

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

**CP (IB) 1490/MB/2017**

Under Section 9 of the I&B Code, 2016

In the matter of

**Kumar Brothers Pharma Pvt. Ltd.**

45, Pragati Industrial Estate, N. M. Joshi

Marg, Mumbai – 400 011

...Operational Creditor/ Petitioner

v/s

**Vascular Therapeutics India Pvt. Ltd.**

B 207, Everest Grande, Mahakali Caves

Road, opp. Ahura Centre, Andheri E,

Mumbai – 400 093

...Corporate Debtor

Order Delivered on: 21.08.2020

**Coram:**

Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)

Hon'ble Shri. Chandra Bhan Singh, Member (Technical)

**For the Operational Creditor/Petitioner:** Mr. Ajit Singh Tawar a/w  
Mr. Burzin Bharucha, Advocates i/b Mr. Nilesh Tribhuvan

**For the Corporate Debtor:** Mr. Rustom Pondiwal i/b Mrs. Lata P  
Kharwa, Advocates.

*Per: Chandra Bhan Singh, Member (Technical)*

**ORDER**

1. This is an application being CP(IB) 1490/MB/2017 filed by **Kumar Brothers Pharma Pvt. Ltd.**, Operational Creditor/Petitioner, under section 9 of Insolvency & Bankruptcy Code, 2016 (**Code**) against **Vascular Therapeutics India Pvt. Ltd.**, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**).

**SUBMISSIONS BY THE PETITIONER**

2. The Petitioner is a Company incorporated on 02.03.2005 and registered under Companies Act, 1956.

3. The Petitioner has claimed an amount of Rs. 57,62,383/- including interest from the Corporate Debtor.

4. The Petitioner states that on and around April, 2016 they were informed from the market sources that the Corporate Debtor had ended its arrangement with "Medtronic" and on 18.05.2016 the Petitioner received an email from the Corporate Debtor asking them to return its stock of "Medtronic" products with a condition that the Petitioner would receive a full refund after a deduction of 10% towards restocking charges. The Petitioner accepted the above condition and delivered the unsold stock back to the Bhiwandi warehouse of the Corporate Debtor. The Corporate Debtor had also raised tax invoices on the Petitioner at the time of purchase of the abovementioned stock.

5. The Petitioner states that the unsold stock was delivered back to the Bhiwandi warehouse of the Corporate Debtor on 20.05.2016 as per the instructions of the Corporate Debtor. The said unsold stock amounting to Rs. 63,18,447/- were thoroughly checked and verified by the Officials of the Corporate Debtor and the delivery challan was duly signed and received by the Petitioner.

6. From the aforesaid amount, 10% restocking charges (i.e. Rs. 6,31,844/-) was deducted by the Petitioner while raising the dues. A further deduction of Rs. 8,93,881/- being unpaid invoices was also adjusted in the total dues which brought down the total payable, as per the Petitioner, by the Corporate Debtor to Rs. 47,92,722/-.

7. The Petitioner states that much prior to the Corporate Debtor's email dated 18.05.2016, by virtue of which the Corporate Debtor had intimated to the Petitioner its decision to discontinue sales and marketing activities of "Medtronic", the Petitioner had via several emails dated 06.07.2015 and 12.10.2015, suggested that there were several pending claims which required immediate clearance. Moreover, the emails dated 06.07.2015 and 12.10.2015 also enumerates the lists of the products, which had been provided free of cost or at a discounted rate to the hospitals and doctors on the instructions of the Corporate Debtor, which the Corporate Debtor had promised to pay at a later date.

8. On 18.10.2016 the Petitioner send a first demand notice to the Corporate Debtor. The Corporate Debtor replied to the said demand notice on 24.10.2016 denying the claim made by the Petitioner.

9. Thereafter on 07.04.2017, the second demand notice in Form 3 and 4 under the Code was sent by the Petitioner to the Corporate Debtor. The Corporate Debtor replied to the said demand notice on 19.04.2017 denying the claims made by the Petitioner.

### **SUBMISSIONS BY THE CORPORATE DEBTOR**

10. The Corporate Debtor filed reply to the petition denying the liability and raised the following contentions:

- a. The Corporate Debtor was appointed as distributor of Covidien Health Care India Pvt. Ltd. (**CHIPL**) who were the suppliers of Peripheral Vascular Products (**PV**) and Neuro Vascular Product (**NV**). These aforesaid products are used in the patients who undergo minimally invasive procedures. These products are life saving products and have to be handled with due care and caution and if any damage is caused to the product or its packing, then such product becomes redundant and cannot be used at all.
- b. The Corporate Debtor, being the main stockist of the aforesaid NV and PV products and in order to cater to the needs of various hospitals all over India, appointed sub-distributors so that the sub-distributors acts as a facilitator and assist the hospitals in getting the stocks faster, which is to be utilized for the patients.
- c. While appointing the sub-distributors, as per the business policy of the Corporate Debtor, the Corporate Debtor, enters into a written contract with its sub-distributors. In the instant case, the Corporate Debtor, had informed the Petitioner to execute a written contract between the Petitioner and the Corporate Debtor with regard to PV and NV products.
- d. Though there was no written contract between the Petitioner and the Corporate Debtor with regard to the terms and conditions of the sale of PV and NV products, certain terms and conditions viz. with regard to the payment terms, of sale and return of products, the shelf life of the products and other allied terms and conditions pertaining to the sale of NV and PV products, were orally agreed upon between the parties. It was categorically agreed between the parties that in case of return of stocks by the Petitioner to the Corporate Debtor, the Petitioner would receive its payments only

upon the acceptance of the stocks by the principal supplier and upon making his payment to the Corporate Debtor.

- e. The Corporate Debtor states that the Petitioner was appointed as the sub-distributor of the Corporate Debtor with regard to the PV and NV products on the aforesaid terms and conditions as orally agreed between the parties since the year 2010 and there has been no dispute of whatsoever nature between the Corporate Debtor and the Petitioner with regard to any terms and conditions of the oral contract/understanding arrived at, save and except the present dispute which has been spearheaded by the Petitioner without any foundation, basis or justification, which can be seen from what is stated herein below.
- f. The Petitioner are well aware that in the case of return of any stocks to the principal supplier, the same should be within the shelf life, packing and boxing, must be in good condition. If, the stocks are not in proper condition, then the same cannot be utilized for the patients and such stocks become redundant.
- g. The Corporate Debtor discontinued their distributorship for PV stocks with the main supplier viz. CHIPL in or around 2015. Accordingly, the Corporate Debtor, informed all its sub-distributors including the Petitioner to return the unused PV stocks lying with them on certain terms and conditions. Accordingly, the Corporate Debtor by its email dated 08.10.2015 addressed to the Petitioner, informed the Petitioner to return the PV stocks, subject to they having more than 1 year shelf life, and packing and boxes must be in good condition and subject to its approval by the principal supplier i.e. CHIPL. It was recorded in the said email dated that the Corporate Debtor in exchange of the derived value of the said PV stocks will give NV products to the Petitioner. Pursuant to the said email, the Corporate Debtor gave a credit to the PV stocks to the Petitioner since the stocks received were in good condition and the same was accepted by the supplier viz. CHIPL without any dispute or whatsoever nature.
- h. The Petitioner are totally aware of the business functioning of the Corporate Debtor company. The Petitioner is also well aware about the terms and conditions of the payment to be made to the Petitioner with regard to the return stocks.
- i. So far as the alleged claim of the Petitioner with respect to Rs. 57,62,383/- in concerned, the same arises out of the NV stocks which were returned by the Petitioner to the Corporate Debtor.

Prior to addressing the email dated 18.05.2016, the representative of the Corporate Debtor viz. Mr. Sanjay Sudhal spoke to the representative of the Petitioner viz. Mr. Utpal Limkar and informed him to return the NV non expiry stock on the similar terms and conditions as mentioned in email dated 08.10.2015, which was duly accepted by the said representative of the Corporate Debtor. Due to good business relationship between the Petitioner and the Corporate Debtor, the terms and conditions which were duly recorded in email dated 08.10.2015 were not repeated in the email dated 18.05.2016.

- j. The NV stocks which were duly returned at the warehouse of the Corporate Debtor was forwarded to the principal supplier viz. CHIPL, which is now taken over by M/s India Medtronic Pvt. Ltd. However India Medtronic Pvt. Ltd., has failed to pay the price of the returned stocks, instead have raised certain disputes with the Corporate Debtor. The Corporate Debtor craves leave to refer to and rely upon letter dated 28.06.2016 addressed by India Medtronic Pvt. Ltd. to the Corporate Debtor in this behalf when produce at the hearing of this Petition.
- k. The stocks which were duly returned by the Petitioner to the Corporate Debtor were in turn forwarded by the Corporate Debtor to its principal supplier India Medtronic Pvt. Ltd. subsequently India Medtronic Pvt. Ltd. by its letter dated 28.06.2016 addressed to the Corporate Debtor, informed that out of total amount of stock aggregating to Rs. 7,86,77,526/-, the stocks of Rs. 5,11,44,008/- were saleable. Hence, it is evident that India Medtronic Pvt. Ltd. did not accept the entire stocks aggregating to Rs. 7,86,77,526/-, according to India Medtronic Pvt. Ltd. the sale stocks were not in saleable condition. The Corporate Debtor states that the stocks which according to India Medtronic Pvt. Ltd. were not in saleable conditions, include the stocks of the Petitioner which was duly forwarded by the Corporate Debtor to India Medtronic Pvt. Ltd.
- l. The Corporate Debtor in response to email dated 13.09.2016 addressed by the Petitioner to the Corporate Debtor, informed the same day that Petitioner that the material which was sent to the manufacturer was in damaged condition.
- m. The Corporate Debtor mentions that so far as the alleged claim of the Petitioner to the extent of Rs. 59,62,383/- is concerned, the same is exaggerated and does not tally with the books of account

of the Corporate Debtor (ledger account of Petitioner). Moreover, the Petitioner is not entitled to receive interest @24% p.a. as alleged in the notice dated 07.04.2017. the alleged claim for interest is absolutely unfounded in as much as there is no provision for charging interest by the Petitioner on returned stocks.

- n. The Corporate Debtor had entered into an agreement with CHIPL and in the said agreement there is a non-compete clause which stipulates that the Corporate Debtor cannot do any business with any other competitive supplier of the NV and PV products for a period of 1 year from the date, the contract is terminated. In view of the negative stipulation in the contract, the Corporate Debtor cannot do any cannot do any competitive business with any other suppliers of NV and PV products for the stipulated period.

#### **SUBMISSIONS BY THE PETITIONER IN REJOINDER**

11. The Petitioner filed a rejoinder and made submissions as follows:
  - a. The Corporate Debtor although relying on a written contract, has not annexed the same and therefore adverse inference to be drawn against the Corporate Debtor. The Petitioner denies that, the Corporate Debtor has ever asked the Petitioner to execute any written contract as alleged and therefore there was no question of non-execution of the alleged written contract. These facts were not alleged either in Corporate Debtor's reply dated 24.10.2016 nor in their reply dated 19.04.2017.
  - b. The Petitioner deny that there was any oral contract as alleged and that it was for the first time that the Corporate Debtor had come up with the cooked up story of the alleged oral contract only with the malafide intention to create an apprehension in the minds of the Tribunal regarding a this issue. The Petitioner deny that there exists any written agreement between the Petitioner and the Corporate Debtor as alleged. The Petitioner also deny that it was agreed between the parties that in case of return of stocks by the Petitioner to the Corporate Debtor, the Corporate Debtor would receive its payments only upon the acceptance of the stocks by the principal supplier and upon making his payment to the Corporate Debtor.
  - c. The Petitioner further submits that whatever disputes may be there between the Corporate Debtor and the principal supplier, the legitimate claim of the Petitioner can certainly not depend on the settlement of such dispute.

- d. The Petitioner also states that there was no oral contract/understanding as alleged, there was no question of any dispute emanating from the same.
- e. The Corporate Debtor never raised a dispute with respect to the one year shelf life or packaging or boxes in good condition till date. The Petitioner cannot know as to what products will be sent by the Corporate Debtor to the principal supplier and further, when the Corporate Debtor has returned the goods to principal supplier after its allegedly delivery to the principal supplier is also not known to the Petitioner. The Petitioner cannot be responsible for the products which are in custody of the Corporate Debtor from the date of delivery by the Petitioner to the date of alleged delivery by the Corporate Debtor to the principal supplier and hence the defence raised by the Corporate Debtor for the first time that the payment will be subject to the approval of the principal supplier is baseless.
- f. The email dated 08.10.2015 relied by the Corporate Debtor is with respect to PV products and not in respect to NV products and therefore, the same is not applicable to the facts of the present case which relates to NV products only.
- g. The Corporate Debtor has admitted that the NV stocks were duly returned at the warehouse of the Corporate Debtor. The Petitioner submit that, in view of the admission made, it can be concluded that the goods were delivered in proper and saleable condition. Any dispute between India Medtronic Pvt. Ltd. and the Corporate Debtor cannot be a subject matter of this petition.

### **FINDINGS**

12. On going through the submissions made by the Counsel from the both the sides and on perusing the documents produced on record, the Bench is of the view that as far as the subject relating to the return of stocks to the Bhiwandi warehouse of Corporate Debtor is concerned, there is no dispute and the same has been admitted by the Corporate Debtor.

13. This Bench also takes note of the fact that the Corporate Debtor's Chartered Accountant's letter submitted by Ms. Lata Kharwa, advocate for the Corporate Debtor, clearly shows that the amount of Rs. 46,80,274.25/- as admitted by the Corporate Debtor in its own books of

accounts relating to ledger account of the Petitioner. The letter by the Corporate Debtor's Chartered Accountant's mentions as follows;

*"TO WHOMSOEVER IT MAY CONCERN*

*This is to hereby certify that Vascular Therapeutics (India) Pvt. Ltd. registered in Maharashtra with PAN. AABCV3562G has payable of Rs. 46,80,274.25/- to Kumar Brothers Pharma Pvt. Ltd. Mumbai as on 31<sup>st</sup> March, 2017. This amount is reflected in note 10 of Other Current Liabilities against Advance from customers – Rs. 88,93,433/- Total of Other Current Liabilities is Rs. 99,63,931/-*

*PLACE: MUMBAI*

*DATED: 8<sup>TH</sup> FEBRUARY, 2019*

*CHARTERED ACCOUNTANTS"*

*(PINKESH A. KAPADIA)*

*Chartered Accountant*

*Membership No. 40814"*

The above letter clearly shows that there is an acceptance of liability by the Corporate Debtor in his books of accounts regarding the amount payable to the Petitioner.

14. There is no written agreement between the Petitioner and the Corporate Debtor. Hence the Corporate Debtor's contention that it was categorically agreed between the parties that in case of return of stocks by the Petitioner to the Corporate Debtor, the Corporate Debtor would receive its payments only upon the acceptance of the stocks by the principal supplier, is not borne out by facts. The Bench is of the view that there may be disputes between the Corporate Debtor and the principal supplier to whom the Corporate debtor has ultimately returned the product. However, the legitimate claims of the Corporate Debtor can certainly not depend and held hostage to the settlement of dispute, if any, between the corporate debtor and a third party

15. The email dated 08.10.2015 relied by the Corporate Debtor is with respect to PV products and not in respect to NV products and therefore, the same is not applicable to the facts of the present case as the goods in question for which dues arise only relates to NV products.

16. In light of the above, this Bench concludes the following from the above findings:

- a) The Petitioner clearly on the written instruction of the corporate Debtor has returned the NV products to the Corporate debtor

and has raised dues as per the written instructions of the corporate debtor abiding by the clause that from the total amount 10 percent by way of restocking charges would be deducted.

- b) The contention of the Corporate debtor that in accordance with e mail of 08-10-2015 the amount becomes due only when the stock is accepted by the Principle supplier is not correct as the said e mail clearly says that it relates only to PV products whereas the Products in question relates to NV products.
- c) The clinching evidence before this Bench is the Books of Account of the Corporate Debtor in which the Ledger account of the Petitioner is enumerated with all details of payment to be received by the Petitioner from the corporate debtor as on 31 March 2017. This ledger account was submitted before the Bench on the Orders of the Bench dated 17-12-2018. Here the Corporate Debtor itself on affidavit certifies that the amount payable to the Petitioner is Rs 46, 89,274. Therefore, the Debt of Rs. 46.89 lakh is admitted Debt even by the Corporate Debtor.

17. This Bench has no doubt that at least an amount of Rs 46,89,274 is a liability which is due from **Vascular Therapeutics India Pvt. Ltd** and qualifies as Operational Debt both in terms of Section 3(11) and Section 5(21) of the IBC, 2016. This Bench also concludes that there is a default in terms of Section 3(12) of the IBC, 2016 which defines default as "...non-payment of Debt when whole or any part or instalment of the amount of debt has become due and payable..." The two essential requirements, i.e. existence of 'debt' and 'default', for admission of a petition under Section 9 of the I&B Code, have been met in this case.

18. The application filed by the Operational Creditor is on proper Form 5, as prescribed under the Adjudicating Authority Rules and is complete.

19. The Applicant has proposed name of Mr. Mahesh Sureka, a registered Insolvency Resolution Professional having Registration Number [IBBI/IPA-001/IP-P00413/2017-18/10736] as Interim

Resolution Professional, to carry the functions of Interim Resolution Professional as mentioned under I&B Code.

20. The Application under sub-section (2) of Section 9 of I&B Code, 2016 filed by the Operational Creditor for initiation of CIRP in prescribed Form5, as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is complete. The existing operational debt is beyond the threshold limit against the Corporate Debtor and its default is also proved. Accordingly, the application filed under section 9 of the Insolvency and Bankruptcy Code for initiation of corporate insolvency resolution process against the Corporate Debtor deserves to be admitted.

21. This application is filed under Section 9 of I&B Code, 2016, filed by **Kumar Brothers Pharma Pvt. Ltd.**, against **Vascular Therapeutics India Pvt. Ltd.**, for initiating corporate insolvency resolution process is **admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

- I. That this Bench as a result of this prohibits:
  - a) 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;
  - b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
  - c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any activity under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
  - d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to such transactions as may be notified by the

Central Government in consultation with any financial sector regulator.

- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. That this Bench at this moment appoints Mr. Mahesh Sureka, a registered Insolvency Resolution Professional having Registration Number [IBBI/IPA-001/IP-P00413/2017-18/10736] as Interim Resolution Professional to carry out the functions as mentioned under I&B Code. The fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
- VII. Having admitted the Petition/Application, the provisions of Moratorium as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of appointment of IRP shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.
- VIII. That as prescribed under Section 13 of the Code on declaration of Moratorium the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.
- IX. The appointed IRP shall also comply the other provisions of the Code including Section 15 and Section 18 of The Code. Further the IRP is hereby directed to inform the progress of the Resolution Plan to this Bench and submit a compliance report within 30 days of the appointment. A liberty is granted to intimate even at an early date, if need be.

22. The Petition is hereby "Admitted". The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of order.

SD/-  
**Chandra Bhan Singh**  
Member (Technical)

SD/-  
**Suchitra Kanuparthi**  
Member (Judicial)