IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

CP(IB) No. 582 /KB/2020

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:

Sandeep Baid, the sole proprietor of Hi Tech Minerals and Chemicals with address being 61A, Park Street, third Floor, P.S. – Park Street, Kolkata – 700016, West Bengal or Mr. Rahul Auddy, Advocate, C/o Rahul Auddy & Co., Nicco House, IB& 2, hare Street, 2nd Floor, Kolkata – 700001, West Bengal

.....*Operational Creditor*

-Versus-

Nexus Health & Beauty Care Private Limited, a company incorporated under the Companies Act, 1956 and being a company within the meaning of Companies Act, 2013 and having Corporate Identification No-U24246WB2005PTC101755 and its registered office at C/o raj Kamal Singh Grewal, Karnani Mansion, 1st Floor, Flat No.114, 24A, Park Street, P.S.-Park Street, Kolkata-700016, in the State of West Bengal.

.... *Corporate Debtor*

Date of Hearing : 13th May, 2022
Date of pronouncing the order: 6th July, 2022

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Harish Chander Suri, Member (Technical)

Appearances (via video conferencing/ physical):

For Operational Creditor	:	Mr. Rahul Auddy, Advocate
For Corporate Debtor	:	Mr. Karanveer Jindal, Advocate

ORDER

***Rohit Kapoor, Member (Judicial)**:*

1. This Court convened through hybrid mode.

2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code) by **Sandeep Baid**, carrying on business in the name and style of Hi Tech Minerals and Chemicals (Operational Creditor), seeking to initiate Corporate Insolvency Resolution Process ("CIRP") against **Nexus Health & Beauty Care Private Limited** ("Corporate Debtor").

3. Part I of this application contains particulars of applicant. Part II contains particulars of corporate Debtor. And part III contains particulars of the proposed Interim Resolution professional. No Interim Resolution professional has been proposed in this case.

4. Part IV of this application contains details of particulars of Debt and documents in support of date from which it fell due is claimed. Part V contains the documents, records and evidence of default.

5. ***Submissions on behalf of the Operational Creditor:***

5.1 The case of the Operational Creditor is that a total amount of debt is Rs. 12,97,959/- is due and payable by the Corporate Debtor to the Operational Creditor consisting of a principal amount of Rs. 10,04,484/- and an interest component of Rs. 2,93,475/-.

5.2 The Corporate Debtor had placed two Purchase Orders being PO No. NHBCPL-0208 dated 19th February 2018 and PO No. NHBCPL-006 dated

13th April 2018. Copies of the said 2 Purchase Orders are annexed hereto and marked as Annexure "C". Pursuant to the said purchase orders, the Operational Creditor had supplied soap stone powder and simultaneously raised invoices upon the Corporate Debtor for payment.

5.3 The soap stone powder was duly received by the Corporate Debtor without any dispute and demur and the same was utilized by the Corporate Debtor in its usual course of business. The invoices so raised by the Operational Creditor were also received by the Corporate Debtor without any dispute or demur. The Corporate Debtor made payments of certain invoices and after considering the payments received, the payment of six invoices are still due and pending. Copies of the aforesaid 6 invoices are annexed hereto and marked as Annexure "D".

5.4 The Operational Creditor requested the Corporate Debtor time and again to make payment of the aforesaid invoices, but however there is no response from the Corporate Debtor. The Operational Creditor through their previous Advocates even caused a legal notice to be issued to the Corporate Debtor and its directors calling upon them to pay the outstanding dues. In spite of receipt of the notice, neither did the Corporate Debtor reply to the said notice nor made any payment. Copy of the legal notice issued by the Advocate of the Operational Creditor is annexed hereto and marked as Annexure "E".

5.5 The Corporate Debtor /associate of Corporate Debtor on 30th August 2018 *vide* email admitted that they had agreed to pay the dues of the Operational Creditor. In this regard, emails issued and exchanged from August 2018 till July 2019 is annexed hereto and collectively marked with the letter "F".

5.6 The goods supplied by the Operational Creditor were to the satisfaction of the Corporate Debtor and the Corporate Debtor never raised any dispute regarding the same.

5.7 The Operational Creditor thereafter issued the statutory notice under Section 8 of the Code on 18th October 2019 through Speed Post at the Registered Office of the Corporate Debtor however the same was returned back to the

Operational Creditor due to the Registered Office being locked. The said notice was also issued to the Corporate Debtor, vide its registered email id and the same has been served and received by the Corporate Debtor. The copy of the statutory notice issued, the email issued, the speed post receipt and the track report is annexed hereto and collectively marked with the letter "G".

5.8 After receipt of the said notice by email, the Corporate Debtor responded to the said notice by a letter dated 19th November 2019 raising frivolous generic disputes for the first time as an afterthought but did not raise any dispute as stated in Section 8 of the Code by bringing on record the existence of pendency of any Suit or Arbitration proceedings filed before the receipt of the Demand Notice as contemplated under clause (a) of sub-section 2 of section 8 of the Insolvency and Bankruptcy Code, 2016. A copy of the said notice dated 19th November 2019 is annexed hereto and marked with the letter "H".

5.9 It is submitted that the debt fell due after the expiry of 60 days from the date of Invoices which are stated in the chart annexed as Annexure “B”.

6. ***Submissions on behalf of the Corporate Debtor:***

6.1 The Corporate Debtor has submitted that it is the manufacturer of talcum powder which is made from talc mineral. The Corporate Debtor entered into an agreement to manufacture talcum powder for M./s J.K. Helene Curtis Limited, which is the company selling talcum powder talcum powder tinder the brand name "Raymond" and "Park Avenue".

6.2 It was the condition of M/s J.K. Helene Curtis Limited (hereinafter referred as **"Raymond Group")** that the raw material has to be brought from the list of their vendors. Therefore, it was Raymond Group, which constrained the Corporate Debtor to buy raw material from the Operational Creditor on the condition that once the payment is made by Raymond Group for the finished product then only the payment would be made to the Corporate Debtor. Also the price of the talc was fixed as Rs. 5.90 per unit. The true copy of the e-mails dated 08.05.2017 and 09.05.2017 evidencing that the raw material to be brought from the Operational Creditor was on the condition precedent from Raymond Group. The true copy of the e-mails dated 08.05.2017 and 09.05.2017 are annexed hereto and marked as ANNEXURE **R 1.**

6.3 It is an admitted case of the Operational Creditor that payment for the raw material supplied to the Corporate Debtor has to be paid by the Corporate Debtor to the Operational Creditor only after the said payment has been released by the Raymond Group to the Corporate Debtor. This fact can be substantiated from the e-mails annexed by the Operational Creditor with the main Petition and the FIR dated 09.10.2019 lodged by the Operational Debtor against the Corporate Debtor and its directors before the Police Station Dausa, District Dausa, Rajasthan, wherein they have specifically admitted that the payment terms were such that payment to the Operational Creditor has to be made by the Corporate Debtor only when the payment to the Corporate Debtor has been made by the Raymond Group, The true copy of the FIR dated 09.10.2019 along with the English translation thereof is annexed hereto and marked as ANNEXURE R-2.

6.4 As per the terms and conditions agreed between the parties, the payment would become due and payable to the Operational Creditor only when the same is released by the Raymond Group to the Corporate Debtor. However, if the Raymond Group is not paying the Corporate Debtor, the Corporate Debtor is also not liable to make any payment to the Operational Creditor.

6.5 Certain payments were also made by the Corporate Debtor to the Operational Creditor when the payments were made by the Raymond Group to the Corporate Debtor. However, thereafter, the Raymond Group didn't make the payment to the Corporate Debtor and hence, the claim of the Operational Creditor is not yet due and payable and hence, this Petition is not maintainable.

6.6 Despite repeated reminders and negotiations, the Raymond Group has failed to release the payment of the Operational Creditor to the Corporate Debtor, It is undertaken that as soon as the Raymond Group releases the payment of

Operational Creditor to the Corporate Debtor, immediately, thereafter, the payment would be released by Corporate Debtor to the. Operational Creditor.

6.7 It is specifically stated that there is nothing due and payable by the Corporate Debtor to the Operational Creditor as on date. All the payments received by the Corporate Debtor from Raymond Group has been duly released to the Operational Creditor. As regards, the illegal claim of the Operational Creditor, it is stated that the same is pending from the Raymond Group and as soon as the same is received, the due payments would be made to the Operational Creditor.

6.8 The demand notice dated 18.10.2019 is void and illegal as the same has not been signed by the concerned person in the column prescribed and therefor; there is a patent defect in the said demand notice. Further, the ledger account was neither annexed with the said demand notice nor with the present Petition and therefore, the demand notice and petition are incomplete and hence, void. The ledger account has deliberately been concealed in the demand notice and the Petition to conceal the true facts of the case and the payments already made.

6.9 Further, there is no document attached with the present Petition, which establishes the authority of Mr. Sandeep Baid as the proprietor of the Hi-Tech Minerals and Chemicals. Also, the present Petition has been filed in the individual name of "Sandeep Baid" and not as "Sandeep Baid, proprietor of the Hi-Tech Minerals and Chemicals". Hence, there is patent defect in the said Petition. Therefore, the present Petition is incomplete and bad in law.

6.10 Further, the interest charged, is illegal and nowhere in the alleged purchase order or in the alleged invoices, the interest clause is present. Also, there was no agreement for interest. Therefore, the interest charged by the Operational Creditor is wholly illegal, Further, since the interest is in dispute, the whole amount of alleged default mentioned in the petition is disputed. Further, the Operational Creditor has not paid income tax on the said notional interest sought to be claimed by the Operational Creditor and hence, it is an afterthought.

6.11 From the alleged invoices and the purchase orders, attached with the Petition, it, is apparent that the delivery of goods was to be done within a period of 5 days from the purchase order. However, it is clear from the dates of invoices that the delivery of goods was not made within a period of 5 days from the purchase order and hence, there was violation of the terms and conditions mentioned in the purchase order.

6.12 The demand notice is only sent in Form 3 and therefore, the same is defective. The claim presented by the Operational Creditor is on the basis of invoices and therefore, the demand notice was required to be sent in Form 4 and not in Form 3.

6.13 The Operational Creditor has concealed in the Petition the FIR No. 558 dated 09.10.2019 lodged at police Station Dausa, Rajasthan prior to issuance of said demand notice. dated 18.10.2019. In the said FIR the Operational Creditor has made a statement that a fraud has been committed w.r.t, the amount of alleged default pleaded in the demand. notice. The said FIR was lodged by some Sh. Prabhat Pareek, stating himself to be the authorized representative of Hi-tech Minerals and Chemicals. Also the business dealings and the transactions and the terms and, conditions of transactions mentioned in the said FIR are in complete contrast and contradictory to the facts and circumstances mentioned in the said demand notice. Therefore, the present Petition is not maintainable in the present case.

6.14 Since an independent investigating officer is investigating the present case, no IBC proceedings can be initiated in a summary proceedings before this Adjudicating Authority.

6.15 It is well settled position of law that the IBC proceedings cannot be used for recovery of the amount. The present proceedings have been initiated with sole motive of recovery of money which is not yet payable and hence, the present petition is liable to be dismissed. It may also be noted that the account of the Corporate Debtor is a solvent Company who is regularly paying its financial creditors.

6.16 There is nothing on record to prove that the Raymond Group has made the payment to the Corporate Debtor for the dues of the Operational Creditor.

Also, there is no allegation that after receiving the amount from Raymond Group, the Corporate Debtor is not paying to the Operational Creditor.

6.17 The payment to the Operational creditor was conditional on the fact that it becomes due and payable only on receiving the payments from the Raymond Group.

6.18 The Operational Creditor has also not made the Raymond Group i.e. M/s J.K. Helene Curtis Limited as party in the present litigation to substantiate its claim that the amount has been paid by them to Corporate Debtor and hence, the debt in issue has become due and payable. It may be noted that only Raymond Group can ascertain whether the debt in issue has become due and payable in the present case or not by placing on record the documentary evidence.

6.19 This Adjudicating Authority has no pecuniary jurisdiction to adjudicate the present Petition and the same is for alleged default of less than Rupees One Crore and hence, this Petition is liable to be dismissed.

6.20 The whole application is conceptually wrong as the payments were being made by the Corporate Debtor to the Applicant / operational creditor on account basis and therefore, there cannot be a ground that a specific invoice is not paid or is payable. Therefore, the date of default cannot be considered from a particular invoice. Since, the present proceedings arc default proceedings, the undisputed date of default is a pre-requisite for initiating the CIRP under the Code.

6.21 The Code only deals with existence of dispute with respect to the claim of the Operational Creditor. The Hon'ble Supreme Court of India in the case of ***Mobilox Innovations Private Limited vs. Kirusa Software Private Limited***, [Civil Appeal No 9405 of 2017] has borrowed the concept of *"plausible contention"* from foreign judgments and applied under the Insolvency and Bankruptcy Code, 2016, which requires the adjudicating authority to see at the stage of admitting the insolvency application as to whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence.

7. ***Rejoinder on Behalf of the Operational Creditor:***

7.1 the Operational Creditor is not concerned with the so called agreement entered into between the Corporate Debtor and J.K. Helene Curtis Ltd. (Raymond Group). There was no tripartite agreement between the Corporate Debtor, J.K. Helen Curtis Ltd and the Operational Creditor. As such, the claim of the Corporate Debtor is imaginary. The purchase orders, invoices, communicates do not make any mention of the so called agreement.

7.2 Further the FIR dated 09.10.2019 has no relevance with the instant Insolvency Proceeding. The Operational Creditor refutes the claim of the so-called "understanding" that the Operational Creditor has no liability for causing realization of payments from J.K. Helen Curtis Ltd on behalf of The C.D.

7.3 It is submitted that the demand notice is absolutely in order and in compliance of law. The Corporate Debtor is trying to raise frivolous issues to bypass its default. A proprietor of a business concern has no separate legal entity from its tradename and hence the skewed claim that the petition is "incomplete and bad in law" is totally misconceived.

7.4 To enclose copy of ledger account with a demand notice is not a mandatory requirement. The outstanding amount has been duly substantiated. Hence, the said objection is vacuous.

7.5 The Corporate Debtor has consciously waived its objections by accepting the delivery of all the goods. Further, the demand notice has been sent in consonance with Rule 5 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016.

8. ***Analysis and Findings:***

8.1 Heard the Ld. Counsel for the Operational Creditor and the Ld. Counsel for the Corporate Debtor and perused the records.

8.2 First and foremost, the instant petition was filed on 17th January 2020. The petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default surpasses the threshold amount stipulated under section 4(1) of the Code, *i.e.*, Rupees one lakh, at the relevant time. Further, the instant petition is well within the limitation period.

8.3 The Corporate Debtor has contended that there was an agreement between the parties herein and M./s J.K. Helene Curtis Limited, according to which the disbursal of payment to the Operational Creditor was contingent upon the receiving of payment by the Corporate Debtor from M./s J.K. Helene Curtis Limited. The Corporate Debtor has relied on emails attached to the reply-affidavit as well as the FIR dated 09.10.2019 which was filed by one Mr. Prabhat Pareek. On perusal on both sets of documents, it can be seen that while the emails mentioned herein merely about confirmation of the Operational Creditor as a vendor and particulars of orders and proposals, the agreement alleged by the Corporate Debtor is nowhere mentioned. In fact, no mention regarding payment has been mentioned at all in these emails.

8.4 Further, the FIR relied upon by the Corporate Debtor has not been filed by the Operational Creditor but by a person representing himself to be the Authorised Officer of the Operational Creditor. However, no evidence has been produced by the Corporate Debtor to establish the relationship of said Mr. Prateek Pareek to the Operational Creditor. As such, there is not enough evidence to substantiate the Corporate Debtor's claim and the same in not maintainable.

8.5 On the other hand, the email dated 24 May 2019 as annexed by the Operational Creditor clearly shows that the Corporate Debtor assured the Operational Creditor that it would clear the pending payment within 15 days. The said email shall act as acknowledgment and admission by the Corporate Debtor of the dues payable by it to the Operational Creditor.

8.6 Further, the Corporate Debtor has contended that the interest claimed by the Operational Creditor is illegal as it is not mentioned in the purchase order or in the alleged invoices. In this respect, the tax invoice dated 20 February 2018 can be referred to, wherein the provision for interest @24% has been mentioned. Further, even if the interest component is excluded from the total claimed amount, the principal amount itself crosses the minimum pecuniary threshold under section 4(1) of the Code. As such, the instant petition is maintainable.

7.6 Further, the demand notice is in consonance with Rule 5 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016. As such, the Corporate Debtor's contention that the same has not been sent in Form 4 is not maintainable.

8.7 The Corporate Debtor has also contended that since the delivery of the goods was supposed to be done within 5 days and the same was not completed within the said schedule, the instant petition is not maintainable. However, in this regard, it has been made clear that the Corporate Debtor accepted the goods without demur. The said acceptance would amount to acquiescence on part of the Corporate Debtor towards the late delivery of goods, and the Corporate Debtor cannot be allowed to claim it as a defect at this stage.

8.8 In light of the above facts and circumstances, this Adjudicating Authority is satisfied that the Corporate debtor has defaulted in its payment of dues to the Operational Creditor. Further, demand notice has been served on the Corporate Debtor and affidavit under section 9(3)(b) has been attached to the petition. As such the instant petition is complete in all respects.

It is, accordingly, hereby ordered as follows: -

a. The application bearing **CP (IB) No. 582/KB/2020** filed by **Sandeep Baid, sole proprietor of Hi Tech Minerals and Chemicals** (Operational Creditor), under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against the Corporate Debtor being **Nexus Health and Beauty Care Private Limited**, CIN: U24246WB2005PLC101755, is **admitted**.

b. There shall be a moratorium under section 14 of the IBC.

c. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

e. **Mr. Pankaj Lunawat** registration number **IBBI/IPA-001/IP-P00066/2017-18/10152**, email: **plunawatca@gmail.com** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code. He has a Authorisation for Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 valid upto 28 November 2022. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out her functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.

g. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.

h. The Operational Creditor shall deposit a sum of **Rs.2,00,000/-** (Rupees Two Lakh Only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

i. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.

j. Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

k. **CP (IB) No. 582/KB/2020** to come up on **22/08/2022** for reporting progress.

l. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Harish Chander Suri	**Rohit Kapoor**
Member (Technical)	**Member (Judicial)**

Signed on this, the 6th of July, 2022

SM(LRA)