the Corporate Debtor and the invoices were raised on the Corporate Debtor.
8. The purchase order in fact nowhere mentions that it was a back to back agreement, neither any other document has been produced on record reflecting the same.
9. The Corporate Debtor has also raised an issue regarding pre-existing dispute citing bad quality of the products delivered, however, once again, no document proving

the same has been produced by the Corporate debtor. It is apparent that the said issue regarding the quality has been raised for the first time in the said Reply Affidavit filed by the Corporate Debtor.

10. As per section 9 of the Insolvency and Bankruptcy Code, 2016 the Adjudicating Authority/Tribunal is satisfied as to the existence of the default and has ensured that the Application is complete, it shall admit the application. However, the Operational Creditor has not proposed any name of the Insolvency Professional to be appointed as Interim Resolution Professional. The adjudicating authority/Tribunal is not required to look into any other criteria for admission of the Application.
11. In the present case, there is a purchase order issued by the Corporate Debtor, the goods were delivered by the Operational Creditor on the address mentioned by the Corporate Debtor and there is a default in payment of the amount arising out of the said transaction.
12. The present Application is complete otherwise, the invoice or notice for payment to the Corporate Debtor has been delivered by the Operational Creditor and no notice of dispute has been received by the Operational Creditor i.e. all the compliance for initiation of CIRP have been met by the Operational Creditor.
13. In the light of the above said discussions, we are of the opinion that this is a fit case for admission. The application is hereby admitted under section 9 of the I & B Code upon the following directions:-

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ORDER

- a) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, Phyto Biotech Private Ltd. is hereby **admitted**.
- b) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.
- c) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- d) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
- i. The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - ii. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - iii. Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under

the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

- iv. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- e) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- f) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- h) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- i) Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- j) Mr. Rajendra Kumar Agarwal, residing at Diamond Arcade, 3rd Floor, Suite No. 301A, 68, Jessore Road, Kolkata 700055 having email: rkaco93@yahoo.co.in and

registration number being IBBI/IPA-001/IP-P00324/2017-18/10594, Mobile No. 94334 72496 is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan. He is directed to submit written consent within 3 days of the receipt of this order.

- k) The Interim Resolution Professional/Resolution Professional to conduct CIRP of the Corporate Debtor as per time line prescribed under Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- l) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- m) The Operational Creditor/Petitioner is directed to deposit 2,00,000/- (Rupees Two Lakhs Only) within one week from the date of this order, in the ESCROW Account in SBI maintained by the Registrar NCLT, Kolkata Bench for the purpose of meeting the preliminary expenses for initiating the CIRP by the Interim Resolution Professional before the constitution of the CoC and the fees and cost can be withdrawn by the IRP/RP after the approval of CoC. Balance, if any, can be withdrawn by the Operational Creditor.
- n) Registry is hereby directed under Section 9(5) of the I & B Code, 2016 to communicate the order to the Operational Creditor, the Corporate Debtor and to the IRP by Speed Post as well as through email.

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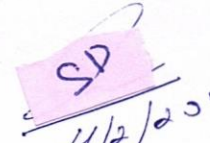
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14. List the matter on 16.03.2020 for the filing of the progress report.

Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.



(Harish Chander Suri)
Member (Technical)



(Jinan K.R)
Member (Judicial)

Signed on this 4th day of February, 2020.

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