

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 210/KB/2023

***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:

Bechman Coulter India Private Limited

... Operational Creditor/ Petitioner.

Versus

AVS Medical Instrument Private Limited

... Corporate Debtor/ Respondent.

Date of Pronouncement: May 07, 2024.

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

**For Operational Creditor: Mr. Kanishka Tyagi, Adv
 Mrs. Manju Bhuteria, Adv,
 Mr. Rahul Auddy, Adv.
 Mr. Aditya Gooptu, Adv.**

**For Corporate Debtor: Mr. Vijay Nath Jha, Adv.
 Mr. Saurav Ganguly, Adv.**

ORDER

Per: D. Arvind, Member (Technical)

- 1.** The Court congregated through hybrid mode.
- 2.** Heard the Learned Counsels for both parties at length.
- 3.** **Bechman Coulter India Private Limited**, hereinafter referred to as "Petitioner"/ "Operational Creditor" has preferred this petition to seek

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the commencement of the Corporate Insolvency Resolution Process, for brevity "CIRP" under Section 9 of the Insolvency and Bankruptcy Code, 2016 (I&B Code) against **AVS Medical Instrument Private Limited**, hereinafter referred to as "Respondent"/ "Corporate Debtor".

4. It is claimed that the Corporate Debtor owes Rs. 1,98,13,325/- excluding GST as on June 22, 2023. The Date of Default is claimed from December 24, 2022, to January 31, 2023 in respect of various Invoices raised.

Factual Conspectus:

5. The Corporate Debtor was the distributor of the Operational Creditor for a long. The parties entered into a Distribution Services Agreement (Dx), hereinafter referred to as "DS Agreement" on 12.03.2021, for services related to stocking and reselling the products supplied by the Petitioner to nominated customers, which was valid for a term of 36 months from the effective date.

6. An Amendment to the DS Agreement was executed between the parties on 22.04.2021 which added special terms and conditions. Further, another amendment to the DS Agreement was executed on 22.07.2022 between the parties to capture the new address of the business unit and warehouse of the Corporate Debtor. The DS Agreement dated 12.03.2021 along with the amendments are annexed to the petition at pages 36-67 as Annexure "3 (Colly)"

7. Further, the petitioner was supplying goods and services as per the Distributor Agreement DxH 500, 520 & 560 ("DA") dated 18.02.2022 for

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the distribution and sale of DxH 500, 520 and 560 instruments and their spares to end customers.

8. As per the petitioner, as per the agreements, the petitioner duly raised invoices upon the respondent from time to time which were due and payable as per the terms and conditions of the agreements.

9. That, vide email dated 09.01.2023, the Corporate Debtor officially intimated to the Operational Creditor about its inability to continue with the petitioner as a distributor and terminated the distribution service with the petitioner. Accepting the request for termination, the petitioner asked for clearing the outstanding invoices to ensure that there are no credit holds and also to ensure that the optimum inventory level is maintained to fulfil the customer's orders and avoid any escalations. However, as per the Petitioner, after a plethora of reminders, the Corporate Debtor failed to clear the outstanding dues under the pending invoices.

10. The statutory notice of demand under Section 8 of the I&B Code was issued on 23.06.2023. The Corporate Debtor vide its email dated 01.07.2023 replied to the demand notice raising the dispute towards the claim of the Operational Creditor and informing about a money suit bearing no. 382/2023 preferred by the Corporate Debtor in the court of appropriate jurisdiction in Calcutta for recovery of unresolved claims which is pending consideration by the court.

The case of the Petitioner:

11. The Learned Counsel appearing on behalf of the petitioner submits that after accepting the Corporate Debtor's request for termination, the

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petitioner requested the respondent to clear all the outstanding invoices. The copy of the termination email and response sent by the petitioner are annexed at pages 1856-1859 to the petition.

12. Further, it is submitted that the Corporate Debtor through various emails while accepting its liability towards the outstanding dues, agreed to pay the outstanding amount, however, failed to do so. The Copies of the emails by the respondent are annexed at pages 1860-1862 to the petition.

13. Further, it is contended that an Audit conducted by the petitioner for the period of April 01, 2018, to March 31, 2019, a margin difference amounting to Rs. 14,59,281/- with GST and for April 01, 2019, to June 30, 2022, a margin difference amounting to Rs. 60,10,736/- with GST is also due and payable by the Corporate Debtor. Copies of the email along with the Margin Audit Report for the said period are annexed at pages 1863-1868 to the petition.

14. Further, vide email dated 26.05.2023, the petitioner addressed various concerns of the Corporate Debtor and asked to clear the outstanding payment. The Corporate Debtor vide its email dated 30.05.2023 proposed a payment plan. Accordingly, on 19.06.2023, the respondent made a part payment of Rs. 13,59,040/- through RTGS.

15. Further, the petitioner on 20.06.2023, issued a letter to the respondent addressing all its concerns and requested to clear the outstanding. It is claimed that instead of clearing such dues, the respondent vide email dated 22.06.2023 asked the petitioner to ascertain the correctness of account. The copies of the email communication

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exchanged between the parties are annexed at pages 1869-1904 to the petition.

16. Leaving no stone unturned, the petitioner issued a statutory notice of demand under Section 8 of the I&B Code on 23.06.2023. In reply to the said demand notice, the respondent issued a letter on 01.09.2023, denying the demand as payable on account of several pre-existing disputes.

Per contra, submissions by the Respondent:

17. The Learned Counsel for the respondent submits that the alleged claim to be in default i.e., of Rs. 1,98,13,325/- on account of the sale of goods and services rendered by the Operational Creditor. However, findings of the financial audit are disputed since 2019-2020, i.e., prior to the issuance of Section 8 Demand Notice dated 23.06.2023. The reason for the disassociation and termination of the DS Agreement with the Operational Creditor is the repeated arbitrariness and non-cooperation on the part of the petitioner.

18. Further, the Learned Counsel for the respondent submits that the disputed claim regarding the financial CP Audit of Rs. 74,70,017/- is neither related to the supply of goods nor service. Thus, it will not come within the purview of Section 5(21) of the I&B Code. Reliance is placed on ***Tower Vision India Pvt. Ltd. v. Procall Private Limited*** reported at **2012 SCC OnLine Del 4396 (Para 25)** and ***Prism Johnson Limited v. Simplex Infrastructure Limited*** in **C.P. (IB) No. 102/KB/2022** order dated 15.12.2023 (Paras 17 and 18). Further, the CP Audit Reports are separately disputed by the Corporate Debtor from 2019 to 2020 vide

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contemporaneous emails annexed at pages 131 to 136 to the Reply Affidavit, and when the alleged 'debt' has been disputed, the question of default does not arise. Further, the Learned Counsel for the respondent took us to Clause 12 of the DS Agreement dated 12.03.2021 and argued that the said clause does not include any provision for damages or compensation related to the Audit Report. The term 'financial audit' in the said clause refers to the general evaluation of the financial health of the company.

19. Further, it is contended that the Operational Creditor sans any amendment to the DS Agreement dated 12.03.2021, autocratically reduced the margin from 10% to 8%, by only issuing an email on 24.06.2022, annexed at pages 50 and 51 to the Reply Affidavit. The Corporate Debtor disputed and objected to this wrongful reduction by the Operational Creditor through an email dated 27.06.2022, annexed at page 52 to the Reply Affidavit. It is contended that as a consequence of this 2% wrongful reduction towards the service fee, the differential margin money would accrue to Rs. 44,62,144/- including GST.

20. Further, it is submitted that the Corporate Debtor raised disputes and informed the same to Operational Creditor, about the delayed customer payments and credit note reimbursements. Consequent to the negligence on the part of the petitioner, an outstanding of Rs. 75,48,810/- accrued and yet to be paid by customers nominated by petitioner to whom goods have been sold.

21. Further, it is claimed that due to disputes and operational issues, a total Credit Note of Rs. 8,92,170/- is pending to be reimbursed by the petitioner till date, which has been intimated to the petitioner on several occasions, prior to the issuance of Section 8 Demand Notice dated

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23.06.2023. Further, an amount of Rs. 66,375/- is also due and payable by the petitioner on account of service charges. The same was demanded by the respondent through a letter dated 30.05.2023, annexed at page 121 to the Reply Affidavit and disputed by the petitioner through an email dated 20.06.2023, annexed at page 128 to the Reply Affidavit. Thus, it is submitted that the dispute between the parties is pending reconciliation which qualifies pre-existing dispute. Reliance was placed on ***Sabarmati Gas Ltd. v. Shah Alloys Ltd.***, in **Civil App. No. 1669 of 2020**, judgment dated **04.01.2023**.

22. Further, it is asserted that a money suit being MS/383/2023 against the Operational Creditor has been filed on 01.07.2023, before the 1st Civil Judge Sr. Div. Barasat for adjudication of all the aforesaid disputes, which were raised by the Corporate Debtor much before the issuance of Section 8 Demand Notice dated 23.06.2023.

In counter, the Petitioner would submit:

23. That, the question of refund of alleged claim of differential margin money up to February 2023 (including GST) of Rs. 44,62,144.36/- does not arise as the same is neither envisaged contractually nor is maintainable legally.

24. That, regarding the outstanding dues recoverable from the petitioner's customers, i.e., of Rs. 75,48,810/-, it is the obligation of the respondent in terms of Clause 8 of the DS Agreement dated 12.03.2021.

25. That, in counter to the allegation of reversal of differential margin money against disputed and illegal Audit report, i.e., of Rs. 74,70,017/-,

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the amount has not been paid to the petitioner, thus, he will not be liable to refund.

26. Further that, amount claimed by the respondent toward the alleged credit note is not the liability of the petitioner to pay and same has been communicated to the respondent on several occasions.

Analysis and Findings:

Issue relating to the financial CP Audit.

27. It is the case of the petitioner that Rs. 74,70,017/- as a margin difference amount is an aftermath of the financial CP audit conducted by the Operational Creditor and the same is due and payable by the Corporate Debtor. However, the respondent has claimed that in terms of Clause 12 of the DS Agreement dated 12.03.2021, if any audit results in a finding that the Corporate Debtor's operations do not conform with the requirements of the Agreement, the Operational Creditor can terminate the Agreement immediately but cannot claim any compensation or damages. We have noted the language of the Clause 12.4 of the DS Agreement dated 12.03.2021 reproduced verbatim:

“12.4 *If Distributor fails to participate in any audit or does not fully cooperate with any compliance investigation Beckman Coulter may initiate to review Distributor's performance under this Agreement or if **any audit results in a finding that Distributor's operations do not conform with the requirements of this Agreement** in any material respect, **Beckman Coulter shall terminate this Agreement immediately.**”*

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28. We have noted that Rs. 74,70,017/- has been claimed as a margin difference amount not as a compensation. However, we find that the Operational Creditor has not raised any invoices or GST paid debit note for its claim of Rs. 74,70,017/-. Further, we have noted that vide an email dated May 30, 2023, annexed at page 1871 to the petitioner, the respondent raised various objections towards the invoice discounts, margin money, reimbursement of discounts given to customers as have been given earlier and other small issues. We hereunder reproduce the extract of the email in verbatim:

“On Tue, May 30, 2023 at 5:49 PM avs medical <sales.avsmedical@gmail.com> wrote:

Dear Sir,

*You will please find from your records that we have been associated with your esteemed organization as a Channel Partner since 2012. During the last more than 10 years of association, there has not been instances of continuing disputes except for the disputes those have cropped up in the last about 3 years, particularly since 2021 mainly on the **issues of invoice discounts, margin money, reimbursement of discounts given to customers** as have been given earlier and other small issues.*

As on date, your total claims as per your email dated 26 May 2023 is Rs.1,37,78,565 as outstanding against invoices and you have claimed another amount of Rs.74,70,017/- + GST on account of difference margin money based on audit report.

As far as outstanding of Rs.1,37,78,565 is concerned, this amount is against invoices raised on us against goods supplied to us. These said goods were further sold to the customers and billed by us against which there are claims on account of discounts and billings which have been conventionally allowed by you but despite repeated requests, you have withheld these claims being a small amount of

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Rs.8,92,170.54 The break-up details of this claim is annexed herewith and is as per approvals and go-aheads given by your competent officers on email.

Kindly refer to your email dated June 24, 2022 by which you revised the CP margin south-side by 2% which we strongly protested and never accepted. Hence, we continued to work on previously agreed terms applicable from July 2022 as prior to this email. However, you have allowed CP margin as per your revised terms in all the new billings till February 2023. Though your officer Mr. Tarit Sain in the month of July itself assured to look into the matter but actually nothing could be and therefore the previously agreed terms have continued to apply. Despite our protest, you have allowed CP margin at revised term thereby resulting in finalized accumulation of differential Margin money at an amount of Rs. 46,57,866.87 (41,58,809.71+ GST 4,99,057.17). The detailed working sheet of this differential margin money is annexed herewith for your kind settlement.

Kindly refer to our emails dated 6th April 2022, 15th October 2022 and 19th January 2023, by which we had raised claims of Rs.66,375 on account of service charges provided to your customer at your behest as per your instructions and assurance of payment and mutually agreed vide service agreement. We regret to remind you that this amount is yet pending for settlement.

Thus, our total claims adjustable against outstanding as per your books is Rs. 56,16,412.41 Thereby leaving a balance of Rs. 81,62,152.59 due and payable by us to you and this amount is not disputed.

As far as your another claim of Rs. 74,70,017 on account of profit margin money as per your audit report is concerned, please note that the business relationship between us maybe nomenclated by any name but at the end of the day it is just of sale and purchase since you directly raise GST tax Invoice on us against the goods purchased by us for onward sale to customers of your own company only and by

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any agreement you have neither agreed or assured any guarantee on stock clearance should we fall in clearing the stock. In such a scenario, we are only liable to pay the tax Invoice amount less any claim genuinely payable to us. All the more, you, realizing your own mistake, had first raised a debit note and nullified the same in your books which clearly proves such amount is not payable to you. Further, the audit report is more than 3 years old, never claimed till date, never agreed by us, hence, it is time barred and not claimable as per the limitation act. Thus, the mentioned amount of Rs. 74,70,017 is not due and payable to you by any means.”

29. Thus, we would infer that the respondent prior to the issuance of demand notice under Section 8, i.e., on 23.06.2023, raised the dispute and objections towards the margin difference as claimed by the petitioner.

30. It is a settled position of law as well as the judgment rendered in ***Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.***, reported in **(2018) 1 SCC 353** by the Hon’ble Apex Court that “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6) of the I&B Code.

31. Further, in ***Alpha Tech Projects (India) Pvt. Ltd. v. JMD Ltd.*** reported in **[2018] ibclaw.in 69 NCLAT**, the Hon’ble NCLAT laid down that once the ‘Corporate Debtor’ raise objection before issuance of demand notice under Section 8(1) of the I&B Code, the application cannot be entertained. Moreover, the same view is also adopted in ***Amrop India Private Limited v. The Hi-Tech Gears Limited*** reported in **(2023) ibclaw.in 663 NCLAT** at para 11 that the “debt” which is highly disputed and requires a proper and thorough adjudication does not fall within the purview of the summary jurisdiction of the Adjudicating Authority.

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Issue relating to Service Fees.

32. It is evident that the through a letter dated 24.06.2022, annexed at page 51 to the Reply Affidavit the petitioner reduced the 'Service Fee' as defined under Clause 8.1 of the DS Agreement dated 12.03.2021, from 10% to 8% being effective from July 01, 2022. It is further evident that through email on 27.06.2022, the respondent raised objection and stated its unviability to provide services to the customers of Behrampur/ Dhulian/ Kanthi/ Malda/ Medinapore/ Tamluk territory at 8% service fee and sought clarification on the same as this breach of contract vide their agreement.

33. We have found that the respondent objected to the reduction of the service fee prior to the issuance of the demand notice, thus principal laid down in ***Mobilox (Supra)***, ***Alpha Tech (Supra)*** and ***Amrop India (Supra)*** will rightly be applicable.

34. Further, we find that there are pending reconciliation of accounts between the parties which would be evident from many email communications prior to the issuance of demand notice under Section 8 of the Code. We would rely on the judgment rendered in ***Sabarmati Gas Ltd. v. Shah Alloys Ltd.*** reported in **(2023) ibclaw.in 02 SC**, wherein the Hon'ble Apex Court held that:

“38. In this context the meaning of the word “reconciliation” is to be looked into. Going by Black’s Law Dictionary, 10th Edition, the apt meaning suitable to the situation in relation to accounting, reads thus: “an adjustment of amounts so that they agree, especially by allowing for outstanding items”. It is submitted by the learned counsel for the respondent that such a reconciliation had not taken place and also that indisputably, DRS was not

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*formulated and approved. The aforesaid facts revealed from Annexure 40 together with the stand taken by the respondent in the letter dated 04.01.2013 (Annexure 36) would reveal the existence of a pre-existing dispute between the parties. In the contextual situation it is only apposite to be remindful of the observation in **Mobilox Innovations (P) Ltd. (supra)** that in doing the act of separating the grain from chaff the Court need not to be satisfied that the defence is likely to succeed. It is enough that a dispute exists between the parties and in other words, what is to be seen is whether there was a plausible contention requiring investigation for the purpose of adjudication. Taking note of the nature of the dispute of the respondent as referred hereinbefore in respect of the claim made by the appellant, we do not find any reason to disagree with the concurrent findings of the Tribunals that there existed a 'pre-existing dispute' between the parties before the receipt of demand notice under Section 8, IBC. In other words, the dismissal of the application under Section 9, IBC on the ground of 'pre-existing dispute' cannot be held to be patently illegal or perverse. We also do not find any reason, in the facts and circumstances, to hold that the case set up by the respondent was a patently feeble legal argument. At any rate, we are not inclined to brush aside the case of the respondent as spurious. We may hasten to add here that we shall not be understood to have held that the dispute set by the respondent regarding the dues is ultimately to be upheld. Certainly, when the expression 'pre-existing dispute' is used it will only indicate the existence of a dispute prior to the receipt of a demand notice under Section 8, IBC, and the correctness or its truthfulness is a matter of evidence. In short, the respondent has succeeded in raising a dispute describable as 'pre-existing dispute'. In that view of the matter once we find that the Tribunals have rightfully held that there existed a 'pre-existing dispute' between the parties there cannot be an order of remand of the matter to the Tribunal for reconsideration of Section 9 application under IBC."*

(Emphasis Added)

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35. Thus, we would infer that pending and/or failing reconciliation or adjustment of account raising prior to the issuance of statutory notice of demand under Section 8 of the I&B Code qualifies the true import of a pre-existing dispute.

36. Further, it is evident that there are a pending Money Suit against the Operational Creditor being MS/383/2023 before the Learned Civil Judge, Senior Division, Barasat for adjudicating and considering the dispute relating to the services. It is the settled position of law that “dispute” as inclusive of **a suit** or arbitration proceedings relating to the existence of the amount of debt; the quality of goods or services; or the breach of a representation or warranty, in terms of the Section 5(6) of the I&B Code. The Hon’ble Apex Court in **Mobilox (Supra)**, held that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application Under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility and such notice must bring to the notice of the operational creditor the “existence” of a “dispute” or the fact that “a suit” or arbitration proceeding relating to a dispute is pending between the parties. We have noted that in the Reply to the Demand Notice dated 01.07.2023, (at page 12 of the reply, annexed at page 1938 to the petition), the Corporate Debtor has raised the fact of pending money suit.

37. Hence, we would infer that the debt claimed herein is highly disputed which requires a proper and thorough adjudication. This Adjudicating Authority having the summary jurisdiction under the I&B Code need not probe in and adjudicate all those disputes between the parties raised prior to the issuance of the statutory notice of demand

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under Section 8 of the I&B Code. Further, there is a pending suit before the Learned Civil Judge Sr. Div., Barasat dealing with those disputes and so long as a dispute exists in fact between the parties, relating to services, that would fall within the **inclusive** definition contained in Section 5(6) of the I&B Code, thus, the application is liable to be rejected.

38. Hence, in terms of the forgoing thorough discussions, we **dismiss** the petition.

39. The Registry of this Adjudicating Authority shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), to whom the company(ies) are registered with, by all available means. 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.

40. The certified copy of this order, if applied for with the Registry, be supplied to the parties, subject to compliance with all requisite formalities.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

This order is signed on the 07th Day of May, 2024.

Bose, R.K. [LRA]