

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI (COURT NO. IV)  
COMPANY PETITION NO. IB-239/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:**

**IBERHOSPITEX S.A.**

**...APPLICANT/OPERATIONAL CREDITOR**

**VERSUS**

**MANJU ENTERPRISE PRIVATE LIMITED**

**...RESPONDENT/ CORPORATE DEBTOR**

**ORDER PRONOUNCED ON: 03.08.2021**

**CORAM:**

**DR. DEEPTI MUKESH  
HON'BLE MEMBER (JUDICIAL)**

**MS. SUMITA PURKAYASTHA  
HON'BLE MEMBER (TECHNICAL)**

*IB/239/2019*

*Iberhospitex S.A. Vs. Manju Enterprise Private Limited*

**MEMO OF PARTIES**

**IN THE MATTER OF:**

**IBERHOSPITEX S.A.**

Having its registered office at:

Av. De Catalunya

4, 08185 Lica de Vall

Barcelona, Spain

**...APPLICANT/OPERATIONAL CREDITOR**

**VERSUS**

**MANJU ENTERPRISE PRIVATE LIMITED**

Having its registered office at:

J 209/3, Lane W-15A, Western Avenue

Sainik Farm, New Delhi - 110062.

Email id: hemant@manjuent.com

**...RESPONDENT/ CORPORATE DEBTOR**

**FOR THE APPLICANT** : Mr. Gaurav Kumar Singh, Adv.

**FOR THE RESPONDENT** : Ms. Pooja Saigal,

Mr. Shantanu Chaturvedi,

Mr. Amit Yadav

Mr. Anshul Bajaj Advs.

**ORDER****Per-Dr. Deepti Mukesh, Member (Judicial)**

1. The Present Application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), 2016 (for brevity 'the Rules') through and by Ms. Radhika Singh (for brevity 'Applicant'), authorized vide Special of power of attorney dated 25.05.2016 executed by Mr. Aniceto Lopez Rodriguez, who is the Director of applicant company and was authorized to sign the POA vide board resolution dated 27.06.2016, the board resolution and the special power of attorney are annexed, with a prayer to initiate the Corporate Insolvency process against M/s Manju Enterprise Private Limited (for brevity 'Corporate Debtor').
2. The Applicant is company incorporated on 02/06/2016 bearing No. N5301/2016/02 having registered office at: Av. De Catalunya 4, 08185 Llica de Vall Barcelona, Spain. The applicant is involved in the business of manufacturing medical equipment and supplies.
3. The Corporate Debtor is company limited by shares incorporated on 23/02/1996 bearing CIN No. U51311DL1996PTC076528 under the provision of Companies Act 1956 and having its registered office at J 209/3, Lane W-15A Western Avenue Sainik Farm New Delhi DL 110062 IN and email id: [contat@manjuent.com](mailto:contat@manjuent.com). The corporate debtor is involved in the activities of importing, marketing, selling and distribution of products.
4. The applicant submits that the corporate debtor approached them in the year 2003, for the purpose of importing selling and distribution of cordynamic full range of products manufactured by the applicant at its manufacturing unit situated at Avda, Catalunva, 4, C.P. 08185 Kica De vall Barcelonea, Spain. The

applicant appointed the corporate debtor on 16.10.2003 as the sole distributor of its products in India, excluding the southern regions, for 1 year, unless cancelled or upon execution of formal distribution contract. The certificate dated 16.10.2003 is annexed.

5. The applicant imported and marketed the goods of the corporate debtor and accordingly raised invoices in the name of corporate debtor during the period of 15.03.2012 to 21.03.2012. The invoices mentioned the payment conditions as 'transfer period of 90 days'. The applicant states that the corporate debtor despite agreeing to the said conditions did not make payments and violated the agreed payment terms by delaying payments. Emails were also exchanged between the parties, wherein the corporate debtor made assurances of payment. The email communications exchanged between the parties are annexed.
6. The applicant submits that the corporate debtor started delaying in making payments from the year 2010 onwards. Thereafter, considering the market conditions and delayed payments of the corporate debtor, the applicant relaxed the payment plan, for invoices raised in June 2012. The payment plan stipulated three equal installments. The applicant also made a separate payment plan for specific invoices. However, despite flexible payment plans the corporate debtor failed to pay the outstanding amount and the unpaid debt was increasing.
7. The applicant as per email dated 28<sup>th</sup> September 2012, wrote to corporate debtor with regards to non-payment and also sent various reminders. The corporate debtor acknowledged the liability through its various email correspondences, exchanged in the Oct 2012. Thereafter on 19.10.2012, the corporate debtor wrote to applicant suggesting a payment plan for an outstanding amount of USD 1,06,250 out of the total debt of EURO 1, 65,792.29. However, the corporate debtor still failed to honor its own suggested

payment plan while accepting a total debt of USD 1,80,904. Thereafter on 11.02.2013, again suggested another payment plan for payment of USD 1,35,000. Further also suggested that advance payment shall be made for any new order. The applicant in response communicated that a default interest of 6% shall be charged from Feb 2013 onwards. The corporate debtor again failed to follow its own second repayment plan and defaulted in payment of its debt. The emails exchanged between the parties from the period of September 2012 to Feb 2013 have been annexed.

8. The applicant further submits that as a gesture of goodwill and good faith the applicant agreed to reduce the total debt of the corporate debtor and an agreement dated 15.09.2014, was executed between the parties whereby the total debt of the corporate debtor was reduced from USD 1,71,702 to USD 85,851. The repayment of debt was to start from the month of Jan 2015 in trenches of USD 15,000 per month, the complete payment to have been made till June 2015. The agreement also stipulated that the breach by either party of any commitment shall imply that the said agreement will be considered as never signed. The agreement dated 15.09.2014 is annexed.
9. The applicant states that in spite of reduction in the debts, the corporate debtor avoided repayment of debt, breaching the statement of agreement dated 15<sup>th</sup> September 2014 and as an afterthought started falsely complaining about the quality of the stents supplied to them. Further also stated that the non-payment of even the reduced debt agreed by the corporate debtor, led to termination of the statement of agreement dated 15<sup>th</sup> September 2014, thereby reverting the total debt due towards the applicant amounting to USD 1,67,812, as originally due, prior to agreement.
10. On 16<sup>th</sup> September 2015, a statutory notice for winding up was served upon the corporate debtor calling upon the corporate debtor to pay the admitted amount

totaling to US\$ 1,67,812/- (US Dollar One Lakh Sixty Seven Thousand Eight Hundred and Twelve Only) within 21 days from the date of receipt of the said notice. The applicant further stated that after the receipt of the statutory notice, the corporate debtor sent reply dated 05.10.2015, disputing the claim of the applicant and alleging wrong, false and concocted stories without adverting to unequivocal and unambiguous acknowledgment of debt.

11. The applicant filed a company petition No. 1085 of 2016 for winding up of the corporate debtor before the Hon'ble High Court of Delhi. The corporate debtor filed reply to the petition, to which rejoinder was also filed. The copies of the winding up petition along with reply and rejoinder filed are annexed. The Hon'ble Delhi High Court transferred the said petition vide order dated 08.05.2017 to NCLT, New Delhi bench. During this period, the Hon'ble Principal Bench vide order dated 16.11.2017 recorded as under:

*“There is no pleadings filed in accordance with the Rules known as Companies (Transfer of pending) Rules, 2016 and Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is thus no option except to dismiss the petition with liberty to the petitioner to file a fresh one on the same cause of action. The petition may now be filed strictly in accordance with the insolvency and Bankruptcy Code, 2016 and the rules framed there under.”*

and disposed off the company petition which was transferred from Hon'ble Delhi High Court. The copies of order dated 08.05.2017 and 16.11.2017 are annexed.

12. The applicant sent demand notice under Section 8 of the code on 03.07.2017, calling upon the corporate debtor to pay the total amount of USD 14,16,332/-. The applicant submits that the notice had been duly served on the corporate debtor. The Copy of demand notice along with postal receipts of the said notice, reflecting the service of said at the registered office of the corporate debtor as per the MCA master data has been annexed. On 07.07.2017, the corporate

debtor sent reply to the said notice and denied the claims of the applicants, stating that the claim is barred by limitation and there is a pre existing dispute.

13. The applicant filed application under Section 9 of the I & B code to initiate the CIRP. As per Form V, the total debt outstanding is USD 1,67,812/-, (USD One Lakh Sixty Seven Thousand Eight Hundred and Twelve only).
14. The corporate debtor filed reply and denying the contentions of the applicant stated the following:
  - a) That the application is not maintainable on grounds that the application has not been signed or verified by an authorized representative. The corporate debtor stated that a board resolution dated 27<sup>th</sup> June 2016 was passed by the Board of Directors of the applicant authorizing Mr. Aniceto Lopez Rodriguez. Further in terms of the said Board resolution, a SPA had been executed in favour Ms. Radhika Singh. The SPA was executed on 25.05.2016, which had been executed on a date prior to even the board resolution. Accordingly, the Mr. Anicto Lopex Rodreiguez was not authorized to execute the SPA. Hence the present petition is liable to be dismissed.
  - b) That the claims of the applicant is time barred as transactions and the invoices raised are of the period March 2012 to June 2012 and even assuming a period of 90 days for repayment, the present application is time barred. Further the applicant has relied upon the agreement dated 15.09.2014, for an amount of 1,67,812 USD. Hence the present proceedings are not maintainable under the provisions of limitation Act.
  - c) That as per the emails, there is no acknowledgement of any outstanding amount but with regards the quality issues for goods supplied. Even the emails pertain to the period of the year 2014 and the present application

is filed in 2019. Moreover, no document has been filed by the applicant to show any document constituting an acknowledgment of debt. The order dated 16.11.2017, granting liberty to file fresh petition on same cause of action does not waive the requirements of law relating to limitation.

- d) That the application is not maintainable on account of pre-existing dispute pending between the parties and all legitimate dues of the applicant had been have paid off. Moreover, the disputes for quality of goods and high prices by applicant had been raised much prior to issuance of Section 8 of the code, which was also acknowledged and accepted by the applicant for which applicant offered reduction of dues. The dispute on quality, nonpayment of amounts was explicitly stated in reply dated 05.10.2015 of the winding up notice dated 16.09.2015. Further also detailed in reply dated 07.07.2017 issued by the corporate debtor to the demand notice dated 03.07.2017. The copies of reply dated 05.10.2015 and 07.07.2017 is annexed.
- e) That the agreement dated 15<sup>th</sup> September 2014, is disputed since it was drafted by the applicant to adjust false (zero value) invoice of USD 93,077/- .

12. The applicant filed rejoinder denying the contentions of the corporate debtor, and reiterating the averments raised in the application, stated the following:

- a) That Ms. Radhika Singh has been authorized vide Power of Attorney dated 25.05.2016, given by its sole Administrator, Aniceto Lopez Rodriguez.
- b) That the invoices were raised between the periods of March 2012 to June 2012, whereas the promise to pay was assured vide email dated 11.02.2013 and the payment schedule was to end on October, 2013. Thereafter in pursuance of the agreement dated 15.09.2014 winding

up proceedings were held in year 2017. Therefore the claims are not time barred.

c) That the corporate debtor in terms of various correspondences admitted the debt and liability, however there is no admission of the quality issues, no certificate or lab report evidencing inferior quality of products has been filed. Accordingly the corporate debtor has failed to establish any pre-existing dispute.

13. As per Part IV from I, the debt fell due when the invoices were raised in the year 2011-12. The debt was admitted by the corporate debtor in terms of agreement dated 15.09.2014. The winding up proceedings, were initiated in the year 2016. The IBC demand notice was sent in July 2017 and the present application is filed on 22.01.2019. Hence the application is not time barred and filed within the period of limitation.
14. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.
15. The present application is filed on the Performa prescribed under Rule 6 of the Insolvency and Bankruptcy Code, 2016 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 r/w Section 9 of the code and is complete.
16. Considering the documents on records and submissions made, we are of view that objections have been raised by the corporate debtor with regards the authorization to file the present application and also for the claim being time barred. However, the claim is not time barred as corporate debtor admitted the debt of 2012 and also admitted the debt in terms of agreement dated 15.09.2014, based on which the winding up proceedings were initiated in the

year 2016 and the proceedings were transferred to NCLT New Delhi bench vide order dated 08.05.2017. Hence the claim is not time barred. Further the SPA executed on 25.05.2016, was never revoked hence Ms. Radhika Singh is duly authorized to file the present application. Moreover, there is a pre-existing dispute among the parties and the same is validated as per emails correspondences exchanged during the year 2011-2012 wherein the corporate debtor had raised dispute with regards the inferior quality of goods. The disputes have also been raised by the corporate debtor in its reply to the winding up notice and demand notice under Section 8 of IBC of the applicant. This leaves no doubt that the so called dispute raised by the corporate debtor is not merely a moonshine dispute. The Hon'ble Supreme Court in the case of "*Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*" in Civil Appeal No. 9405 of 2017 held that :

*".....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 claim of the corporate debtor suggests 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".*

In view of the aforesaid facts, a conclusion can be drawn that there is 'Pre-existence dispute' which was raised by the corporate debtor time and again in terms of the agreement executed between the parties much prior to the notice served under section 8 of I & B Code by way of its reply to statutory notice for winding up as well reply to winding up petition and also in reply to Section 8

notice under IBC. It is a fit case to reject the application under section 9 of the I & B Code. In terms of above order the application is rejected.

17. A copy of the order shall be communicated to the Applicant and the Corporate Debtor by the Registry. In addition, a copy of said order shall also be forwarded to IBBI for its records.

**Sd/-**  
**SUMITA PURKAYASTHA**  
**MEMBER (T)**

**Sd/-**  
**DR. DEEPTI MUKESH**  
**MEMBER (J)**