IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 5, MUMBAI BENCH

C.P. (IB) 2218/MB/2019

Under Section 8 & 9 of the IBC, 2016

In the matter of

Mabel Cosmetics

3, 304, Ganesh Complex, Laxmi Road, Near Aruna Chowk, 313, Nana Peth, Pune- 411002

.... Petitioner

v/s.

Apogee Healthcare Private Limited

Office No. 602, DLH Park, S.V. Road, Goregaon (West), Mumbai- 400062

…. Corporate Debtor

Order Delivered on: 16.07.2020

Coram: Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)
Hon'ble Shri V. Nallasenapthy, Member (Technical)

For the Petitioner: Mr. Avinash R. Khanolkar, Advocate i/b Mandar Wagh, PCS

For the Corporate Debtor: Rita Yadav and Kajal Sarvaiya, Advocates, i/b Reeti Law Associates

Per: V. Nallasenapthy, Member (Technical)

ORDER

1. This Company Petition is filed by Mabel Cosmetics of (hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Apogee Healthcare Private Limited (hereinafter called "Corporate Debtor") alleging that the Corporate Debtor committed default in making payment of ₹16,71,954/- since 02.02.2019 by invoking the provisions of Section 8 and 9 of the Insolvency & Bankruptcy Code (hereinafter called "Code") read with rule 5 and 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter called "Rules").
2. The petitioner submits that he had entered into a super stockist agreement dated 03.07.2018 with the Corporate Debtor wherein the petitioner was appointed as the super stockist for the health care products of the Corporate Debtor. As per the agreement the petitioner is the super stockist for the areas of north Maharashtra and Gujarat and the Corporate Debtor will provide a discount/margin of 7 % on the cost of the product taken by the petitioner from the Corporate Debtor. Accordingly the Corporate Debtor supplied the goods to the petitioner and also billed the petitioner to the extent of supplies made. The petition further reveals that somehow the petitioner is not in the position to market the products and finally the goods were

returned back to the Corporate Debtor and thereby the petitioner is claiming a sum of Rs. 16,71,954/-, the break up being the return back of goods to the extent of Rs. 13,56,954/- and Rs. 3,15,000/- towards 7 % discount / margin amount on the expected sale of Rs. 15 lacs per month.

3. The petitioner submits that after realizing the false commitment of the Corporate Debtor that there will be a sale of Rs. 15 lacs per month and on being not in a position to make any sale of the products, the petitioner on 20.10.2018, sent an email communication to the Corporate Debtor saying that they want to discontinue the present understanding of super stockist arrangement and requested the Corporate Debtor to settle the dues. The Petitioner returned the stocks on 02.02.2019 and requested the corporate debtor to settle the dues. On 19.04.2019 the petitioner issued a demand notice under the Code demanding a sum of Rs. 17,57,900/-.

4. Heard the counsel on both sides and gone through the pleadings of the parties.

5. The email communications between the petitioner and the Corporate Debtor reveals that the petitioner agreed to repay the amount to the Corporate Debtor and in support of this the petitioner enclosed the following emails;

   a. Email communicated dated 01.04.2019 sent by the Corporate Debtor to the petitioner:

      "Dear Riddhi Madam,

Total amount due with Apogee is 1620000

Investing this amount in my business, I can easily earn net 32000 per month.

I am asking you to pay 2 % monthly interest on my account from Jan 19, as that can be easily I can earn in my business.

I have business opportunity with me but due to non-availability of funds I am not able to grab that.

Please think about it either you can clear my dues or pay me interest of 2 % from Jan 2019.

I have expressed all real things in front of you.

Regards,

Akshay.

b. Email dated 08.04.2019 sent by the petitioner to the Corporate Debtor:

""Dear Ridhi Madam,

We have given you enough time.

I request you to pay 2% interest on whole amount from Jan I9 till you cleared mabel dues.

We have given you enough time, take your decision till Thursday 11th Apr 19.

We expect clear reply regarding payment till 11th Apr 2019.

Transfer interest amount expecting 2% per month from jan 19 to Apr 19.

Understand our situation and transfer amount till Friday 12th Apr 2019 so that trust can be build in our mind.

Will wait till Friday and hope will start getting funds in our account.

Regards,
Akshay."

c. Email dated 11.04.2014 sent by the petitioner to the Corporate Debtor:

""Dear Ridhi Madam,

We will wait till tomorrow 12th Apr 2019 for funds to get credited in Mabel account.

You can pay whole amount of 1620000 or pay interest of 2% from Jan 2019.

From Monday 15th Apr 2019, we will start legal proceedings.

Regards,
Akshay"

d. Email dated 11.04.2019 from the Corporate Debtor to the petitioner:

"Dear Mr. Akshay,

We will need time to repay this amount as mentioned.....And we are ready to pay but we need time to get back to you...

We had discussed 1% interest January…, If you don't trust us then you can proceed with the legal proceedings….

Regards

Riddhi Mehta"

e. Email dated 11.04.2014 sent by the petitioner to the Corporate Debtor

"Dear Madam,

This is borrowed money from bank.

As per my knowledge when you are not able to pay at given time you need to pay 1.5 % on capital.

I have good opportunities with me.

As you are not paying me on time that opportunity will be loose from my side.

I have borrowed money from bank at 14% interest for this business.

Pay interest of 1.5% per month from Jan19, till 15th Apr 19 and clear your intentions.

My bank is asking me to Refund all amount.

Account has gone in NPA.

Understand and take proper actions.

Regards,

Akshay"

f. Dated 11.04.2014 from the Corporate Debtor to the petitioner 4.28

"Sir,

I understand Your agony and I am not moving away from what my responsibilities are but even my hads are tied…..I am trying my level best….I am still saying we win be able to pay you but there are circumstances that were ambiguous and unclear that is why we did not email the calendar... Also, when you had come to office you had not even demanded the 1% and it was something that I personally mentioned from my side because I understand your situation and dilemma.

Regards,

Riddhi Mehta"

6. The above emails clearly shows that the Corporate Debtor accepted the liability and also agreed to make the payment to the petitioner.
7. The main contention of the Corporate Debtor is that the petitioner does not fall under the definition of the Operational

Creditor as provided under the Code. It is submitted that the Corporate Debtor is the vendor to the petitioner and the petitioner has not supplied any goods and the amount claimed by the petitioner is refund of advance amount given against supply of stocks, therefore the same will not fall under the definition of the Operational debt.

8. In support of the above contention the petitioner relied on the judgement of NCLT, Mumbai Bench, in the case of *TATA Chemicals Ltd. Vs. Raj Process Equipments and Systems Pvt. Ltd (MANU/ND/8244/2018)* wherein it was held that the refund of advance money which has been taken by the corporate debtor, not on account of goods / services, is not an operational debt.

9. The corporate debtor submits that there are pre-existing disputes in the materials retuned back after the expiry of the super stockist agreement by the petitioner. It is submitted that the agreement was valid up to 31.12.2018, the stocks were received only on 31.01.2019 after the expiry of agreement, in spite of various reminders by calls and emails. Due to delay in returning the stocks by the petitioner, the Corporate Debtor suffered huge loss and lost sales and clients, which led to the shutdown of the respective markets due to the deterioration of the goodwill of the Corporate Debtor. It is also submitted that disputes were raised in emails exchanged between the parties before issuance of demand notice on 19.04.2019.

10. The corporate debtor submits that the petitioner failed to maintain ledger account, the principal amount claimed in the demand notice is Rs. 17,57,900/- and in amended form 5 it is Rs. 16,71,954/-. The claim of compensation for loss does not qualify as an operational creditor. However, the petitioner has claimed Rs. 3,15,000 as compensation.
11. After hearing both sides and going through the pleadings the followings are the observations of the Bench;

    a. The first issue is whether the transaction in question is an 'Operational Debt' and the petitioner is an 'Operational Creditor'. Under Section 3(11) of the Code, 'debt' means a liability or obligation in respect of a claim which is due from any person. Debt includes an 'Operational Debt' which is defined under Section 5 (21) of the Code- "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority; Section 5(20) of the Code defines 'Operational Creditor' - means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;
    b. On plain reading of the above definitions, it is clear that the person seeking initiation of CIRP under Section 9 of I&B Code, must be a person to whom a claim in respect of the provision

of goods or services including employment or a debt in respect of the repayment of dues arising under any law and payable to the Central Government, State Government or local authority is payable. In this case initially the goods were supplied by the corporate debtor to the petitioner on the basis of the super stockist agreement executed between the parties, the corporate debtor raised invoices on the petitioner, subsequently the goods were returned by the petitioner to the corporate debtor and hence petitioner is claiming back amount paid for the stock duly returned by the petitioner. The relationship between the petitioner and the corporate debtor is that of purchaser/stockist and seller and subsequently due to the return of goods the relationship turned as creditor and debtor, hence, we hold that the petitioner is entitled to claim the amount as an operational creditor under the code.

c. The judgement in *TATA chemicals Ltd.* case referred supra, wherein it was held that the claim for refund of advance is not an operational debt, is of no avail to the corporate debtor view of the judgement of the Honourable NCLAT the case of *Overseas Infrastructure Alliance (India) Pvt. Ltd. Vs. Kay Bouvet Engineering Ltd.(MANU/NL/0342/2018)*, wherein it was held that the claim for refund of advance in a contractual transaction is an operational debt. Further the petitioner herein is claiming the money back for the return of goods purchased by it.

d. Even though the Corporate Debtor contends that there are pre-existing disputes, there are no pre-existing disputes that can be found from the emails referred by the Corporate Debtor. In fact by an email dated 10.04.2014 sent by the Corporate Debtor to the petitioner, the Corporate Debtor unequivocally accepted the liability.

e. The issue of non-maintenance of the ledger account of the petitioner and the variation of the demand notice and the Form no. 5 will not affect the right of the petitioner to ask for repayment for the goods returned, especially when the goods returned back without any objection by the Corporate Debtor and subsequently the corporate debtor agreed to refund the amount through email.

f. As far as the claim of compensation is concerned, we are of the view that the petitioner is not entitled to ask for any compensation and hence that part of the claim fails, and since the balance claim is Rs.13,56,954/- for the returned goods, which is more than Rs. 1 lac, and the petitioner is entitled to claim the same which is in default.

12. In view of the above discussion, it is clear that the debt of the petitioner is proved and the default is also proved. Hence, the petition deserves admission.

13. This Bench having been satisfied with the petition which is in compliance of provisions of Section 8 & 9 of the Insolvency &

Bankruptcy Code admits this petition declaring Moratorium with the directions as mentioned below:

(a) that this bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgement, decree or other in any court of law; transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

(b) that the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(c) that the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(d) that the order of moratorium shall have effect from 16.07.2020 till the completion of the CIRP or until this Bench approves the resolution plan under sub-section (1) of Section

31 or passes an order for liquidation of Corporate Debtor under section 33, as the case may be.

(e) that the public announcement of the CIRP shall be made immediately as specified under Section 13 of the Code.

(f) that this Bench hereby appoints Mr.Kshitiz Gupta, C/104, Lotus CHSL,N Gundecha Valley of Flowers , Thakur Village, Kandivali East, Mumbai-400101, having Registration No. IBBI/IPA-002/IP-N00721/2018-2019/12140 as an Interim Resolution Professional to carry out the functions as mentioned under the Code.

14. The Registry is hereby directed to communicate this order to both the parties and to the Interim Resolution Professional immediately.

-sd-	-sd-
V. Nallasenapathy	Suchitra Kanuparthi
Member (Technical)	Member (Judicial)