

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court -II)
KOLKATA**

CP(IB) No. 138/KB/2020

*A petition 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:

Prabhat Marketing Co. Ltd., a company incorporated under the Companies Act, 1913 and being a company within the meaning of Companies Act, 2013 and having Corporate Identification No- U15139WB1954PLC021938 and its registered office at 26, Amherst Street, Kolkata-700009, in the State of West Bengal.

.....Operational Creditor

-Versus-

Tirrihannah Co. Ltd., a company within the meaning of Companies Act, 2013 and having Corporate Identification No- L65993WB1908PLC001838 and its registered office at 5, Kiran Shankar Roy Road, Kolkata-700001, in the State of West Bengal.

.... Corporate Debtor

Date of Hearing : 5th September, 2022

Date of pronouncing the order: 12th September, 2022

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/ physical):

For Operational Creditor : Ms. Sonal Shah, Advocate

For Corporate Debtor : Mr. Kushagra Shah, Advocate
Mr. Aniket Chowdhury, Advocate
Ms. Manju Bhuteria, Advocate
Mr. Anurag Bagaria, Advocate
Ms. Tanvi Luhariwala, 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 **Prabhat Marketing Co. Ltd.** (Operational Creditor), seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Tirrihannah Co. Ltd.** (“Corporate Debtor”).
3. The Corporate Debtor is a public company incorporated on 04.05.1908. The authorised share- capital of the company is ₹10,00,00,000/- and the paid-up share- capital of the company is ₹3,18,68,750/-.
4. The total amount claimed by the Operational Creditor is ₹46,39,622/- along with interest @14% on and from 90 days from the date of invoice till the date of final payment. The Demand notice under section 8 of the Code was issued by the Operational Creditor on 22.11.2019. The Corporate Debtor replied to the same vide letter dated 11th December 2019.
5. **Submissions on behalf of the Operational Creditor:**
 - 5.1 The Operational Creditor is engaged in the business of supplying agrochemicals, insecticides, herbicides, pesticides, etc.

- 5.2 Upon various purchase orders being placed by the Corporate Debtor, the Operational Creditor supplied different varieties of agrochemicals to the Corporate Debtor. After each delivery, a tax-invoice was raised, which was received by the Corporate Debtor at its office, in Kolkata.
- 5.3 The said goods were received by the Corporate Debtor without any protest or demur as to the quality, quantity, or branding of the goods. The Corporate Debtor's account with the Operational Creditor was a running and continuous one.
- 5.4 In order to escape its liability, the Corporate Debtor has raised issues regarding one supply of 20 liters of pesticide of 'Miteshot' Brand, stating that the same had destroyed the crops.
- 5.5 The Operational Creditor was a mere supplier of the goods in question and had never given guarantee with regards to the effect of such chemicals. Therefore, the contention that the pesticide destroyed the crop cannot be raised by the Corporate Debtor. Nevertheless, the Operational Creditor has given the Corporate Debtor credit for the amount of ₹36,225/-, raised against the supply of the said chemical 'Miteshot' under the invoice dated 25th May 2019.
- 5.6 After giving the abovementioned credit, a sum of ₹46,39,622/- is due and payable from the Corporate Debtor to the Operational Creditor. However, despite several requests and reminders issued by the Operational Creditor, the Corporate Debtor has deliberately and negligently failed to make any payments whatsoever towards the tax- invoices raised upon it.
- 5.7 The date on which the aforesaid amount fell due shall be reckoned from 90 days of the date of the first invoice being 26th April, 2018 and from the date when last supplies had been made, being on 6th June, 2019.
- 5.8 The Operational Creditor issued upon the Corporate Debtor a demand notice under section 8 of the Code on 22nd November 2019. The Corporate

debtor replied to the same vide letter dated 11th December 2019, thereby raising the contention regarding the 'Miteshot' supplied to it being ineffective and counterproductive.

6. The Operational Creditor, in support of its claims has relied upon the following documents:
- a. Purchase order, Delivery note and the bill cover, being Annexure "D".
 - b. The disputed invoice, being Annexure "E";
 - c. Copies of the various communications seeking payments, being Annexure "F";
 - d. Ledger maintained by the Operational Creditor, being Annexure "G";
 - e. Demand Notice dated 22nd November 2019 and its reply dated 11th December, 2019, being Annexure "H";

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

7.1 The Corporate Debtor has submitted that the Operational Creditor approached it for supplying chemicals and pesticide for the tea estate of the Corporate Debtor and it commenced business with the Operational Creditor since 2012.

7.2 The Operational Creditor used to advise and suggest as to what chemicals, pesticides *etc.* the Corporate Debtor should use in its tea garden. As per such advice, the Corporate Debtor used to place order with the Operational Creditor for the supply of chemicals and pesticides. Mr. Kailash Dhaundival, one of the directors of the Operational Creditor used to deal with the Corporate Debtor. Mr. Kailash Dhaundival along with the other officers of the Operational Creditor used to visit the tea garden of : liters the Corporate Debtor from time to time and used to suggest what chemical and pesticides would be beneficial for tea plantation and what

would be effective to protect the tea plantation from damage from pest attack.

7.3 Since the Corporate Debtor used to place orders on the basis of the advice given by the Operational Creditor and relied upon the skill and judgment of the Operational Creditor, the parties were effectively in a fiduciary relationship for several years and the Corporate Debtor reposed faith and trust in the Operational Creditor.

7.4 Prior to 2012, the Corporate Debtor was using the chemical from 'Magister' brand for protecting tea plantation from being damaged by pest. After the Corporate Debtor started the business with the Operational Creditor in 2012, the Operational Creditor also recommended and supplied 'Magister'.

7.5 In the year 2018, when the Corporate Debtor required the supply of 'Magister'. the Operational Creditor informed it that 'Magister' is not readily available in the market and there is a new brand 'Miteshot' which is more effective than 'Magister' and readily available in the market. The orders were placed as per the suggestion of the Operational Creditor and the information provided by the Operational Creditor as to what quantity would be available in the market in respect of the chemicals requested by the Corporate Debtor. Whenever the Corporate Debtor used to inform the Operational Creditor about the requirement of 'Magister', the Operational Creditor used to inform the Corporate Debtor that entire quantity of 'Magister' is not available in the market and used to indicate as to what quantity of 'Magister' is available and for the balance quantity the Operational Creditor used to ask the Corporate Debtor to place order for 'Miteshot'.

7.6 The Corporate Debtor relied on the Operational Creditor's representation that 'Miteshot' is effective for the purpose of protecting the tea plantation

from the attack of pests and believed the representation of the Operational Creditor that "Miteshot" will be fit for the purpose of protecting.

7.7 Relying on the skill and judgment of the Operational Creditor, the Corporate Debtor *bonafidely* placed order for the supply of the said 'Miteshot' instead of 'Magister'.

7.8 In the year 2018, a large area of tea plantation and substantial tea crop got infected and ruined the tea crops causing huge financial loss. Again, in the year 2019 large area of tea plantation and substantial area of tea crop got infected and ruined the tea crops resulting in huge financial loss. This made the Corporate Debtor suspicious with regard to the chemical 'Miteshot' supplied by the Operational Creditor.

7.9 Upon enquiry it came to the notice of the Corporate Debtor that 'Miteshot' was not a chemical to be used against pests and the same was not meant for the protection of tea plantation. The Corporate Debtor called upon the Operational Creditor and informed the same to the Operational Creditor. Sometime in May 2019, the Operational Creditor sent its representative, Mr. Ishan Dhaundival, who is the son of Mr. Kailash Dhaundival, to the tea estate of the Corporate Debtor to see the recurring damage of the Tea crop from the pest attack. At that point of time it was not known to the Corporate Debtor that Mr. Ishan Dhaundival is the son of Mr. Kailash Dhaundival. The representative of the Operational Creditor acknowledged and admitted that 'Miteshot' was not effective in controlling the pest resulting in huge loss.

7.10 The Corporate Debtor returned the balance chemical of 'Miteshot' brand to the Operational Creditor and the Operational Creditor in turn issued a credit note to the Corporate Debtor in respect of the returned 'Miteshot' brand chemicals.

7.11 By a letter dated 29th July, 2019 the Corporate Debtor informed the Operational Creditor regarding the financial loss suffered by the Corporate Debtor due to the Operational Creditor. The Operational Creditor replied to the said letter by its letter dated 2nd August, 2019 and raised frivolous allegations. The Corporate Debtor thereafter made further enquiries and was shocked to find out that Mr. Kailash Dhaundival, a Director of the Operational Creditor has a company named Proxichem LLP. The designated partners of Proxichem LLP are Kailash Dhaundival and his son, Ishan Dhaundival.

7.12 The Corporate Debtor learnt that Proxichem LLP is the manufacturer/supplier of 'Miteshot'. The seller is Proxichem LLP and the buyer is the Operational Creditor.

7.13 From the website of Proxichem LLP, it appears that the registered office of Proxichem LLP is at 4, Synagogue Street. Kolkata and its sales office is at 39/ 2B, Kalighat Road, 2nd Floor. Kolkata and Siliguri branch office is at Silliguri Basera building. It would appear from the Operational Creditor's letterhead that the sales office is at 4. Synagogue Street. It would be evident from the documents that the Guwahati branch office address of the Operational Creditor and Proxichem LLP is same.

7.14 It is evident from the above as to why the Operational Creditor persuaded the Corporate Debtor to buy 'Miteshot'. The Operational Creditor knowing fully well that 'Miteshot' is not applicable for the purpose required by the Corporate Debtor, misrepresented that 'Miteshot' is effective for the purpose and induced the Corporate Debtor to buy 'Miteshot' resulting in huge financial loss to the Corporate Debtor.

7.15 There are pre-existing disputes between the parties and the same was raised much prior to the demand notice raised by the Operational Creditor. The Operational Creditor knowing fully well that the Corporate Debtor

would file proceedings against the Operational Creditor has filed the instant petition with ulterior motive and *mala fide* intention. A huge sum is payable by the Operational Creditor to the Corporate Debtor for the loss suffered by it. The Corporate Debtor recorded the same in its letter dated 29th July, 2019. The said letter has been issued prior to the demand notice dated 22nd November, 2019.

8. **Rejoinder on behalf of the Operational Creditor:**

8.1 The Operational Creditor has stated that the deponent of the reply - affidavit is not authorised by the Corporate Debtor to affirm the affidavit on its behalf. There is no document of authority either annexed to the said reply or relied upon by the deponent. No such copies have been served upon the Operational Creditor.

8.2 It is stated that no dispute as defined under section 5(6) of the Code exists in the instant case. The Operational Creditor has denied that it used to advise and suggest what chemicals and pesticides should the Corporate Debtor use in its garden as alleged or at all. The Operational Creditor used to merely supply the pesticides and/or chemicals requisitioned by the Corporate Debtor and never would offer any advise. It is accordingly denied that Mr. Kailash Dhaundiya and other officers used to visit the garden of the Corporate Debtor so as to advise it and suggest them the chemicals and pesticides to be used as alleged or at all.

8.3 The Operational Creditor has denied and disputed that even 'Magister' was advised by the Operational Creditor to be used by the Corporate Debtor as alleged or at all. The Operational Creditor states that in the year 2018 to 2019 the operational creditor has supplied to the Corporate Debtor 420 liters. of 'Magister' as such it is

false to contend that the Operational creditor did not supply 'Magister' to the Corporate Debtor and instead supplied 'Miteshot' to them.

8.4 Even assuming for the sake of arguments that the Operational Creditor used to promote the 'Miteshot' brand that was manufactured by some alleged sister concern of the Operational Creditor and such pesticides backfired and instead of eliminating the red spiders caused further infestation, the Corporate Debtor should have then and there only stopped receiving such supplies and not wait till July, 2019 to take up this issue of the crops being infested. The said contention of the Corporate Debtor is only a garb to not make payments for supplies made to the Corporate Debtor.

8.5 It is further stated that the Operational Creditor has not been paid for the supplies of pesticides and chemicals supplied to the Corporate Debtor and from April, 2018. The 'Miteshot' brand pesticide chemical was for the first time supplied in February, 2018 and has been consistently used since then but the issue of infestation and crop spoiling was raised only in July, 2019 i.e., after one year of consistently placing orders for such supply and utilising the same.

8.6 The Operational Creditor has denied that in the year 2018, the Operational Creditor informed the Corporate Debtor that the 'Magister' brand is not readily available and accordingly promoted 'Miteshot' to it.

8.7 The Operational Creditor reiterates that the 'Miteshot' brand pesticide chemical was for the first time supplied in February, 2018 and has been consistently used since then but the issue of infestation and crop spoiling was raised only on 29 July, 2019 i.e., after more

than one year of consistently placing orders for such supply and utilising the same.

8.8 It is denied that the Corporate Debtor returned any balance chemical of 'Miteshot' against which a credit note was issued by the operational Creditor as alleged or at all. In May, 2019 the Corporate Debtor had sought for 40 liters of 'Miteshot' out of which 20 liters was returned and an invoice for 20 liters was raised which was thereafter given credit of from the claim of the Corporate Debtor.

8.9 It is repeated and reiterated that against one supply of 20 liters of 'Miteshot' pesticide in May 2019, the Corporate Debtor, in order to escape its liability to pay the operational creditor its outstanding dues, has raised issues stating that the same had destroyed the crops, though the Operational Creditor is just a supplier of the goods requisitioned.

8.10 The Operational Creditor also states that it is not a case that the letter of the Corporate Debtor of 29th July, 2019 raising allegations of spoiling of crop was raised upon the actual loss suffered instead it was upon the persistent meeting held by and between the parties on 29th June, 2019 seeking payment of the outstanding amount in which the Corporate Debtor was provided with the details of the outstanding amount. In the same meeting the corporate debtor also handed over the cheque for ₹365642/- to be deposited at a later date on 18.07.2019. There was no mention of any damage or loss caused to the corporate debtor for any supply of 20 liter 'Miteshot' made in May 2019 and repeated assurance was provided to the operational creditor that it's dues will be settled as quickly as possible.

9. **Analysis and Findings:**

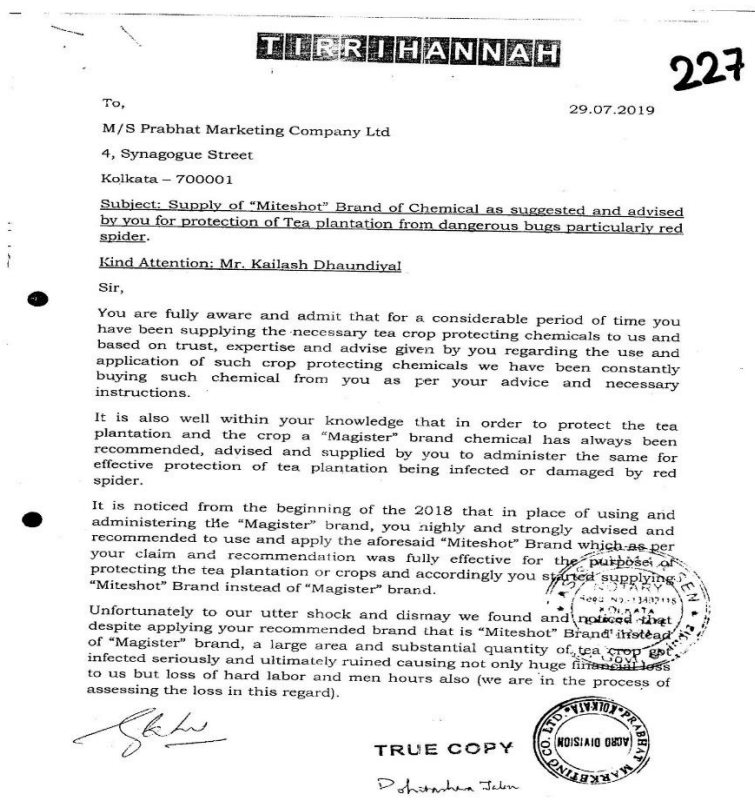
9.1 We have heard the Ld. Counsel for the Operational Creditor and the Ld. Counsel for the Corporate Debtor and perused the record.

9.2 When this matter was taken up for consideration, the preliminary objection of the Corporate Debtor was that there is pre-existing disputes in the matter and therefore, the petition is liable to be rejected.

9.3 While arguing, the Ld. Counsel for the Corporate Debtor drew our attention to the letter dated 29th July 2019 on page 227 of volume II of the petition.

9.4 It is stated that tis letter was written by the Corporate Debtor to the Operational Creditor much prior to the Demand Notice dated 22nd November 2019 .

9.5 A scanned copy of the letter dated 29th July 2019 has been extracted below:



TIRRIHANNAH

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During such serious incident of ruining of crop in the year 2018 and year 2019 again despite using your recommendation and supply of "Miteshot" Brand once again, we suffered considerable crop loss and as a result substantial financial loss also.

The matter was immediately reported to you and you sent some representatives together with your son and upon inspection, a large area of plantation where the "Miteshot" brand was sprayed and applied along with relevant charts. your visiting representatives acknowledged and admitted in presence of our Managing Director that the supplied "Miteshot" brand is found to be ineffective and did not perform for the purpose it was sprayed. As a consequence, the entire area and the crop got infected and ruined adding to our further suffering and financial loss.

We hope and expect that you must have given a serious thought and deliberation regarding the financial loss suffered by us due to supply of ineffective and non performing chemical like "Miteshot" to us which we never expected from a renowned and reliable company like you on whom we always trusted and followed your, advices and recommendation and believed that it will only protect our interest and add to our income but in the instant matter we have been made to suffer because of some ill or motivated recommendation and hence would like to be informed the reasons in detail for replacing "Magister" brand to "Miteshot" brand and the reasons for its utter failure causing only financial loss to us so far.

Your reply at the earliest is solicited.

Thanking You

Yours Faithfully

For Tirrihannah Company Limited

Shanujyoti Kankari
Authorised Signatory



TRUE COPY

Rohitashu Jais

9.6 The Ld. Counsel for the Operational Creditor, while rebutting the contention of the Corporate Debtor has drawn our attention to the reply dated 2nd August 2019 on page 229 of the volume II of the petition. The Ld. Counsel has further stated that the letter dated 29th July 2019 was issued only after the Corporate Debtor was asked to repay the dues. In this context, the Ld, Counsel drew our attention to email dated 3rd July 2019 on page 239.

According to the Ld. Counsel of the Operational Creditor, there are no pre-existing disputes as contented by the Corporate Debtor.

9.7 We have heard the Ld. Counsel for the Operational Creditor and the Ld. Counsel for the Corporate Debtor and perused the record.

9.8 Upon perusal of the records, specifically the letter dated 29th September 2019 and its reply dated 2nd August 2019, it is clear that there were pre-existing disputes in the instant matter. Further, annexure R-3 to the reply affidavit, being the master data of the Proxichem LLP i.e the company which manufactures 'Miteshot' reveals that the representatives of the Operational Creditor, being Mr. Kailash Dhaundival and Mr. Ishan Dhaundival are the directors of Proxichem LLP. Even though the letter containing such disputes was issued after the demand for the debt was made by the Operational Creditor vide email dated 3rd July 2019, it appears that the Corporate Debtor's contentions regarding the relation between the Operational Creditor and Proxichem LLP is not baseless and need to be looked into further. However, the same can only be adjudicated in an evidentiary proceeding and not by a summary proceeding under the Code.

9.9 In this regard, we would like to refer to the decision of the Hon'ble Supreme Court in the matter of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited***¹ wherein it was held that:

"The scheme of Section 7 stands in contrast with the scheme Under Section 9 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days

¹ Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (21.09.2017 - SC) : MANU/SC/1196/2017

of receipt of the demand notice or copy of the invoice mentioned in Sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.” (Para 29)

The Apex Court, in ***Mobilox Innovations Private Limited*** (*Supra*) further held that:

“...Therefore, all that 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.” (Para 40)

9.10 Keeping in mind the aforementioned judgment, we are of the opinion that the pre-existing disputes in the instant case are not mere feeble arguments and need to be adjudicated upon by a court of competent jurisdiction. As such, in presence of pre-existing disputes, the instant petition is not maintainable.

9.11 In light of the above-mentioned facts and circumstances, this Adjudicating Authority is satisfied that the instant petition is liable to be ***rejected***.

9.12 Consequently, **C.P.(IB) No. 138/KB/2020** shall stand **rejected**. Needless to say, the Operational Creditor is free to pursue its remedies under any other

law, and the dismissal of the present petition shall not stand in the way of such pursuit of remedies.

9.13 The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

9.14 Certified Copy of this order may be issues, if applied for, upon compliance of all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 12th day of September, 2022

SM[LRA]