IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT -V

C.P. (I.B) No. 1202/MB/2020

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

M/s. Vijaynagar Food & Nutraceuticals Private Ltd.
Having its registered address at #9-29-15/7, Padmavarhi Towers, 3rd floor,VIP Road, Balaji Nagar, AU North Campus, Siripuram, Visakhapatnam- 530 003.

...Operational Creditor/Applicant

Vs

Tetra Pak India Private Ltd
53 MIDC, Chakan-Phase 2,
Village Vasuli, Taluka Khed,
Pune-41050.

...Corporate Debtor/Respondent

Order Dated:09.02.2024

Coram:

Reeta Kohli, Hon'ble Member (Judicial)

Madhu Sinha, Hon'ble Member(Technical)

Appearances: (Physical)

For the Operational Creditor: Adv. Sagar Wagle

For the Corporate Debtor: Adv. Bhavana Dubepatil

ORDER

Per: Reeta Kohli, Member (Judicial)

1. This Company Petition is filed **by M/s. Vijaynagar Food & Nutraceuticals Private Ltd.** (hereinafter referred as "**the Operational Creditor/Operational Creditor**") seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as **"CIRP"**) against **Tetra Pak India Private Ltd.** (hereinafter called "**Corporate Debtor**") by invoking the provisions of **Section 9** of the Insolvency and Bankruptcy code, 2016 (hereinafter called "**Code**") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for an Operational Debt of **Rs.1,06,14,875/-** (Rs.77,10,000/- plus 18% interest up to 10.07.2020 is Rs. 29,04,875/-)

Brief Facts: -

1. The present petition reveals that M/s. Vijayanagar Food Nutraceuticals (P) Limited, is a private limited company established in the year 2008 for processing Coconuts and Coconut Milk Products.

2. Subsequently, the Operational Creditor included a new line of business to process coconut value added products in the year 2015. The Operational Creditor was supported by AP Food Processing Society under Food Processing scheme. The company has commenced its commercial operations of coconuts and its products from 01.07.2017.

3. The Operational Creditor and Corporate Debtor entered into an MOU which was executed on 26.10.2017 as a frame agreement under which the Corporate Debtor was to sell, install and commission coconut water and coconut milk processing UHT system with Homogeniser and an aseptic tank. In consonance with the MOU, the Corporate Debtor also sent a composite proposal dated 29.11.2017 bearing proposal no. 0198-12201701-Q01A-R02 to the Operational Creditor expounding certain terms & conditions.

4. As stated in the MoU there were two equipment's to be supplied by the Corporate Debtor being:

(a) Ultra High Temperature along with homogeniser for euro 6,48,684/- to be supplied by another company being M/S. Tetra Pak Europe / USA.

(b) Aseptic Tank for storage of aseptically processed products for Rs. 2,30,00,0000/- to be supplied by Corporate Debtor.

As per clause 2 of the MoU, 30% of the total amount was to be paid in advance and the remaining 70% to be paid before dispatch of the equipment.

5. It was agreed by the Corporate Debtor that as per clause 5 of the MoU, a detailed scope of supply would be sent to the Operational Creditor within 10 days, but a revised proposal was sent on 29.11.2017 which was almost after 1 (one) month of signing the MoU. In the revised proposal it was stated by the Corporate Debtor that the Purchase orders were to be issued by the Operational Creditor.

6. Accordingly, the Operational Creditor issued two (2) purchase orders being one on the Corporate Debtor and the other on M/s. Tetra Pak South East Asia Pvt. Ltd., on 21.12.2017 respectively:

(a) P.O. No. VFNPL/ 17 / tetra/ 224 dated 21-12-2017 for purchase of ALSAFE (Sterile Tank), ALCIP, Homogenizer panel and Aseptic Piping for a value of Rs. 25,700,000/- and installation and commission of

the same for an amount of Rs. 40,00,000/- (Annexure G)

(b) P.O. No. VFNPL/ 17 / tetra /223 dated 21-12-2017 for purchase of UHT Treatment and ASEPTIC Homogeniser for a value of euro 6,79,684/-. Copy of P.O.No.VFNPL/ 17 / tetra/223 dated 21-12-2017.

7. Both the POs contemplated advance payment to the extent of 30%. The case of the Operational Creditor is that in so far as PO No. VFNPL/17 / Tetra/224 (Hereinafter referred to as "PO No. 224*) is concerned, the Applicant made the requisite advance payment under two tranches.

8. Further the Operational Creditor submits that by cheques dated 30.10.2017 and 23.12.2017 bearing numbers 000626 and 000193 for an amount of Rs.50,00,000 / - and Rs.27,10,000/- respectively was paid as a token advance. The aggregate of the two payments referred to herein before constitute the 30% advance under PO No. 224 (30% of Rs. 2,57,00,000/-). No dispute in so far as receipt of the aforesaid two payments is concerned.

9. Pursuant to the Purchase Orders, the Corporate Debtor ordered raw materials, performed engineering, completed

the requisite designs and commenced manufacturing activity and production of the specified equipment.

10. Further the Operational Creditor sent an email dated 20.04.2018 to the Corporate Debtor apologizing for delay in making further payment on the ground of slow processing of their loan by the bank. Thus, even till April 2018, the Operational Creditor acknowledged that it was to make payment of the remaining advance and there was a delay at their end in making the same and no delay was attributed or alleged to the Corporate Debtor in this email.

11. The Corporate Debtor on 03.07.2018 sent an email to the Operational Creditor seeking status of the payment under the Purchase Orders informing that the manufacturing activity had already been initiated by the them and most of the equipment (including imported equipment) was ready but they have not received the full advance payment against the Purchase Orders. No dispute was raised by the Operational Creditor to the equipment being ready.

12. It is submitted by the Operational Creditor that further payment was to be made by the them only after the Corporate Debtor raised a proforma invoice before

dispatch, which invoice was never raised. Subsequent to the above after more than one year from the Purchase orders being issued, PO No. 223 was cancelled by the Operational Creditor on account of bad market conditions via email dated 17.01.19. With regards to PO No. 224 the Operational Creditor wished to go ahead pertaining to it being an indigenous equipment.

13. The Corporate Debtor via email dated 23.01.2019 replied to the above email from the Operational Creditor conveying that more than one year has elapsed since the receipt of the purchase orders and the partial advance payments towards the proposal and that acting upon the said purchase orders the Corporate Debtor had gone ahead with manufacturing and has already incurred expenses and that it was not possible to cancel the Purchase Order No.223 at this belated stage.

14. The Operational Creditor again sent another email dated 25.01.2020 requesting the Corporate Debtor to convey them about the schedule of the production of the equipment, and subsequently on 26.02.2020 restating the content of its earlier email dated 17.01.2019 regarding cancelling of PO No. 223 and only going ahead with PO No. 224.

15. Further the Operational Creditor sent an email dated 04.06.2020 stating that the Corporate Debtor delayed in supply of the equipment and cancelled both the Purchase orders and requested for the refund of the advance of Rs.77,10,000/- along with interest @ 18% p.a. from 21.12.2017 i.e., date of purchase order. **The Operational Creditor submitted that the date of default is 23.12.2017.**

16. The Ld. Counsel for the Corporate Debtor has vehemently denied the misleading allegations made by the Operational Creditor and stated that the applicant is liable to compensate the Corporate Debtor for the expense incurred by them towards raw materials, man power spent on production etc. as per the requirement of the purchase order.

17. The Operational Creditor further on 11.06.2020 issued a legal notice to the Corporate Debtor demanding refund of the advance amount of Rs.77,10,000/- with interest @ 18% p.a.

18. The Corporate Debtor replied to the aforesaid notice and made a counter claim for a sum of Rs.1,80,00,000/- as compensation for the expenses incurred pursuant to the terms of the POs issued by the Operational Creditor.

19. The Operational Creditor acknowledged the receipt of the aforementioned reply to the notice dated 26.06.2020, but reiterated their earlier demand.

20. The Operational Creditor further sent a demand notice on 11.07.2020 under Section 8 of the Insolvency and Bankruptcy Code 2016 demanding payment of outstanding amount of Rs.1,06,14,875/- being refund of alleged principal amount of Rs.77,10,000/- plus Rs.29,04,875/- as interest @ 18% p.a.

21. The Corporate Debtor on 22.07.2020 replied to the said demand notice issued under section 8 of the code denying the allegations and also made a counter demand of Rs.1,80,00,000/- towards the expenses incurred and losses suffered by the Corporate Debtor under the purchase orders, asking the Operational Creditor to make the payment within 15 days of the receipt of the notice falling which the Corporate Debtor shall be restrained to invoke Arbitration under Clause 16 of the revised proposal dated 29.11.2017.

Findings/Conclusion

We have heard the arguments of the Learned Counsel for Operational Creditors as well as the Corporate Debtor and have gone through the records placed before the Hon'ble Tribunal.

22. The case of the Operational Creditor is that since an amount of Rs.1,06,14,75 /- is the debt due on Corporate Debtor, as Corporate Debtor has failed to supply the equipment to the Operational Creditor under the MoU dated 26.10.2017. Two POs were raised pursuant to the said MoU. The refund amount is due and payable and in view of the fact that it is the Corporate Debtor who has failed to deliver the equipment on time which ultimately led to cancellation of the POs by the Operational Creditor. The date of default is stated to be 23.12.2017. The Demand Notice under Section 8 was sent by the Operational Creditor on 11.07.2020 and the same was replied to by the Corporate Debtor on 22.07.2020 to substantiate his case without refunding the amount back to Operational Creditor within the requisite time of 10 days. Hence the present petition.

23. During the course of Arguments, the Ld. Counsel of the Operational Creditor contended that pursuant to the issuance of the PO No.223 it had deposited the requisite advance of 30% and had cancelled PO No. 224. Thus was

not liable to make any payment qua PO No.224. Subsequently, the reason of delay if any was on their part on the account of slow processing of their loan. Further the Operational Creditor submitted that there was no profroma invoice raised by the Corporate Debtor, so that it could pay the remaining 70% as agreed between the parties. That though the product were ready to be delivered as communicated by the Corporate Debtor, the Corporate Debtor never conveyed to them about the time and place from where the product could be lifted by them. Thus because of this delay in delivery of the equipment on the part of the Corporate Debtor, the Operational Creditor was left with no other option but to cancel the contract and claim the refund of the advance paid to the Corporate Debtor with Interest.

24. Refuting the contentions of the Operational Creditor, the Ld. Counsel for the Corporate Debtor tried to draw the attention of Hon'ble Tribunal to various emails exchanged between the parties. Though all these emails were part of the present petition but the Ld. Counsel for the Operational Creditor failed to deal with them. The Counsel further contended, that the attempt of the Operational Creditor was to suppress the entire communication exchanged between the parties. The perusal of mails at the behest of the Ld. Counsel for the

Corporate Debtor, exchanged between the parties makes it evidently clear that the cause and reason of delay being attributed to Corporate Debtor is factually incorrect. In fact, the entire delay has been on the part of the Operational Creditor in releasing the due payment in terms of the POs. The Ld. Counsel for the CD drew the attention of the Tribunal to the below email to substantiate his argument: -

From: Reddy Mounith <Mounith.Reddy@tetrapak.com>
Sent: Tuesday, July 3, 2018 2:21 PM
To: {EXT} Anand Datla <anand@vfnpl.com>
Cc: Ratanpure Manoj <Manoj.Ratanpure@tetrapak.com>; D T Raju Raju <dtraju@me.com>; Datla Raju <dtrajudtraju@gmail.com>; phani sundar <phanisundar.vbl@gmail.com>; Vijaynagar Food & Nutraceuticals Pvt Ltd <info@vfnpl.com>; V AnandKumar <AnandKumar.V@tetrapak.com>; Tumuluru Bharat <Bharat.Tumuluru@tetrapak.com>
Subject: RE: Delay of Advance Payment

Dear Anand,

This is in reference to your trailing mail & our discussions,

We have been waiting to hear from you regarding the advance payment status. It has been more than 8 months since we concluded the order & six months since we received PO.

As you are aware we have already initiated manufacturing activity & most of the local equipment & some imported equipment is ready

We are under immense pressure to liquidate the equipment, since it builds lot of financial pressure on us and also impacts our other production lines due to space constraints.

Kindly give us a direction how to take this further.

Thanks & Regards

Mounith Reddy

Mobile +91 9591722544

Hence, taking into consideration the emails exchanged between the parties, it is clear that delay on the part of

the Operational Creditor to make the advance payment is the sole reason which led to Corporate Debtor not supplying the ready equipment on time to the Operational Creditor.

25. Further, the Ld. Counsel for Operational Creditor tried to draw the attention of Hon'ble Tribunal against the contention raised by the Corporate Debtor that the petition does not meet the minimum threshold amount of Rs. 1 crore for initiating CIRP stating that the 18% interest added to the amount of Rs. 77,10,000/- to make it Rs.1,06,14,875/- is nowhere mentioned in any documents exchanged between the parties; thus the Ld. Counsel for the Operational Creditor submitted that the contentions raised by the Corporate Debtor is misplaced by basing their reliance on Section 61 of the Sales of Goods Act, 1930. The said provision is read as under:

"61. Interest by way of damages and special damages. -

(1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price--

(a) to the seller in a suit by him for the amount of the price-from the date of the tender of the goods or from the date on which the price was payable;

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller-from the date on which the payment was made."

It was further submitted that the above provision in context of the proceeding under the IBC has been invoked in the case of *P.K. Vaduvammal vs Jaydev Construction CP/1461/IB/2018*, wherein it has been held as under:

"Moreover it is also pertinent not been envisaged under any of the Sections of this Code that operational creditors are not entitled to claim interest over the principal, whether it is said or not said, it is a fact, on credit transactions, value addition keeps accruing along with passage of time, if that is not the case, one -it will not become commercial transaction and it will amount to depriving business on credit. It makes no difference whether it is cash or kind, the fact of the

matter is, value will remain adding unless it is given for other considerations other than commercial considerations. Two - Credit policy is the breath of business, once it is choked depriving the unpaid creditors claiming interest on unpaid consideration, business will not run minus credit. If interest clause is there in the understanding, such creditor is obviously entitled, even if such clause is not there, then also the claimant is entitled to claim interest as stated in the Sale of Goods Act. To run business, credit is a must, when credit is a must; it must be construed that payment of reasonable interest in commercial parlance is in built in the Credit Policy. For this reason alone, in the year 1930 itself, almost 100 years before that is when the Sale of Goods Act has come into force, it was felt that unless it is explicitly stated that interest shall not be claimed, the seller is entitled to claim interest though it is not stipulated in the contract".

Hence, the Ld. Counsel for Operational Creditor submitted that the aforesaid decision squarely applies to the facts of the present case and the OC is entitled to claim interest in terms of Section 61 of the Sale of Goods Act, 1930.

26. In response to the above, the Ld. Council for Corporate Debtor has relied upon *Union of India V. Raman Iron Foundry,1974 AIR 1265, wherein the Apex court* held as under:

> *"it is trite that a claim for unliquidated damages is not a claim for a sum presently due and payable and cannot constitute a debt. A claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority."*

27. Further the counsel for Corporate Debtor submitted that section 61 itself shows that the interest "may be awarded by the Court'. This shows that there has to be an adjudication by a court prior to awarding any interest by way of damages. Moreover, it is at the discretion of the court to award such damages by way of interest as section 61 uses the term "may" and not "shall".

28. After going through the facts and circumstances, we are of the considered opinion that the Operational Creditor cannot be allowed to derive any interest benefit only on the basis of Section 61 of the Sales of Goods Act, 1930.

Thus the argument of the Operational Creditor ought to be rejected and under no circumstances can the Operational Creditor be permitted to maintain a claim for 'interest' to cross the threshold prescribed to maintain an application under Section 9 of IBC.

29. Further the Ld. Counsel for the Corporate Debtor has submitted that there is a real and genuine pre-existing dispute between the parties. The Operational Creditor delayed and failed in adhering to the payment terms under the contract. The Operational Creditor claims to have terminated the Purchase Order for Indigenous Equipment because the Corporate Debtor failed to supply the said Indigenous Equipment as these POs were integrated. It is submitted in the argument that Operational Creditor was itself in breach of its obligation to make payment of the advance amount and had wrongly sought to cancel the Purchase Order for Imported Equipment as the POs were in fact integrated. Since it was a composite agreement, until the Operational Creditor made payment of the advance amounts under both the said POs, the Corporate Debtor was not obligated to deliver/ supply any of the Equipment to the Operational Creditor, even though the Equipment was ready for supply until the Operational Creditor complied with its obligations and made the requisite payment. Thus, it is

on account of the Operational Creditor's prolonged default, that none of the Equipment could be supplied to the Operational Creditor. The delayed termination and subsequent demand of the amount paid made by the Operational Creditor are wrongful, illegal and completely unjustified in the facts and circumstances of the present case.

30. It is further submitted that the Operational Creditor sought to cancel the Purchase Order for Indigenous Equipment on 4.06.2020 and for the first time, raised a demand for refund of the advance amount with interest. However, even prior thereto, on 23.01.2019, the Corporate Debtor has denied the Operational Creditor 's request to cancel the Purchase Order for the Operational Creditor 's claim, the email of which is produced as under:

RE: This has reference to the discussion with us in connection with the supply of Tetra Pak line

V AnandKumar <AnandKumar.V@tetrapak.com> Wed, Jan 23, 2019 at 12:50 PM
To: {EXT} Vijaynagar Food & Nutraceuticals Pvt Ltd <info@vfnpl.com>
Cc: "dtrajudtraju@gmail.com" <dtrajudtraju@gmail.com>, "anand@vfnpl.com" <anand@vfnpl.com>, "phanisundar.vbl@gmail.com" <phanisundar.vbl@gmail.com>, "coconutra@gmail.com" <coconutra@gmail.com>

Dear Sir,

With reference to below mail we had internal discussion reviewed the project status and have the following to convey

- As it is more than 2 years since we have received the order, gone ahead with manufacturing and incurred lot of expenses
- Hence, it is not possible to cancel the order at this stage. However, we can discuss about other options as we did / planned last time in Vizag
- Please let us know convenient time to come and meet / call to discuss and close this matter

Best Regards,

Anand Kumar

31. Thus, in view of the existence of the genuine, real and pre-existing disputes between the Operational Creditor and the Corporate Debtor qua the purported claim of the Operational Creditor, this Hon'ble Tribunal is of the opinion that the claim of the Operational Creditor deserves to be rejected. Once a genuine or existing dispute is found it takes the matter beyond jurisdiction of the tribunal & the Application deserves to be dismissed relying on the judgment having been rendered by the Hon'ble Apex Court in ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*** held that "*what the Adjudicating Authority is to see at this stage is*

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. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application".

32. Therefore, in view of the above stated facts and circumstances, the argument advanced by both the Counsels and in view of the law laid down by the Hon'ble Apex court,we are of the considered opinion that the **C.P. No. 1202/MB/2020** deserves to be dismissed, not only on the ground of it being below the threshold limit but also because of pre-existing dispute between the parties. Hence the present petition merits no consideration and deserves to be **'dismissed'.**

SD/-
MADHU SINHA
MEMBER (TECHNICAL)

SD/-
REETA KOHLI
MEMBER (JUDICIAL)

/Aakansha/