IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI (COURT NO. IV)

Company Petition No. IB-1263/ND/2019

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

IN THE MATTER OF:

HENAN BOOM GELATIN CO. LTD

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

SUNIL HEALTHCARE LIMITED

...RESPONDENT/ CORPORATE DEBTOR

ORDER DELIVERED ON: 19.02.2021

CORAM:
DR. DEEPTI MUKESH
HON'BLE MEMBER (JUDICIAL)
MS. SUMITA PURKAYASTHA
HON'BLE MEMBER (TECHNICAL)

For the Applicant : Ms. Nandini, Mr. Mudit Sharma
For the Respondent : Mr. Eerdapurna Mukherjee, Adv.

MEMO OF PARTIES

HENAN BOOM GELATIN CO. LTD
Having its Head office at:
No.96, Middle of Hanghai Road,
Zhenghous, Henan, China

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

SUNIL HEALTHCARE LIMITED
Having its registered office at:
38E/252 A, 1st Floor, Vijay Tower,
Shahpurjat, New Delhi-110049

...RESPONDENT/ CORPORATE DEBTOR

ORDER

AS PER SUMITA PURKAYASTHA (MEMBER TECHNICAL)

1. The present application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), 2016 (for brevity 'the Rules') by Henan Boom Gelatin Co. Ltd. (for brevity 'Applicant') through Mr. Manoj A.I (authorized vide board resolution dated 19.04.2019) with a prayer to initiate the Corporate Insolvency process against Sunil Healthcare Limited (for brevity 'Corporate Debtor').

2. The Applicant Henan Boom Gelatin Co. Ltd, claimed to be the Operational Creditor, is a manufacturer and exporter of Gelatin & Collagen products, with the identification number being 410100000008595 (New Number: 141013782208091T) having its registered office at 96, Middle of Hanghai Road, Zhengzhou, Henan China.

3. The Respondent Sunil Healthcare Limited is a company incorporated on 05.02.1973 under the Companies Act, 1956 having its registered office at 38E/252 A, 1st Floor, Vijay Tower, Shahpurjat, New Delhi-110049 and CIN L24302DL1973PLC189662 is engaged in the business of manufacturing man-made fibers which includes manufacture of artificial or synthetic filament and non-filament fibers.

4. The Applicant herein the Operational creditor had supplied varied quantities of Pharmaceutical Grade Gelatin to the Corporate Debtor/ the terms and conditions of such supply was that the payment of the goods so supplied was to be made on the basis of Open account 45 days after Bill of Lading date. The goods were supplied by the Operational Creditor in tranches. The said goods were supplied in accordance with the arrangement between the parties vide sales contracts bearing no 18BOOMG004 dated 25.01.2018, contracts bearing no 18BOOMG028 dated 05.0.2018 and contracts bearing no 18BOOMG029 dated 07.03.2018. The Operational Creditor raised its invoices bearing no. 18BOOMG004 dated 11.02.2018, No. 18BOOMG028 dated 19.03.2018 and no. 18BOOMG029 dated 19.03.2018 to a total in amount of USD. 3,77,392.00.

5. As per the averments mentioned in the application the Corporate Debtor failed to make payment within the agreed credit period and the Applicant through its counsel demanded the due payment vide email dated 20.07.2018. It is stated that the Corporate Debtor`s representative Mr. Santosh Kumar Sharma, vide his email dated 25.07.2018 did not deny or dispute the unpaid operational debt and informed the Counsel of the Applicant that a meeting has been scheduled between the parties on 27.07.2018 at Shanghai. Further, Mr. Santosh Kumar Sharma vide his email dated 03.08.2018, provided a copy of Minutes of meeting/MOU dated 27.07.2018, executed and entered into between the parties, whereby the Corporate Debtor equivocally admitted and acknowledged the aforesaid unpaid operational debt of USD 3,77,392.00 and further undertook to make payment thereof by way of three installments.

6. It is submitted by the applicant that the Corporate Debtor has failed to adhere to its own undertaking and assurance given under the minutes of the meeting/MOU dated 27.07.2018, which shows that the Corporate Debtor is unable to discharge its liabilities in the normal course of business. it has been mentioned that just before the expiry of the undertaking given by the Corporate Debtor, once again approached the Applicant for extension of time vide its email dated 20.01.2019. Despite further extension being granted by the Applicant, the Corporate Debtor did not make any payment in terms of the undertaking given by the Corporate Debtor. Therefore, a Demand Notice under section 8 of the Code, dated 01.02.2019 was issued at the registered office of the

Corporate Debtor thereby calling upon the Corporate Debtor to make payment of the unpaid debt of USD 3,77,392.00.

7. As per the averments made in the application the Corporate Debtor replied to the Demand Notice vide an email dated 04.02.2019. Upon receipt of the notice dated 01.02,2019, the Corporate Debtor in its email dated 04.02.2019 stated that *"as per the discussion with the client for payment of the entire due amount the Corporate Debtor shows an intention and commitment to make the payment. It was further requested to withdraw the Demand Notice in Form 3 as the Corporate Debtor is very much competent to clear its dues as per the commercial terms, agreed between the parties"*. The Applicant states that the total amount in default is USD 3,77,392.00 which is equivalent to Rs. 2,63,22.110.78/- considering the exchange rate of Rs. 69.75/- per INR 1. The Applicant has not complied with the requirement of the Section 9(3)(c) stating that the Hon`ble Apex Court in its Judgment dated 15.12.2017 in ***Macquarie Bank Limited Versus Shilpi Cable Technologies Limited*** *has* stated that Bank Certificate is not required.

8. The Applicant has therefore filed this Application under Section as an Operational Creditor praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor for its inability to liquidate their claim of USD 3,77,392.00. Further a notice was issued to the Corporate Debtor vide order dated 27.05.2019 of the Adjudicating Authority and the reply to the Section 9 application was filed by the Corporate Debtor as on 09.07.2019. The Corporate Debtor states that the

Application is liable to be dismissed at the threshold since Form 5 is incomplete. The Operational Creditor has omitted to specify and mention the proposed IRP. Further it is stated that the Application does not contain the statement of accounts, pursuant to Section 9(3)(c) of the Code. The Corporate Debtor states that there is a pre-existing dispute in relation to the amounts claimed by the Operational Creditor.

9. The Corporate Debtor in its reply stated that the Counsel of the Operational Creditor issued correspondence dated 01.02.2019 and 06.02.2019 without legal basis since the same was not authorized by the Operational Creditor vide any Board Resolution. It is stated that the resolution passed by the Board of Directors of the Operational Creditor on 19.04.2019 at Zhengzou China, giving Authorization to Mr. Manoj A.I. and Mr. Ratheesh Joseph, both Indian citizen to file the application under Code, cannot be relied as the same is neither Notarized nor Apostilled in the country of origin. Further it is stated that the Operational Creditor has failed to disclose the existing dispute between the parties with respect to delay in supply/ dispatch of gelatin to us, which had consequentially resulted the losses to the Corporate Debtor.

10. Pursuant to the Order of the Adjudicating Authority dated 30.01.2020 wherein it was stated that *"Learned counsel for the Corporate Debtor states that entire liability claimed in this case has been set off by the debit notes duly accepted by the Operational Creditor. Let the same be filed by way of affidavit being invoices raised and the total adjustment made vide debit notes duly accepted by the Operational Creditor, with copy in advance to*

the learned counsel for the petitioner who may file any document in rebuttal. Learned counsel for the Operational Creditor has raised objection to aforesaid indulgence being granted to Corporate Debtor. This Bench of the view and in the interest of Justice, as well as the fact that in any event, justice should not be a casualty. This Bench requires the aforesaid facts to be placed on record and the affidavit is needed for disposal of the matter. List on 06.02.2020." The Corporate Debtor filed the reply dated 03.02.2020 and brought forward on record an email dated 04.05.2018 with respect to the issue raised by quality Control department apprising the CEO of the Corporate Debtor regarding quality of gelatin received from the Applicant. Furthermore, the correspondence email was also placed on record, wherein the issue with respect to the quality was communicated by the CEO of the Corporate Debtor to the Applicant vide email dated 30.07.2018, which was acknowledged by the Applicant vide its email on the same day.

11. The Corporate Debtor further states in its reply dated 03.02.2020 that the Applicant has filed this present application without disclosing the current continuing commercial relationship, between the Applicant and the Corporate Debtor. It was submitted that despite the outstanding debt mentioned in the Application the Operational Creditor has directly through his own personal involvement effected shipments of worth USD 4,41,000 to Corporate Debtor which has been adjusted against the alleged disputed Invoices which establishes that even after shipment of Invoice raised at pre dispute stage, the Operational Creditor had made direct

supply of three shipment and Business Transactions entered post the dispute stage amounting to a total value of USD 4,41,000 and all payment to the Operational Creditor were made through LC.

12. The Corporate Debtor submits that the Operational creditor failed to disclose that due to repeated qualitative issues and delay in supply/ dispatch of gelatin to the Corporate Debtor herein, had consequentially resulted in losses to the Corporate Debtor. Accordingly, on account of the pre-existing dispute the disputed Invoices bearing no. 18BOOMG004 dated 11.02.2018, No. 18BOOMG028 dated 19.03.2018 and no. 18BOOMG029 dated 19.03.2018 to a total in amount of USD. 3,77,392.00 were adjusted against issued 4 Debit notes issued by the Corporate Debtor which were signed and stamped by the Operational Creditor and acknowledged by them via email sent to the Corporate Debtor at various points of time which was accepted by the Operational Creditor without any protest as an adjustment against the disputed Invoices. It is pertinent to note that as per Indian Accounting system, the business transactions are recorded on FIFO basis (First in First out basis). The First three Invoices at pre dispute stage are of total value of US$ 3,77,392 and have anyway been on a FIFO basis adjusted directly with the payment made post the dispute regarding invoice. A payment amounting to USD 4,41,000 was made to the Operational Creditor i.e. Henan boom. Accordingly, no debt exists as alleged wrongly by the Applicant.

13. The Operational Creditor in its written submission has stated that the purported Debit Notes Nos. 101/19-20 dated 27.05.2019, Debit Note No.102/19-20 dated 30.06.2019, Debit Note No.128/19-20 dated 07.11.2019 and Debit Note No.131/19-20 dated 10.12.2019 are for a total amount of USD 1,49, 250/-. Admittedly the amount of Operational Debt which is the subject matter of 3 Invoices and the present Application is USD 3,77,392.00 i.e. INR 2,63,22,110.78 Rs. 69.75 as on 23.04.2019. Hence, even after adjusting the purported Debit Notes, the Operational Debt of USD 2,28,079 is admittedly due and payable.

14. In "***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– 2017 1 SCC OnLine SC 353***", the Hon'ble Supreme Court analysed the meaning of dispute with respect to Operational Creditors and observed:

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the

operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. ...."

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: ......
(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?"
If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

15. The date of default is 19.03.2018 that is the date of the last invoice issued which was unpaid, and the present application is filed on 20.05.2019. Hence the application is not time barred and filed within the period of limitation.

16. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.

17. From the aforesaid decision, it is clear that the dispute must exist before the receipt of demand notice or invoice. Be that as it may, on appraisal of the arguments advanced by the Ld. Counsels, it emerges that there were disputes existing prior to the issuance of the Demand Notice. We find that in the e-mail dated 04.05.2018, the quality Control department had indicated its issues to the CEO of the Corporate Debtor regarding quality of gelatin received from the Applicant, the same was communicated by the CEO of the Corporate Debtor to the Applicant vide email dated 30.07.2018, which was acknowledged by the Applicant, clearly demonstrates a pre-existing dispute. A pre-existing dispute does not entitle the Operational Creditor to seek Insolvency Resolution of the Corporate Debtor. Whether the Operational Creditor is entitled to seek recovery of the amount of balance USD 2,28,079 out of the total USD 3,77,392.00 as sett off by the Corporate Debtor through issuance of Debit Notes, is not for the consideration of this Bench. However, the Applicant has the option to file a Civil suit before the appropriate forum, for the recovery of the same.

18. In view of the above, this Bench is of the view that the prayer for initiating Corporate Insolvency Resolution process against the Corporate Debtor is not sustainable.

19. Application is therefore rejected and disposed off in terms of above order.

Sd/-

Sumita Purkayastha

Member (T)

Sd/-

Dr. Deepti Mukesh

Member (J)