

**NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT- V**

C.P. 749/IB/MB/2021

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Korea Trade Insurance Corporation

Unit No. 605, 6th Floor, Global Foyer Building, Section 43, Gurugram - 122009, Haryana

**..... Operational Creditor/
Petitioner**

Vs

Chesa Dental Care Service Limited

203, Food Grain Bhavan, Plot No. 58, Sector 19C, Navi Mumbai Thane - 400703

..... Corporate Debtor

Order Delivered on: 31.03.2023

Coram:

Hon'ble Shri. Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via Videoconferencing)

For the Petitioner: Adv. Ranjeev Carvalho, Mr. Noel Thomas, Ms. Khursheed Vajifdar i/b Legasis Partners

For the Respondent: Adv. Sanjiv Punalekaro

Per: Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The above Company Petition is filed by **Korea Trade Insurance Corporation** hereinafter called as the ("**Operational Creditor**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against **Chesa Dental Care Service Limited** hereinafter referred to as the ("**Corporate Debtor**") by invoking the provisions of Section 9 Insolvency and Bankruptcy code (hereinafter called "**Code**") read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for a Resolution of Operational Debt of USD 4,96,725/-.
2. The Operational Creditor mentioned that the Corporate Debtor approached Vatech Company Ltd. (Insured) for supply of certain goods (hereinafter referred to as 'said goods') to be supplied and shipped to the Corporate Debtor in India. That relying upon the representation made by the Corporate Debtor, M/s Vatech Company Ltd. supplied and delivered the goods to the Corporate Debtor in accordance with their specifications and requirements and raised following Invoices:

Invoice No.	Invoice Date	Invoice Amount
VT180326-IN01	MAR 26, 2018	3,09,395
VT180423-IN01	APR 23, 2018	2,40,895
VT180426-IN01	APR 26, 2018	2,75,000
VT180529-IN01	MAY 29, 2018	2,40,895
TOTAL		10,66,185

3. The Operational Creditor has further mentioned that the Corporate Debtor has made part payment of USD 569,460 towards the above stated Invoices, however, the corporate debtor failed to make payment for the remaining outstanding sum of USD 196,725. That the Corporate Debtor admitted its complete liability towards the Insured, M/s Vatech Company Ltd. vide its email

dated January 4, 2019 and assured that all outstanding payments shall be made to the insured by March 31, 2019 and the aforesaid transaction was insured by the Applicant, Korea Trade Insurance Corporation (K-Sure), who is one of the official Export Credit Agencies wholly operated by the Korean Government. The Applicant herein had been continuously involved and assisting M/s Vatech Company Ltd. in following up the matter with the Corporate Debtor. The Corporate Debtor had been aware of the Applicant and has in this respect also communication with the Applicant on various occasions.

4. The Operational Creditor reimbursed M/s Vatech Company Ltd., the loss caused to them in the aforesaid transaction and pursuant thereto, M/s Vatech Company Ltd. had assigned all its rights against the Corporate Debtor under or in relation to the aforesaid Sales, including the right to recover the aforementioned outstanding amount from the Corporate Debtor, to the Applicant herein. vide a Letter of Assignment dated June 25, 2019. That the Corporate Debtor has been informed of the above fact of assignment vide Email dated August 12, 2019 by the Applicant.
5. It is submitted that despite the assurances given by the officials of Corporate Debtor, it has failed and wilfully ignored to make any further payment to the Applicant. The Applicant being aggrieved by the conduct of the Corporate Debtor and feeling cheated at the hands of Corporate Debtor despite it showing good faith and belief issued a demand notice dated October 18, 2019 under section 8 of the Insolvency and Bankruptcy Code, 2016 ("Statutory Demand Notice") to the Corporate Debtor, through its Counsel, calling upon it to make the full and final payment of its admitted outstanding to the Applicant.
6. It is submitted that the Corporate Debtor failed to respond to the Statutory demand Notice within the mandatory 10 days period of receipt of the notice and also failed to make the payment of the outstanding dues within the said permitted period. That the Corporate Debtor however, sent an undated letter to the Counsel of the Applicant, which was received by the Counsel on December 9, 2020. The Corporate Debtor in the above stated undated letter

raised certain irrelevant facts regarding some vague and unwritten terms between the Corporate Debtor and M/s Vatech Company Limited. The Corporate Debtor also refused to accept the assignment of debt to the Applicant. It is however, pertinent to mention that the Corporate Debtor did not deny its liability for the specific amount as claimed by the Applicant. Hence this Petition.

Reply: -

7. The Corporate Debtor submitted that the Applicant under Section 9 of the Insolvency & Bankruptcy Code, 2016 seeking initiation of the Corporate Insolvency Resolution is not maintainable incomplete and misconceived. In this regard, it is submitted that the application is neither maintainable nor is tenable under the provisions of the Insolvency and Bankruptcy Code, 2016. It is pertinent to mention that the Applicant has misrepresented and suppressed material facts before this Hon'ble Tribunal in order to obtain an order of admission of application under provisions of IBC and therefore, the application is liable to be dismissed and the present application filed by the Applicant as an assignee of M/s. Vatech Company Limited is not maintainable as the Applicant is not covered under the scope of IBC, 2016 to file an application before this Hon'ble Court. The Applicant is not an Operational Creditor and thus the present application is liable to be dismissed on this ground alone.

8. It is further submitted that the alleged letter of assignment at Exhibit G of the application is neither stamped nor registered under the laws of India and the same is not permissible as a legally enforceable document in India. Even the applicable taxes on the alleged transaction of assignment have not been shown as paid by signatories of the said assignment to the concerned government authorities. Therefore, it is clear that the alleged operational debt of Vatech India Pvt. Ltd has not at all been "legally assigned" in fact considering Section

33 of Maharashtra Stamp Act, the alleged letter of assignment is liable to be impounded.

9. It is further submitted that the Applicant is also guilty of suppression of material facts. In this regard, it is pertinent to mention that the Corporate Debtor has replied to the notice of the Applicant vide reply dated NIL sometime in December 2019 disputing the alleged amount due or payable. By the said reply it was clearly brought to the notice of the Applicant that it was the insured i.e. Vatech which was in breach of the agreed understanding and is liable to pay damages to the Corporate Debtor for the said breaches and that no amount was due and payable by the Corporate Debtor to either the said insured or the Applicant. Copy of reply dated 11/12/2019 sent by the Corporate debtor is annexed herewith as Annexure-R2.

10. It is further submitted that the Corporate Debtor has raised the disputes much before the receipt of demand notice from the Applicant, the Corporate Debtor had brought to the notice of Vatech India Pvt. Ltd. an 'existence of dispute' with regards to the alleged claim as claimed by the Applicant and that on account of the breach of obligations by the Insured (Vatech) the Corporate Debtor is clearly entitled to recover liquidated damages of Rs. 6,34,16,602/-. There is a dispute with regard to the amount payable by the Respondent Company as well, as products worth Rs. 3,50,000/- (Rupees Three Lakhs Fifty thousand) which are lying defective with the Petitioner which is due to be replaced but the Insured (Vatech) is neither replacing the goods nor is it offering any solution with regard to the defective goods and that the true and correct facts and circumstances are that sometime in the year 2015, the Respondent company was approached by India representative of Vatech (company insured by the Applicant herein) (hereinafter referred to as the "Insured") for the purpose of becoming their sole exclusive Dealer for India. Copy of Agreement entered into with the said Vatech is annexed herewith as Annexure-R3.

11. It is further submitted that the Vatech was earlier having another exclusive Dealer in India, but they were in a lookout for a new dealer as Vatech was looking for aggressive marketing sales and growth in India and after detailed deliberations and negotiations, the Corporate Debtor was appointed as 'Dealer' by the Insured (Vatech). During the course of deliberations/negotiations it was intimated to the Corporate Debtor that the total sale of Vatech was about Rs.7 crore per annum and that it wanted the Corporate Debtor to enhance it further.
12. It is further submitted that it was agreed upon and between the parties, that the Corporate Debtor shall be responsible for the distribution, marketing, sales, maintenance of the stocks of the Insured (Vatech), conducting Expos of the products of the Insured (Vatech) on its behalf and for providing after sales service as well was also required to provide warranty to the purchasers which was to be provided on back-to-back basis, with the primary responsibility of warranty lying with the said Insured (Vatech) and the said Insured (Vatech) also called upon the Corporate Debtor to sponsor a team of manpower for called the VAM team. The said VAM team was essentially working for Insured (Vatech) but the entire cost of the said VAM team was to be borne by the Corporate Debtor. The said VAM team operated directly under the control of Insured (Vatech) and was in touch with and under the control of Insured (Vatech) during the period from September, 2016 to May, 2018. Copy of one of the invoices raised by the manpower of the said Vatech is annexed herewith as Annexure-R4. Copy of ledger maintained by the Corporate Debtor with regard to the said manpower company is annexed herewith as Annexure-R5.
13. It is further submitted that by its sincere efforts, the Corporate Debtor was able to increase the sales of Vatech from about Rs.7 crores per annum to about Rs.50 crores in just about 2.5 years. A detailed financial ledger maintained by the Corporate Debtor with regard to the entire business activity between the said Vatech and Corporate Debtor during 2014 to 2019 is annexed as Annexure-R6. In pursuance of the agreement between the parties, the Corporate Debtor incurred all the expenses pertaining to marketing, stocking of goods of Insured

(Vatech), providing after sales support, sales operation and providing back to back warranty.

14. It is further submitted that the Insured (Vatech) deliberately and mala fide refused to honour its warranty obligation and refuse to replace the defective products which not only caused loss of reputation and goodwill to the Corporate Debtor but also financial losses to the Corporate Debtor who has to replace the defective product at its own cost.
15. It is further submitted that there have been many correspondences emails exchanged between the said Vatech and Corporate Debtor whereby it clearly emanates that serious disputes had arisen between them and that the email dated 04/01/2019 that is being relied upon by the Application to allege acknowledgement of debt is of no consequence. The said email does not amount to admission of the debt that is being now claimed by the applicant.

Findings: -

16. We have heard the Counsel for the Parties and have gone through the records.
17. It has been contended by the Counsel for the Operational Creditor that Vatech Company Limited entered into a distribution agreement dated 01.12.2014 with the Corporate Debtor for sale, distribution and servicing of goods manufactured by it. Vatech supplied goods to the Corporate Debtor and raised invoices dated 26.03.2018, 23.04.2018, 26.04.2018, 29.05.2018 aggregating to USD 10,66,185/-. The Corporate Debtor made part payment of USD 5,69,460/- leaving an outstanding balance of USD 4,96,725/- amounting to Rs. 3,72,54,375/-. The transactions between the Vatech and the Corporate Debtor were insured by the Operational Creditor and the latter reimbursed to loss caused to Vatech due to non-payment by the Corporate Debtor which in its turn transferred debt to the Operational Creditor. The Operational Creditor informed the Corporate Debtor about the Assignment of Debt vide email dated 12.08.2019. Thereafter, the Operational Creditor issued a demand notice dated

18.10.2019 but the Corporate Debtor failed to pay the amount. Thus, it stands established that the Corporate Debtor owed Operational Debt to the Operational Creditor and also committed default in its payment and, therefore, Petition under Section 9 of the Code deserves to be admitted.

18. On the other hand, the Counsel for the Operational Creditor has argued that the Operational Creditor has no locus standi to file the present Petition as the Assignment of Debt in this case is not valid. The invoices are not bills of exchange which could be validly assigned. Moreover, Vatech is a foreign company and the assignment was required to be registered under the Indian Registration Act and further that the Assignment is bad for want of registration. It has further been argued on behalf of the Corporate Debtor that there is no privity of contract between the Operational Creditor and the Corporate Debtor.

19. It has further been contended on behalf of the Corporate Debtor that there is a pre-existing dispute between the Vatech and the Corporate Debtor. According to the Corporate Debtor, Vatech had breached the terms and conditions of the Agreement with the Corporate Debtor resulting in losses to the latter. According to the Corporate Debtor, Vatech appointed other distributors in India which was against the interests of the Corporate Debtor who had toiled hard to increase the sales of Vatech from Rs. 7 Crores to Rs. 50 Crores in two and a half years. As against the Vatech provided dealership to 250 dealers in breach of undertaking and commitment with the Corporate Debtor that it would deal with all buyer only through the Corporate Debtor as its exclusive dealer. This resulted in loss to the Corporate Debtor who had invested heavily in setting up the sales network and appointment of employees. Therefore, the Corporate Debtor is entitled to recover damages from Vatech. According to the Counsel for the Corporate Debtor, in the light of the pre-existing dispute, the Petition under Section 9 deserves to be dismissed.

20. We have weighed the contention raised on behalf of the parties and have gone through the records.

21. As far as the objection regarding Assignment of Debt is concerned, it is the case of the Operational Creditor that it had insured all transactions between the Vatech and the Corporate Debtor and in the event of non-payment by the Corporate Debtor of its dues, the Operational Creditor paid the same to Vatech who in turn assigned the debt to the Operational Creditor vide letter dated 25.06.2019 vide letter (Exhibit -G) and on the basis of letter of assignment, intimation was also sent to the Corporate Debtor vide letter dated 12.08.2019 (Exhibit-H). The Corporate Debtor has raised objection that the Assignment is not valid as Assignment Deed was required to be registered in terms of Section 17 of the Registration Act, 1908. However, this contention is not tenable considering the fact that Section 17 speaks of documents of title relating to immovable property and the transfer of the Operational Debt cannot be equated with transfer of interest in some immovable property. Therefore, this contention is not tenable.
22. Secondly, it has been argued on behalf of the Corporate Debtor that Vatech had breached the terms and conditions of the Agreement causing loss to the Corporate Debtor. In this regard, it has been pointed out that Vatech appointed as many as 250 dealers in breach of its commitment with the Corporate Debtor to deal with all buyers through the exclusive dealership of the Corporate Debtor alone. Even this contention is not factually correct. In this regard, reference can be made to the distributorship agreement (Exhibit-R3) attached with the reply filed by the Corporate Debtor wherein under Clause 1.1, it is clearly mentioned that the Corporate Debtor was appointed as non-exclusive distributor in India. Therefore, the contention raised that the other dealers were appointed in violation of the distribution agreement is absolutely wrong and deserves to be rejected. It has further been argued on behalf of the Corporate Debtor that there is no privity of contract between the parties and even otherwise there is a pre-existing dispute. In this regard, the Counsel for the Corporate Debtor has pointed out that in reply to the demand notice, the issue of losses suffered by the Corporate Debtor was raised. The Corporate Debtor had further raised disputes in emails (Exhibit-R8) and further that some stocks

were returned by the Corporate Debtor with regard to which Vatech had issued two credit notes that the said amount worth of Rs. 1.5 crores were not payable. Thus, the Operational Creditor has failed to crystalize the Operational Debt meaning thereby that there is no legally enforceable debt and there is a pre-existing dispute between the parties which cannot be resolved in summary proceedings.

23. So far as the contention that the distribution agreement was violated, as stated above, the same is not tenable. As regards email (Exhibit R7) dated 27.04.2018, there is a reference of replacement stock of 17 pieces and 7 pieces of IOX, 12 pieces of battery and 15 pieces complaints of replacement of IOS. In the email dated 31st December 2018, it has been admitted by the Corporate Debtor that they have nil replacement stock for IOS and IOX. Considering the minor number of complaints in terms of replacement of some parts in the articles sold which as per the Agreement between the parties, the company called Vatech never shield away from resolving the matter cannot be said to be a pre-existing dispute in real sense of the term. Apart from that, in reply to the demand notice (Exhibit J) sent by the Corporate Debtor no substantive disputes seems to have been raised except the fact that Vatech had appointed 250 more dealers in breach of terms which contention for the sake of repetition has been found to be not tenable as the Corporate Debtor was never appointed as exclusive dealer by Vatech. The other dispute raised in the reply (Exhibit-J), whereby the letter of assignment dated 05.06.2019 has also been challenged found and to be untenable as explained in the foregoing part of the Petitioner. Therefore, in the reply no substantive pre-existing dispute has been raised on the basis of the present Petition can be dismissed.

24. As a result of the foregoing discussion, we are of the considered view that the Petitioner has been able to make out a case of Operational Debt and default committed by the Corporate Debtor.

25. Accordingly, the above Company Petition is '**admitted**' by passing the following:

ORDER

- A. The above Company Petition No. (IB) 749 of 2021 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Chesa Dental Care Service Limited**.
- B. Since the Operational Creditor has not suggested the name of IRP to perform the duties of the Interim Resolution Professional (IRP) in the petition, this Bench hereby appoints **Mr. Mahesh Pareek**, Insolvency Professional, Registration No: IBBI/IPA-001/IP-P-02529/2021-2022/13877, having Email id mpareek63@hotmail.com as the interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- C. The Operational Creditor shall deposit an amount of Rs. (2) Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount only towards expenses and not towards his fee till his fee is decided by COC.
- D. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; 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. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- F. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- G. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- H. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- I. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- J. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.
- K. Accordingly, the C.P.(IB)749 of 2021 is **admitted**.
- L. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
MEMBER (JUDICIAL)