IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-IV

Company Petition No. (IB)-120/(ND)/2019

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:

M/s. Wacker Chemie AG

.... Operational Creditor

Vs.

M/s. Mccoy Silicones Limited

.... Corporate Debtor

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (J)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (T)

Order Delivered on: 17.08.2022

ORDER

PER: SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

The instant petition is filed by M/s. Wacker Chemie AG (hereinafter referred as 'Applicant'/ 'Operational Creditor', a company incorporate and existing under the laws of Germany and having address at Hanns-Seidel-Platz 4, 81737 Munchen, Germany under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. Mccoy Silicones Limited (hereinafter referred as 'Respondent Company' or 'Corporate Debtor').

2. The Respondent Company M/s. Mccoy Silicons Limited having CIN: U72200DL1996PLC083597 is incorporated under the provisions of the Companies Act, 1956 having its registered office situated at C-55 Okhla Industrial Area, Phase-1, New Delhi-110020. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. The brief facts of the case leading to the filing of this petition as averred by the applicant are as follows:

   a. The applicant submits that the applicant through its subsidiary M/s. Wacker Chemicals (South Asia) Private Limited had entered into a Distribution Agreement on 29.04.1999 with the corporate debtor. The applicant further adds that in terms of the distribution agreement, it was agreed that the corporate debtor shall act as the 'Distributor' for Wacker's silicone sealant catridges on non-exclusive basis.
   b. The applicant submits that in 2003, Wacker Chemicals (South Asia) Pte Ltd. had sold its manufacturing unit, consequently, M/s. Wacker Chemicals Private Limited, India by a letter informed the corporate debtor that corporate debtor shall distribute the Wacker's silicon Sealant Catridges in India manufactured by Wacker Chemic GmbH Germany and it was clearly mentioned that "McCoy works on an exclusive basis and that WMC is entitled to deal on its own or authorize third parties to deal with Wacker products.
   c. The applicant submits that during 2006-2008, there was an apparent change of focus in corporate debtor's strategy and corporate debtor had stuck its brand label on all Wacker catridges sold and repacked the boxed locally with McCoy cartons.
   d. The applicant further submits that during these period the corporate debtor started dishonoring payments due to the applicant and corporate debtor with an intent to avoid legitimate dues of the applicant had made allegations against the applicant vis-à-vis pretended losses incurred by the applicant's alleged

breach of the exclusive nature of the Distributor Relationship between the operational creditor and corporate debtor.

e. The applicant submits that as and by way of supplies made by the applicant to the corporate debtor from time to time pursuant to the Distribution Agreement entered between the applicant and corporate debtor, the corporate debtor is liable to make payment of USD 228,924 to the applicant towards the 5 invoices raised in the month of September, 2009. The applicant further submits that the corporate debtor had never rejected the invoices whose non-payment are the ground of filing this petition. The applicant placed its reliance on Hon'ble NCLAT judgement in **Ahluwalia Contracts (India) Limited V Raheja Developers Limited [Company Appeal (AT) 703/2018)].**

f. The applicant submits that corporate debtor had promised to pay the amount due as decided in the settlement meeting held during March 2011, however, the corporate debtor committed default in making payment to the applicant. The applicant further submits that the applicant by legal notice dated 05.03.2012 called upon the corporate debtor to pay the outstanding amount of USD 228,924 failing which all necessary actions to enforce payment may be initiated by the applicant. The applicant adds that the corporate debtor through their attorney sent reply dated 03.04.2012 and 11.05.2012 wherein they denied the payment.

g. The applicant submits that despite service of notice under Section 433 read with Section 434 and 439 of the Companies Act, 1956 by the applicant to the corporate debtor, the corporate debtor failed to clear the outstanding dues of the applicant or any part thereof without any reasonable excuse.

h. The applicant submits that as the corporate debtor failed to pay the outstanding debt on expiry of three weeks from the date of receipt of the statutory demand notice, the applicant filed company winding up petition under Section 433 and 434 of the Companies Act, 1956 being Company Petition No.464/2012 against the corporate debtor in the Hon'ble High Court of Delhi. The applicant further submits that the Company Petition No. 464/2012 was transferred to the NCLT, New Delhi in view of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

i. The applicant submits that during the hearing of the said petition, the Hon'ble NCLT vide order dated 04.10.2018 had allowed the withdrawal of the petition with liberty to file a fresh petition on the same cause of action.

Sd- Sd-

j. The applicant submits that applicant issued demand notice in Form – 3 on 15.10.2018 demanding the payment of outstanding debt amounting USD 228,924/-. The applicant further submits that the said demand notice had been duly delivered at the address of the corporate debtor, however the corporate debtor neither replied nor made payment of the legitimate dues. Consequently the instant Application was filed.

k. The applicant had provided the following documents on record to prove the claims:

   i. Copy of the Distribution Agreement dated 29.04.1999.
   ii. Copy of the extension agreement dated 05.01.2004.
   iii. Copy of the Five Invoices issued by the applicant to the Corporate Debtor
   iv. Copy of the legal notice dated 05.03.2013 sent by applicant to the corporate debtor.
   v. Copy of the reply dated 20.03.20212 and 03.04.2012 sent by the corporate debtor to the applicant.
   vi. Copy of the order dated 05.07.2018 of the Hon'ble High Court of Delhi in Company Petition No.464/2012
   vii. Copy of the order dated 04.10.2018 of the NCLT, New Delhi.
   viii. Copy of the Demand Notice dated October 15,2018 sent to the corporate debtor.

4. The corporate debtor had filed its reply dated 24.07.2019 and additional reply dated 15.02.2022 and the averments of the corporate debtor in the reply are stated in brief as below:-

a. The applicant submits that the Distribution Agreement dated 29.04.1999 was exclusive distributor agreement between the parties. The applicant further submits that as per clause 7.6 of the said agreement the corporate debtor was appointed as the sole active distributor in the territory.

b. The corporate debtor submits that applicant had breached the distribution agreement by distributing the products directly in market resulting in financial losses/ irreparable hardship to the respondent. The corporate debtor further submits that the corporate debtor raised claim to the applicant vide email dated 24.02.2010 highlighting the dispute involved and also refers to a meeting dated 21.12.2009 between the officials of the applicant and corporate debtor.

c. The corporate debtor submits that the demand notice dated 15.10.2018 sent by the applicant under Section 8 of the Code was

-Sd- -Sd-

never served or received by the corporate debtor, thus, the instant petition is not maintainable.

d. The corporate debtor submits that there exists a pre-existing dispute before issuance of demand notice dated 15.10.2018 in regard to the omissions and commissions of the applicant constituting breach of the Distribution Agreement.

e. The corporate debtor submits that after negotiated settlement the applicant had agreed to compensate the corporate debtor for losses caused due to predatory pricing and discounted sale made by the applicant and buy-back the stock still in possession of the corporate debtor. The corporate debtor further submits that the corporate debtor had raised claims and issued debit note against the applicant on several occasions i.e., 08.01.2010, 24.02.20210 and 31.08.2011, however, the applicant instead of resolving the dispute kept on shifting the onus on its subsidiary/affiliate i.e., Wackers Metroak Ltd. as evident from applicant's acknowledgement of the dispute by the letter and email dated 29.01.2010 and 29.07.2010 respectively.

f. The corporate debtor submits that the applicant had sent demand notice dated 05.03.2012 under Section 433(e), 434 of the Companies Act, 1956 demanding the amount as claimed in the present case which was duly replied by the corporate debtor on 20.03.20012 and 11.05.2012 stating that there exist serious and bona fide disputes between the parties.

g. The corporate debtor submits that M/s. Wacker Metroark Chemicals Pvt. Ltd., subsidiary company of the applicant had filed a winding up Company Petition No. 232/2012 against the respondent company which was dismissed on 17.05.2012 by the Ld. Single Judge of Hon'ble High Court by holding that "*This court is of the view that the defence of the respondent would have to be examined. However, this court cannot do so as its jurisdiction is summary in nature. Consequently, the company petition was dismissed with liberty to file a recovery proceeding.*"

h. The corporate debtor adds that being aggrieved by the order dated 17.05.2012, M/s. Wacker Metroark Chemicals Pvt. Ltd. had filed a Company Appeal No. 640 of 2012 before the Division Bench of the Hon'ble Delhi High Court, but the said appeal was dismissed vide order dated 07.05.2013 on the plea of the respondent based on the doctrine of single economic entity in view of the amounts allegedly outstanding from the holding company to the respondent. It was further held that the defence raised is reasonable and bonafide and needs to be examined, this could only be done by a civil court, for which liberty has already been granted to the appellant to file a recovery proceeding in accordance with law. The corporate debtor adds that M/s. Wacker Metroark Chemical Pvt. Ltd. filed a review application no. 11629 of 2013 which was also dismissed on 30.07.2013.

i. The corporate debtor submits that M/s. Wacker Metroark Chemicals Pvt. Ltd. after dismissal of the winding up Company Petition No. 232/2012 had moved an application under Order 12 Rule 6 for passing of judgement on admissions of the strength of the Debit Note before Ld. Additional District Judge, Saket, New Delhi, which was dismissed vide order dated 11.07.2018.

j. To support the existence of pre-existing dispute between the parties, corporate debtor had relied on **M/s. Innovative Industries Ltd v. ICICI Bank & Anr and Mobilox Innovation v. Kirusa Software, 2018 Vol. 1SCC 353**

k. The corporate debtor had provided with the following documents on record to prove its contentions:
   i. Certified copies of the order dated 17.05.2012, 07.05.2013 and 30.07.2013 passed by the Hon'ble High Court of Delhi.
   ii. Certified copy of the order dated 11.07.2018 passed by Additional District Judge, Saket, New Delhi
   iii. Copy of the correspondence letters dated 08.01.2010, 29.10.2010, 24.02.2010 exchanged between the parties.

5. We have heard Ld. Counsel for both the parties and perused the averments made in the application, reply and written submissions filed by the parties. The relevant documents annexed with the respective submissions have been examined in detail.

6. Before going into the merits of the present petition, this Adjudicating Authority upon perusing the record prima facie observes that the outstanding amount of US$ 228,924 as claimed in Part-IV of Form-5 of the petition is barred by limitation according to the own averments mentioned in the above company petition, and therefore we examine the issue of limitation first.

7. As regard to the limitation, on perusal of pt.2 of Part-IV of the Form -5, we observe that according to the Applicant, a total of 5 invoices dated

-Sd- -Sd-

10.09.2009, 10.09.2009,11.09.2009,22.09.2009 and 22.09.2009 raised by the applicant were in default and as per the terms of the invoice, the debt became payable 90 days after B/L date. We further observe that the applicant sent demand notice dated 05.03.2012 under Section 433(e), 434 of the Companies Act, 1956 to the corporate debtor demanding the alleged outstanding dues, pursuant to which the applicant had filed winding up petition under Section 433 and 434 of the Companies Act, 1956 being Company Petition No.464/2012 against the corporate debtor in the Hon'ble High Court of Delhi.

8. The Hon'ble Supreme Court in **B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates** held that the Limitation Act would apply to applications filed under Sections 7 and 9 of the IBC. The Court held:

> "42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

9. After perusal of the provisions and series of events, we are of the view that the applicant had served the demand notice dated 05.03.2012 under Section 433(e), 434 of the Companies Act, 1956 within a period of three years from the date of default by the corporate debtor. The Company Petition No.464/2012 was pending before the Hon'ble High Court of Delhi, was transferred to this Adjudicating Authority on an application filed by the applicant after an amendment made to the Eleventh Schedule of the Code wherein Section 434 of the Code, 2016 was substituted. On the hearing of the Transferred Petition, this Tribunal on 04.10.2018 had allowed the applicant to withdraw the Transferred Petition with a liberty to file fresh petition with the same cause of action, consequently the instant petition was filed on 10.01.2019. Therefore, the instant petition is within the law of limitation.

-Sd- -Sd-

10. As regard to the Corporate Debtor's contention of non-service of Demand Notice dated 15.10.2018 to the corporate debtor, we are of the view that the Demand Notice dated 15.10.2018 was duly served to the corporate debtors at its Registered Office address available on the MCA master data on 20.10.2018 as evident from Track Report attached in the petition by the applicant. Therefore, we find no force in the Corporate Debtor's contention.

11. We further observe that while the instant petition was filed by M/s. Wacker Chemie AG, the distribution agreement dated 29.04.1999 was executed in the name of M/s. Wacker Chemicals (South Asia) Pte Ltd, whereas the invoices were issued by Wacker Chemie AG and Company Petition 232/2012 before the Hon'ble High Court of Delhi was filed by M/s. Wacker Metroark Chemicals Private Limited and the instant petition was filed by M/s. Wacker Chemie AG. Be that as it may, since the invoices were raised by the applicant in its name, we hold M/s. Wacker Chemie AG as the operational creditor of the corporate debtor.

12. As regard to the contention of the corporate debtor of pre-existing dispute between the parties, we find that in order to substantiate the plea of pre-existing dispute between the parties, the corporate debtor has stated contentions in its reply and additional reply along with relevant documents showing the exchange of correspondence letters between the parties to resolve the dispute regarding the alleged breach of distribution agreement.

13. The Hon'ble Supreme Court in a catena of Judgement has laid down the principle that pre-existing dispute which may be ground to thwart an application under Section 9 has to be real dispute, a conflict or controversy. A conflict of claims or rights should be apparent from the reply as contemplated by Section 8(2). The Corporate Debtor is not to raise bogie of disputes but there has to be real substantial dispute. The

-Sd- -Sd-

existence of dispute when the Demand Notice was issued is mandatory condition for exercising jurisdiction to reject the Application by the Adjudicating Authority as is referred to in sub-section (5) of Section 9. The statute uses the expression 'existence of a dispute'. The word 'dispute' has been defined in Black's Law Dictionary as in the following manner:-

> **"Dispute.**
> *A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a relation to which jurors are called and witnesses examined. See Cause of action; Controversy; Justiciable controversy; Labour dispute.*

14. On perusal of the documents, we observe that the corporate debtor had placed on record the certified copies of the Order dated 17.05.2012, 07.05.2013 and 30.07.2013 passed by the Hon'ble High Court of Delhi adjudicating the same cause of action under the winding up provisions of the erstwhile Companies Act, 1956.The relevant extract of the order dated 17.05.2012 and 07.05.2013 passed by the Hon'ble High Court of Delhi are reproduced herein:-

> **"IN THE HIGH COURT OF DELHI AT NEW DELHI**
> **CO.PET. 232/2012**
> Date of Decision: 17th May, 2012
>
> *7. Accordingly, this Court is of the view that the defence of the respondent would have to be examined. However, this Court cannot do so as its jurisdiction is summary in nature.*
> *8. Moreover, the Supreme Court in M/s. IBA Health (I) P. Ltd. vs. M/s. Info-Drive Systems SDN. BHD. (2010) 10 SCC553 has held that "the Company Court is expected to ascertain that the company's refusal is supported by a reasonable cause or a bona fide dispute in which the dispute can only be adjudicated bya trial in a civil court.*
> *" (Refer 'para 31').*
> *9. Consequently, the present petition is dismissed with liberty to the petitioner to file a recovery proceeding in accordance with law. 10. It is made clear that the civil Court would decide the matter on its merits without being influenced by any observations made by this Court."*

****

-Sd-

"IN THE HIGH COURT OF DELHI AT NEW DELHI
Co. A. No. 64/2012

ORDER
07.05.2013

Learned Company Court vide the impugned order has held that the defence raised by the respondentCompany needed to be examined, which the Company Court exercising summary jurisdiction could not do so. The learned Company Court has relied on a judgment of the Hon'ble Supreme Court in Ms. IBA Health (I) P. Ltd. Vs. M/s. Info-Drive Systems SDN.BHD.(2010) 10 SCC 553, in which it is held as under:-

"the Company Court is expected to assert that the Company's refusal is supported by a reasonable cause or a bonafide dispute in which the dispute can only be adjudicated by a trial in a civil court."

We are in agreement with the finding of the leaned Single Judge that the defence raise is reasonable and bonafide and needs to be examined, which would only be done by a civil court, for which liberty has already been granted to the appellant to file a recovery proceedings in accordance with law.

We find no infirmity in the impugned order. Appeal is accordingly dismissed with no orders as to costs."

****

15. In the case of ***"Mobilox Innovative Private Limited vs. Kirusa Software Private Limited"*** in civil appeal number 9405 of 2017 ([2017] ibclaw.in 01 SC) the Hon'ble Supreme Court vide order dated 21.09.2017 has held that:

"Therefore, all 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. In the present case the respondent has raised dispute with sufficient particulars. Besides the case records reveal that there was existence of dispute much prior to the issuance of notice under section 8 of the code. The claims of the dispute suggest the need of elaborate investigation. The moment there is existence of such a pre-existence dispute, the corporate debtor gets out of the clutches of the code."

Sd-

16. All these facts would go on to show that there exists dispute between the parties with regard to the same cause of action i.e., outstanding payment of operational debt of USD 228,924 as claimed in Part IV of the Form 5 and the applicant is indulging in the act of forum shopping by pursuing the present petition before this Tribunal. Further, from the series of acts we infer that the applicant is trying to waste the valuable time of this Adjudicating Authority, which practice is required to be deprecated. Under the given facts and circumstances, we are of the view that in order to dissuade the practice of consciously filing petition under Section 9 of the Code by willfully concealing the fact that there exists a pre-existing dispute between the parties and also filing multiple proceedings before other fora for the same cause of action, and thereby wasting the valuable time of this Adjudicating Authority, the present Application entails an imposition of Costs. To preserve the sanctity of the proceedings and confidence of the public in the system, simply dismissing the petition may not serve the purpose.

17. Thus the present **Company Petition (IB)-)120/(ND)/2019** filed by the applicant under Section 9 of the Code, 2016 ***stands dismissed with the costs of Rs.1,00,000/- to be paid by the applicant*** i.e., **M/s. Wacker Chemie AG**. The cost is to be paid to **PM Relief Fund** within a period of 14 days from the date of pronouncement of this order and the applicant is directed to file an affidavit of compliance.

The case folders and connected papers may be sent to the record room.

Sd-

(DR.BINOD KUMAR SINHA)
MEMBER (T)

Sd-

(DHARMINDER SINGH)
MEMBER (J)