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**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH**

SPECIAL BENCH (URGENT HEARINGS THROUGH VIDEO CONFERENCE)

PRESENT: HON'BLE SHRI RATAKONDA MURALI- MEMBER JUDICIAL  
HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI- MEMBER TECHNICAL  
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 27.08.2020 AT 10.30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP (IB) No. 279/9/HDB/2019
NAME OF THE COMPANY	Shivas Farma Casa Pvt Ltd
NAME OF THE PETITIONER(S)	Cornileus Pharmaceuticals Pvt Ltd
NAME OF THE RESPONDENT(S)	Shivas Farma Casa Pvt Ltd
UNDER SECTION	9 of IBC

**Counsel for Petitioner(s):**

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

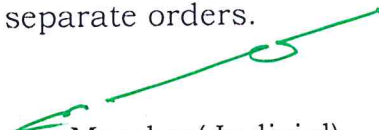
**Counsel for Respondent(s):**

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

**ORDER**

Orders passed in CP(IB)No.279/9/HDB/2019 vide separate orders.

  
Member(Technical)

  
Member(Judicial)

Pavani

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH, HYDERABAD**

**CP (IB) No. 279/9/HDB/2019  
U/s. 9 of Insolvency & Bankruptcy Code, 2016  
R/w Rule 6 of I & B (AAA) Rules, 2016**

**In the matter of:**

M/s. Shivas Farma Casa Private Limited  
Shyam arahant, 3<sup>rd</sup> Floor, Plot No.10 & 11  
MCH No.1-8-304 to 307/10  
Patigadda Road, Secunderabad.

**... Petitioner/Operational Creditor**

**VERSUS**

M/s. Cornileus Pharmaceuticals Private Limited  
Flat No.201, East Block  
Shri Sai Orchid Image Hospital Road  
Vital Rao Nagar, Madhapur  
Hyderabad – 500 081

**... Respondent/ Corporate Debtor**

**Date of order: 27.08.2020**

**Coram:**

**HON'BLE SHRI RATAKONDA MURALI,  
MEMBER (JUDICIAL)**

**and**

**HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI, MEMBER  
(TECHNICAL)**

**Parties / Counsels present:**

For the Petitioner : Shri M. Ramakanth, Advocate

For the Respondent: Shri Venkata Rangadas Kanuri, Advocate

**Per: HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI,  
MEMBER (TECHNICAL)**

**Heard on:** 31.01.2020, 18.02.2020, 16.03.2020, 20.07.2020,  
06.08.2020 and 19.08.2020.

**ORDER**

The present petition is filed by M/s. Shivas Pharma Casa Pvt. Ltd./Operational Creditor alleging that M/s. Cornileus Pharmaceuticals Pvt. Ltd./Corporate Debtor had defaulted the total amount of Rs.1,30,49,063/- (Rupees One Crore Thirty Lakhs Forty Nine Thousand Sixty Three only) along with interest @ 24% p.a., which includes Principal amount of Rs.1,08,56,764/- plus interest of Rs.21,92,299/-.

2. Hence this petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016, read with Rule 4 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the Petition, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.

3. The averments of the petition filed by the Petitioner/Operational Creditor in brief are described as follows:

3.1 M/s. Shivas Farma Casa Private Limited / Operational Creditor is a Private Limited Company, having CIN : U24239TG2001PTC038241. Messrs Cornileus Pharmaceuticals Private Limited is a Private Limited Company, having CIN U24239TG2001PYC038288, incorporated on 28.12.2001. The Operational Creditor and Corporate Debtor entered into an Agency Agreement, which is valid for a period of 5 years starting from April 1, 2017 to March 31, 2022 for supporting the sale of Corporate Debtor's products.

3.2 It is averred initially Operational Creditor entered into Agreements with various local pharma manufacturers for sale of pharma products in various countries and passes on the order to the suppliers like the Corporate Debtor.



3.3 The Corporate Debtor manufactures the products and dispatches the same to the overseas Buyers. The Corporate Debtor thereafter raises invoices on the Buyer and receives the consideration towards the supply of the products. Based on the invoices raised, after receipt of the consideration, Corporate Debtor pays commission to the Operational Creditor.

3.4 It is averred that normally the Corporate Debtor pays the commission by 7<sup>th</sup> of every month but for the period from February, 2018 to March, 2019, the Corporate Debtor stopped paying the Commission. The Corporate Debtor did not pay the commission deducted and remitted TDS on the invoices.

3.5 It is averred that the Operational Creditor wrote emails which remain unanswered. On 28.02.2019, the Operational Creditor sent a pending commission statement of Rs.1,08,56,764/-to the Corporate Debtor, payable by the Corporate Debtor.

3.6 It is also averred that on March 20,2019, the Operational Creditor sent an e-mail stating that an amount of Rs.1,08,56,764/- is due for a long time. The Operational Debt computation details are described at page no.198 of the Application booklet. Thus, Corporate Debtor committed default of Operational Debt.

**4. COUNTER DATED 23.08.2019 FILED BY THE RESPONDENT/ CORPORATE DEBTOR.**

4.1 It is stated that the averments in the application filed by the Operational Creditor are all false, baseless and denied the same.

4.2 It is averred in para 3 of the Counter that the Operational Creditor and the Corporate Debtor had entered into Agency Agreement for a period of five years commencing from April 1, 2017 valid upto March 31, 2022 and denied that the Operational Creditor supports the Corporate Debtor in the sale of its products.



4.3 In para 4 of the Counter it is denied that the Operational Creditor entered into agreements with various local pharma manufacturers for sale of pharma products in various countries and passes on the orders to the suppliers and averred that it is invented for the purpose of submitting the application.

4.4 It is averred that the Corporate Debtor manufactures the product and dispatches the same to the overseas buyer and thereafter raises invoices on the buyer and receives the consideration towards the supply of the products. Accordingly, the Corporate Debtor after receipt of the consideration pays commission to the Operational Creditor based on the invoices raised.

4.5 It is averred in para 6 of the Counter that the Operational Creditor collected amounts from the Corporate Debtor as Forex Commission amounting to Rs.4,45,25,167/- which the Operational Creditor has not paid to any parties. After receipt of notice from the Operational Creditor, the Corporate Debtor learnt that the Operational Creditor has not paid Forex Commission to anybody and it is liable to refund the said amount to the Corporate Debtor. Now, they have been claiming dues from the Corporate Debtor which is nothing but illegal and arbitrary.

4.6 In para 7 of the Counter it is averred that normally the Corporate Debtor pays the Commission by 7<sup>th</sup> day of every calendar month is false and invented for the purpose of filing of this application. It is averred that as per the Agency Agreement Commission will be paid within four weeks from the date of realization of the payment from the customers.

4.7 In para 8 of the Counter it is averred that the Operational Creditor has to follow-up with all the customers to ensure that timely remittance is made to Corporate Debtor. However, the Operational Creditor did not do so. Thus, the Operational Creditor has violated the condition of the agreement. The Corporate Debtor had paid the commission within time regularly without any delay to the Operational Creditor.



4.9 In para 9 of the Counter the Corporate Debtor had reproduced extract from the Agency Agreement, which reads as under:

*“Cornileus is desirous of selling their products, manufactured currently and in future which include Active Pharmaceutical Bulk Chemicals etc. in the above Territory exclusively through the Operational Creditor and Operational Creditor is desirous of offering Corporate Debtor products in the “Territory”.*

*It is now agreed that:*

*SFC will diligently promote and protect the business interest of Cornileus in the above market territory.*

.....

*ARBITRATION:*

*Any disputes or claims arising out of this agreement shall be resolved by an Arbitrator as acceptable to both the parties and the award of such arbitrator will be fully binding on both the parties. The location of the arbitration shall be any court of law in India.”*

4.10 It is averred that as per the Arbitration Clause, the matter has to be placed before the Arbitrator to resolve any disputes between the Operational Creditor and the Corporate Debtor but the Operational Creditor without approaching the Arbitrator filed this application with all false and baseless allegations which is not permissible under law. It is further averred that the Operational Creditor having accepted the dispute approached the Hon'ble Tribunal as such this application is not maintainable and liable to be dismissed.

4.11 In para 10 of the Counter the respondent denied that the Operational Creditor wrote emails in absence of the payment of commission and which remained unanswered. It is averred that it is invented for the purpose of this application.

4.12 In para 11 of the Counter it is averred that Commission Statement sent by the Operational creditor showing due of Rs.1.08 crores is created and fabricated which was made with wrong calculations to arrive at huge amounts.

4.13 In para 12 of the Counter it is averred that the Operational Creditor allegedly has shown an amount of Rs.1,08,56,764/- as due as on March 31, 2019 which is illegal and arbitrary and not in accordance with the Agency Agreement. It is further averred that

sister companies of the Operational Creditor, namely, Shipra Holdings and Flemming Laboratories Ltd. are having dues payable to the Corporate Debtor and when the Corporate Debtor demands those companies for repayment, the Operational Creditor in order to evade such amounts, filed this application. As such there are no dues at any point of time and the Corporate Debtor is not liable to pay any amounts much less the alleged amount of Rs.1,08,56,764/-.In fact Mr. B. Shivakumar, Managing Director of the Corporate Debtor is liable to pay Rs.70,26,929/- as on July, 2019 from Shipra Holdings and Rs.2,21,83,647/- from Fleming Laboratories Ltd.

4.14 It is averred in para 13 of the Counter that Operational Creditor agreed under the Agency Agreement dated 01.04.2017 which was entered with the Corporate Debtor that the Corporate Debtor will not do anything that will be detrimental to the business interest of the Corporate Debtor, but the Operational Creditor violated the said clause by acting/ leading with another company namely GALT Pharma Exports Private Limited and exported similar products of Corporate Debtor which caused huge loss to the tune of Rs.4,90,22,551/- to the Corporate Debtor and subsequently the Corporate Debtor learnt that the Operational Creditor and GALT Pharma are the sister concerns and Mr. B. Shiva Kumar is acting as Director and actively participating day to day affairs of both the companies. As such, the Operational Creditor is liable to refund the said amount to the Corporate Debtor.

4.15 In para 14 of the Counter it is averred the Operational Creditor without approaching the Arbitrator directly approached this Tribunal. It is further averred that this Tribunal has no jurisdiction to entertain the application filed by the Operational Creditor. The application is not maintainable either in law or on facts of the case and is liable to be dismissed in limini. The Operational Creditor has no locus standi to file the application and seek any relief against the Corporate Debtor.

4.16 In para 15 of the Counter the Corporate Debtor relied on decision of the Hon'ble Supreme Court of India in the matter of TRANSMISSION CORPORATION OF AP LIMITED Vs. EQUIPMENT



CONDUCTORS AND CABLES LIMITED in Civil Appeal No.9597 of 2018, dated 23.10.2018, wherein it is held that whenever there is existence of real dispute, provisions of the I&B Code cannot be invoked and 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. Therefore, the above said judgement squarely applies to the present case as the dispute is existing between the parties and as such the application is liable to be rejected.

**5. REJOINDER DATED 13.09.2019 FILED BY THE APPLICANT/ OPERATIONAL CREDITOR.**

5.1 By way of Preliminary Objections the applicant submits that neither there is pending dispute in relation to the claim nor is there any record of pendency of any suit or arbitration proceeding filed nor receipt of any notice on the matter or the Operational Debt. That the Corporate Debtor raised various matters never raised before and they are not connected to the Corporate Debtor, but aimed to mislead from the main outstanding Operational Debt due to the Operational Creditor. That the Corporate Debtor vide letter dated 18.04.2019 (ANNEXURE-1), in reply to the Demand Notice, had admitted and confirmed that an amount of Rs.87,42,340/- as due and payable as on 31.03.2019 and gave no reason for the balance outstanding.

5.2 In para 11 of the Rejoinder it is averred the Corporate Debtor has not produced any proof of claims made. It is aimed only to mislead the facts and liability. There is nothing illegal or arbitrary on the matter.

5.3 In para 13 of the Rejoinder it is averred that the Corporate Debtor has never raised the matter before the Operational Creditor not pursuing with the customers. It is averred that there are no outstanding dues from customers except where the Corporate Debtor has defaulted on quality issues. The Corporate Debtor has not provided details of dues from customers and the action taken on the matter.



5.4 In para 15 of the Rejoinder it is averred the deduction of TDS is conclusive proof that the Corporate Debtor acknowledges the Operational Debt but has not paid the Operational debt. The Corporate Debtor has failed to provide copies of reply to the e-mails and there is no need for the Operational Creditor to create the same for this application.

5.5 In paras 16-18 of the Rejoinder it is averred that computation table along with the invoices attached are conclusive proof of the Operational Debt outstanding. The Corporate Debtor having admitted the outstanding debt it is surprising how can it be said to be fabricated and created. The Operational Creditor has not done anything detrimental to the interest of the Agency Agreement

5.6 In para 20 of the Rejoinder it is averred the judgement of the Hon'ble Supreme Court in TRANSMISSION CORPORATION OF AP LIMITED Vs. EQUIPMENT CONDUCTORS AND CABLES LIMITED in Civil Appeal No.9597 of 2018, dated 23.10.2018 (supra) is not applicable to the facts of the present case. Rather the applicant referred to decision of the Hon'ble Supreme Court on the matter of such as **KIRUSA SOFTWARE PRIVATE LIMITED VS. MOBILOX INNOVATIONS PRIVATE LIMITED.**

5.7 In para 21 of the Rejoinder it is averred the email correspondence is relevant only to the extent of demands made by the Operational Creditor. That Statement of Forex Commission collected has never been raised by the Corporate Debtor earlier and raised for the first time and aimed to mislead the main issue and has no relevance to this proceeding. That statement of Financial Loss has never been raised by the Corporate Debtor earlier and done so for the first time, aimed to mislead the main issue and the Corporate Debtor is free to seek appropriate remedies.

**6. WRITTEN SUBMISSIONS DATED 20.01.2020 BY THE APPLICANT/ OPERATIONAL CREDITOR.**

6.1 The applicant has given responses to each issue raised by the corporate debtor as under:



Sl. No.	Issue raised by the corporate debtor.	Response by the operational creditor.
1.	Receipt of Forex Commission of Rs. 4,4525,167 as forex commission and non-remittance of the same.	Proof of claims not produced. There is nothing like Forex Commission. The corporate debtor was earlier paying commission in foreign currency directly to agents overseas. The corporate debtor requested Operational Creditor to pay commission as corporate debtor missed mentioning forex commission in the GR Form. Since then corporate debtor used to transfer money to Operational Creditor in Indian currency with request to remit commission to agents overseas. Needful is done by Operational Creditor accordingly.
2.	Operational Creditor not following up with customers.	There are no dues outstanding from customers. If there is any, the corporate debtor has to furnish details.
3.	Arbitration Vs. IBC.	The Operational Creditor initiated action under I&B Code in view of debt outstanding. It is not civil proceeding for recovery. Arbitration Clause in Agency Agreement does not bar proceedings under I&B Code. Decision of the Hon'ble NCLAT in ACHENBACH BUSCHHUTTEN GMBH & CO. V. ARCOTECH LTD. [2017] 84 taxmann.com 262 (NCL-AT) is relied on.
4.	TDS deducted.	Deduction of TDS is conclusive proof that corporate debtor acknowledged the debt.

*H. B. B. B.*

*[Signature]*

5.	Dues from sister companies.	Matter referred by corporate debtor related to other companies are not relevant. The Operational Creditor is free to take independent action against the sister companies, if there is a debt outstanding.
6.	Issue of exports through GALT Pharma Export Pvt Ltd. (GALT) by corporate debtor.	Operational Creditor has not violated Agency Agreement. The issue raised by corporate debtor is to avoid debt payable.
7.	E-mail exchanges.	The corporate debtor misrepresents and misinterprets the e-mails. The applicant has narrated the e-mail messages in chronology to say that the principal and interest though not relevant to this application has been paid. There is no outstanding from sister companies as alleged. Corporate debtor is free to recover interest, if any, by independent action based on documents.
8.	Legal arguments.	
	Reply to Notice.	Corporate debtor vide letter dated 18.04.2018, in response to Demand Notice, has admitted credit balance of Rs.87,42,340/-. This establishes liability of corporate debtor to Operational Creditor.
	Dispute	Corporate debtor tried to take shelter that a dispute exists between corporate debtor and Operational Creditor. In this context the applicant/ Operational Creditor relied on sections 5(6) and 8 of the I&B Code.
9.	Section 9 of I&B Code.	The applicant fulfils all the obligations under this section.




6.2 The applicant has relied on the following judgments.

- (i) Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited, (2018) 1 SCC 353.
- (ii) Decision of the Hon'ble Supreme Court in Transmission Corporation of A.P. Vs. Equipment Conductors and Cables Limited in Civil Appeal No.9597 of 2018, dated 23.10.2018.

**7. WRITTEN ARGUMENTS DATED 17.01.2020 BY THE RESPONDENT/ CORPORATE DEBTOR.**

7.1 It is contended in para 3 of the Written Arguments that the applicant without approaching the Arbitrator under the Arbitration Clause provided in the Agency Agreement has approached this Tribunal directly.

7.2 It is averred in para 4 of the Written Arguments that the Corporate Debtor manufactures the products and dispatches the same to the overseas Buyers. The Corporate Debtor thereafter raises invoices on the Buyer and receives the consideration towards the supply of the products. Based on the invoices raised, after receipt of the consideration, Corporate Debtor pays commission to the Operational Creditor.

7.3 It is averred in para 5 of the Written Arguments that the applicant collected amounts from the Corporate Debtor as Forex Commission amounting to Rs.4,45,25,167/- which amount has not been paid to any parties. After receipt of notice from the applicant, the Corporate Debtor learnt that the applicant has not paid Forex Commission to anybody and it is liable to refund the said amount to the respondent. The applicant has not denied the said fact in its rejoinder.

7.4 It is averred in para 7 of the Written Arguments that the applicant was required to do follow-up with all the customers for timely remittance of payments to the respondent, but failed to do so. Thus, there is violation of Agency of Agreement.




7.5 It is averred in para 8 of the Written Arguments that the applicant has shown a sum of Rs.1,08,56,764/- and that the respondent became due on 31.03.2019. This contention is based on e-mail (ANNEXURE-7). The respondent has reproduced in this para, e-mail messages dated 20.06.2016, 08.10.2016, 21.06.2016, 13.04.2017, 15.04.2017, 07.09.2017, 28.02.2019, 01.03.2019, 06.03.2019, 06.03.2019, 08.03.2019 and 11.03.2019, that were exchanged between the applicant and the respondent.

7.6 It is averred in para 10 of the Written Arguments that the respondent is not liable to pay the amount of Rs.1,08,56,764/- as shown due by the applicant. On the contrary the applicant is liable to pay as on July 2019, Rs.70,26,929/- from Shipra Holdings and Rs.2,21,83,647/- from Fleming Laboratories.

7.7 It is averred in paras 11 and 12 of the Written Arguments that in breach of Agency Agreement dated 01.04.2017, the applicant had exported products to Brazil and caused loss of Rs.4,90,22,551/-. The respondent learnt that the applicant and GALT Pharma are sister concerns and Shri B. Shiv Kumar is its Director. Thus, he applicant is liable to refund the said amount. The respondent relied on decision of the Hon'ble Supreme Court in the case of STATE OF UP AND OTHERS Vs. RENU SAGAR POWER COMPANY AND OTHERS DATED 28.07.1988.

7.8 In para 14 of the Written Arguments the respondent relied on decision of the Hon'ble Supreme Court in the case of TRANSMISSION CORPORATION OF AP LIMITED Vs. EQUIPMENT CONDUCTORS AND CABLES LIMITED in Civil Appeal No.9597 of 2018, dated 23.10.2018 (supra) and quoted the following observation:

*".. Whenever there is existence of real dispute, the IBC provisions cannot be invoked and 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."*



7.9 In para 16 of the Written Arguments the respondent relied on Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited, (2018) 1 SCC 353 and contended that the said judgment applies to the present case.

7.10 In para 17 of the Written Arguments the respondent relied on decision in the case of SWISS RIBBONS PRIVAET LIMITED AND ANOTHER Vs. UNION OF INDIA AND OTHERS, (2019) 4 SCC 17.

7.11 Based on the above decisions the respondent contended that the present application deserves rejection.

8. We have heard the Counsel for Operational Creditor and Counsel for Corporate Debtor. Both sides filed written submissions. Points urged in the written submissions will be dealt in the course of the order. The Learned Counsel for Operational Creditor would contend that the Operational Creditor entered into Agency Agreement with the Corporate Debtor on 01.04.2017 which is valid for 5 years for sale of the products of Corporate Debtor in Brazil and Mexico. The services rendered by the Operational Creditor to the Corporate Debtor is to secure orders for the sale of the pharma products manufactured by Corporate Debtor in Brazil and Mexico. The Operational Creditor after getting orders from the overseas buyer, would send a covering letter to the Corporate Debtor mentioning the details of commission in Indian Rupees and Forex as applicable. The Corporate Debtor would raise invoices on the overseas buyer who would pay the amount covered by the invoices. The Operational Creditor would raise invoices towards commission payable as agreed. The Corporate Debtor used to pay commission along with GST and Forex depending on case to case. The Corporate Debtor was paying commission at 5% on FOB plus GST and any additional commission on case to case basis. The commission was payable only after realization of amount from the overseas buyer. The Corporate Debtor stopped paying commission from February, 2018. However, Corporate Debtor deducted the TDS on the invoices raised by the Operational Creditor but did not pay the amount of commission. The further case of Operational Creditor that it sent emails to the Corporate Debtor to pay the amount and the amount due by the Corporate Debtor to Operational Creditor is Rs.



1.8 crores. The email was sent on 20.03.2019. The claim amount due by the Corporate Debtor is Rs. 1,08,56,764/-. The Demand Notice was issued on 03.04.2019 in Form-3 along with invoice in Form-4. The same was served on the Corporate Debtor on 09.04.2019. The Petition is therefore filed to initiate Corporate Insolvency Resolution Process against Corporate Debtor for committing default of operational debt.

9. On the other hand, the case of Corporate Debtor that Operational Creditor had entered into Agency Agreement dated 01.04.2017 which is valid for 5 years. Thus, Corporate Debtor is admitting of entering into Agency Agreement with Operational Creditor for securing overseas buyer for sale of its pharma products subject to certain conditions mentioned therein. The first contention of Corporate Debtor that this Tribunal has no jurisdiction and any dispute arising under the Agency Agreement to be resolved through Arbitration. The Corporate Debtor is heavily relying on the Arbitration Clause in the Agency Agreement for settling the dispute arising under the Agency Agreement. The contention of the Corporate Debtor that this Tribunal has no jurisdiction to entertain the Petition on the ground that if any dispute arises under the Agency Agreement, parties to approach arbitration. The contention of the Corporate Debtor cannot be accepted for the simple reason that Operational Creditor is not prohibited to initiate action under the provision of IBC. It is not the case of Corporate Debtor that arbitration proceedings were pending. It is also not the case of Corporate Debtor that it had initiated action under Arbitration and Conciliation Act. Hon'ble NCLAT has made it clear in the decision reported in the case of **ACHENBACH BUSCHHUTTEN GMBH & CO. V. ARCOTECH LTD.** [2017] 84 taxmann.com 262 (NCLAT) that there is no bar to initiate action under the provisions of IBC against Corporate Debtor even though there is a clause in the agreement that dispute to be settled through arbitration. Therefore, this objection raised by the Corporate Debtor cannot be a ground to reject the petition.

10. The Corporate Debtor is also admitting the procedure for payment of commission. On receipt of amount from the overseas buyer in respect of invoices raised, the commission will be paid to the





Operational Creditor based on the invoice raised. Thus, the Corporate Debtor is not disputing the procedure followed for payment of commission to the Operational Creditor for securing orders from overseas buyers.

11. The main contention of Corporate Debtor that Operational Creditor has collected Rs. 4,45,25,167/- from the Corporate Debtor towards Forex commission and that operational creditor had not paid the commission to the overseas agents. Therefore, the Operational Creditor was liable to remit the amount collected towards Forex Commission. The next contention of Corporate Debtor that it is the duty of the Operational Creditor to ensure prompt payment by the overseas buyer. The Operational Creditor committed violation of these conditions. The case of Corporate Debtor that even though the amount is due from the overseas buyers, the Corporate Debtor nevertheless paid commission to the Operational Creditor.

12. The main contention of Corporate Debtor that there was a pre-existing dispute which was raised prior to email dated 31.03.2019 issued by the Operational Creditor to the Corporate Debtor for payment of Rs. 1,08,56,764/-. It is the case of Corporate Debtor that it has raised dispute prior to email shown as Annexure-7 that Operational Creditor was liable to pay to the Corporate Debtor in respect of its sister concerns viz., M/s Shipra Holdings and Fleming Laboratories Ltd. The Corporate Debtor relied upon the emails sent to the Operational Creditor from time to time mentioning the amount due from the above sister concerns of Operational Creditor.

13. The case of Corporate Debtor that an amount of Rs. 70,26,929/- was payable by Shipra Holdings to Corporate Debtor and Rs. 2,21,83,647/- was due from Fleming Laboratories Ltd.

14. The last contention of Corporate Debtor that Operational Creditor violated the terms of Agency Agreement and Operational Creditor supplied the same product manufactured by Corporate Debtor to the overseas buyer from GALT Pharma Exports Private Limited which is also a sister concern of Operational Creditor. The



contention of Corporate Debtor is that the Operational Creditor cannot supply the same product manufactured by the Corporate Debtor to the territory i.e. Brazil through GALT Pharma Exports Private Limited and thus, Corporate Debtor suffered damage. Thus, the contention of Corporate Debtor that there was a pre-existing dispute and as such petition cannot be admitted.

15. There is no dispute that Corporate Debtor entered into Agency Agreement with Operational Creditor for supply of its products in Brazil and Operational Creditor in turn is entitled for commission @ 5% on FOB plus GST etc. There is also no dispute with regard to procedure for payment of commission. The case of Operational Creditor that Corporate Debtor committed default in paying the commission from February 2018.

16. The case of Corporate Debtor that there was a pre-existing dispute. Some amount is due from sister concerns of the Operational Creditor. The Operational Creditor in turn strongly denied that there was any pre-existing dispute. On the other hand, the case of Operational Creditor is that Corporate Debtor categorically admitted that there was a credit balance of Rs. 87,42,340/- payable to Operational Creditor. The case of Operational Creditor that Corporate Debtor gave reply admitting there was credit balance to the Operational Creditor for the above amount. The demand notice issued by the Operational Creditor was for Rs.1,30,49,063/- which is shown as Annexure-11 at page No. 199-204. This is dated 03.04.2019. The amount due as on 31.03.2019 as per the demand Notice was Rs. 1,30,49,063/-. The notice was served on Corporate Debtor. The Corporate Debtor gave reply. This is dated 18.04.2019 which is filed along with the rejoinder. The Corporate Debtor categorically stated in the reply that the commission for the bills up to 31.03.2018 is accepted / approved and the credit balance is Rs. 87,42,340/- due as on 31.03.2018. The Corporate Debtor categorically stated in the reply that from 01.04.2018 it has not accepted / approved the debit note raised by the Operational Creditor. So, the Corporate Debtor for the first time stated that the Operational Creditor violated the terms of Agency Agreement by supplying the same product through GALT Pharma Exports Private Limited and causing loss to it. The contention



of the Corporate Debtor that GALT Pharma Exports Private Limited is sister concern of Operational Creditor. Mr Shiva Kumar is the common Director in all the sister companies of Operational Creditor including Shipra Holdings and Fleming Laboratories Ltd. The Corporate Debtor raised the same points in the reply to the demand notice which are stated in the counter.

17. The contention of Operational Creditor that Mr. Shivakumar may be common Director in the Operational Creditor and also the other Companies viz GALT Pharma Exports Private Limited, Shipra Holdings and Fleming Laboratories Ltd. The contention of the Learned Counsel for Operational Creditor that transactions with other Companies are different and independent. Counsel contended, it is very clear from the email correspondence filed by the Corporate Debtor that the dispute is with reference to the interest payable. According to the Corporate Debtor, it was entitled for compound interest in respect of amount due by Shipra Holdings and Fleming Laboratories Ltd, whereas the case of those Companies that they are liable to pay only interest on straight line method. The amount whatever due was also paid to the Corporate Debtor by those Companies and no amount was due. The alleged dispute is just raised as a defence which does not exist and which was not raised in respect of transactions with the Operational Creditor. In other words, the alleged dispute was never raised prior to the demand notice and on the other hand it was raised for the first time by way of reply to the demand notice.

18. We have gone through the email correspondence filed by the Corporate Debtor. The transactions with the Operational Creditor is an independent and separate transaction. The payment due by the Corporate Debtor is arising under the Agency Agreement. Thus, it is a separate transaction. The Agency Agreement is dated 01.04.2017. Before this Agency Agreement, the Corporate Debtor was having independent transactions with other companies referred by it namely Shipra Holdings and Fleming Laboratories Ltd. The email correspondence filed by the Corporate Debtor is long prior to Agency Agreement. How this email correspondence with other companies can be connected to the transactions covered by the



Agency Agreement? It goes without saying that transactions with other Companies are separate and independent. May be Mr Shivakumar is a common Director in all the Companies including the Operational Creditor Company. If at all there is any dispute with other Companies, the Corporate Debtor is free to take action and if at all any amount is due, it is open to Corporate Debtor to initiate appropriate action against those companies. The fact remains that no action is taken against those companies till date.

19. In the present case, we have to see whether there is any operational debt due by the Corporate Debtor to the Operational Creditor and whether it was committed default. In the reply to the demand notice, the Corporate Debtor categorically stated that there is a credit balance of Rs. 87,42,340/- payable to the Operational creditor. But the Corporate Debtor raised some flimsy grounds, as if there was a dispute.

20. The Corporate Debtor has not filed any proof that some amount was still due from any of the overseas buyer. The Corporate Debtor made a simple allegation that some amount was due to be recovered from the overseas buyer. Absolutely Corporate Debtor has not filed any proof. Even otherwise there is no whisper from the side of Corporate Debtor as to what action it had initiated against overseas buyer for non-payment of the invoice amount. So, this allegation is without any substance and without any proof.

21. The second contention is the Operational creditor collected Forex commission and the same was not paid to the concerned parties. The Corporate Debtor is making this allegation without any proof. The Corporate Debtor has not filed any proof that any overseas agent made a claim for non-payment of forex commission.

22. The explanation given by the Operational Creditor that at the first instance the Corporate Debtor was paying the forex commission for some time. Later the Corporate Debtor expressed difficulty and the same was paid to the Operational Creditor who in turn paid the same to the overseas agents. Thus, the Corporate Debtor has not taken any steps against the Operational creditor in



respect of alleged forex commission if really the same was not paid to the overseas agents.

23. The important question is that the Corporate Debtor deducted TDS on the invoices raised by the Operational Creditor for the commission. The fact that TDS is deducted in respect of the invoices raised by the Operational Creditor, itself shows that Corporate Debtor was liable to pay to the Operational creditor, the amount due under the invoices. It is also the case of Operational creditor that Corporate Debtor is very much aware that its products was sent to Brazil through GALT Pharma Exports Private Limited. Only the product of the Corporate Debtor was sent to overseas buyer through GALT Pharma Exports Private Limited. So, the Operational Creditor has filed abundant evidence of raising invoices supported by other documents. There is absolutely no pre-existing dispute as contended by the Corporate Debtor. The Operational Creditor is able to establish the services rendered to the Corporate Debtor and the amount of operational debt which was due by the Corporate Debtor which was not paid and committed default. As the petition is in order, it is liable to the admitted.

**ORDER**

24. Hence, the Adjudicating Authority admits this Petition under Section 9 of I & B Code, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:-

(A) The Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority; 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 Securitization and Reconstruction of Financial Assets and Enforcement of



Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in 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 27<sup>th</sup> August 2020, till the completion of the Corporate Insolvency Resolution Process 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, whichever is earlier.

(E) The petitioner is directed to pay a sum of Rs.1,00,000/- (Rupees one lac only) to the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall, however, be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the petitioner.

(F) This Bench hereby appoints **Shri Dantu Indu Sekhar**, having Registration No.IBBI/ IPA-003/ IPA-ICAI-N-00233/ 2019-2020/ 12773, as Interim Resolution Professional. His contact details are:

e-mail ID: [indu.sekhar3@gmail.com](mailto:indu.sekhar3@gmail.com)

Phone no.: 8806667974

(G) Proposed IRP filed Form-B issued by the Institute of Insolvency Professionals. Authorisation for Assignment is valid from 20.09.2019 to 19.12.2020. This information is also



available in IBBI Website. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore, the proposed IRP is fit to be appointed as IRP since the relevant provision is complied with.

(H) That the Public announcement of Corporate Insolvency Resolution Process shall be made immediately as specified under section 13 of the code.

(I) Registry of this Tribunal is directed to send a copy of this order to the Registrar of Companies, Hyderabad for marking appropriate remarks against the Corporate Debtor on MCA site as being under CIRP.

25. Accordingly, this Petition is admitted.

  
[SHRI VEERA BRAHMA RAO AREKAPUDI]  
MEMBER (TECHNICAL)

  
[RATAKONDA MURALI]  
MEMBER (JUDICIAL)

Shyamala/ karim/ Binnu