

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) 2144/MB/C-IV/2019

Under section 9 of the Insolvency &
Bankruptcy Code, 2016

In the matter of

**M/s Rasayano, a proprietorship
concern represented by its
proprietor, Mr Purushottam G
Khetan**

...Operational Creditor

Versus

Katariya Pet Private Limited

[CIN: U74999PN2016PTC166634]

... Corporate Debtor

Order Delivered on 06.12.2019

Coram:

Mr. Rajasekhar V.K. : Hon'ble Member (Judicial)
Mr. Ravikumar Duraisamy : Hon'ble Member (Technical)

Appearances:

For the Operational Creditor : Mr Girish B Kedia a/w Ms
Shivangi Kedia, Advocates

For the Corporate Debtor : Mr Amit Gharte, Advocate

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (**IBC**) by M/s Rasayano, represented by its proprietor, Mr Purushottam G Khetan ("the Operational Creditor"), a proprietorship concern represented by its proprietor, Mr Purushottam G Khetan seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Katariya Pet Private Limited ("the Corporate Debtor").
2. The Corporate Debtor is a private company limited by shares and incorporated on 30.09.2016 under the Companies Act, 2013, with the Registrar of Companies (RoC), Maharashtra, Mumbai. Its Corporate Identity Number (CIN) is U74999PN2016PTC166634. Its registered office is at Gat No.3/4/1A, Milkat No.2253, Handewadi Road, Opp Indian Oil Petrol Pump, Behind Samriddhi Hotel, Uruli Devachi Road, Katraj-bypass Road, Taluk Haveli, Pune, Maharashtra 421 308. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed on 06.06.2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs.41,36,348.00 (Rupees forty-one lakh thirty-six thousand three hundred and forty-eight only) as principal and Rs.8,30,961.00 (Rupees eight lakh thirty thousand

nine hundred and sixty-one only) as interest as on 22.06.2018, which is the date of default.

4. The case of the Operational Creditor is as follows: -

(a) Pursuant to Purchase Orders placed by the Corporate Debtor with the Operational Creditor, the Operational Creditor sold, supplied and delivered the materials under two invoices to the Corporate Debtor aggregating to a sum of ₹48,36,348/- (para 1 of Part IV at page 3 of the Petition), details of which are as follows:

1. Invoice No.84 dated 21.05.2018 for a sum of ₹24,18,174.00 (pp.40-45 of the Petition);
2. Invoice No.85 dated 21.05.2018 for a sum of ₹24,18,174.00 (pp.46-52 of the Petition);

The payment in respect of the invoices was to be made within thirty days (para 1 of Part IV at page 3 of the Petition);

(b) Against receipt of the goods covered under the two invoices, the Corporate Debtor made part payment of ₹7,00,000/-, leaving a balance principal sum of ₹41,36,348/- as due and payable (para 1 of Part IV at page 3 of the Petition);

(c) In discharge of the said liability, the Corporate Debtor issued several cheques, all of which were dishonoured upon presentment. The Corporate Debtor gave written

acknowledgement in the form of a note signed by the Director of the Corporate Debtor, confirming the contents and terms as set out in the email dated 17.1.2018. A copy of the correspondence has been placed at p.76 of the Petition (para 1 of Part IV at page 4 of the Petition).

5. The invoices have been placed on record as **Exhibits '6 & 7'** at pp.40-52. The invoices provide for interest in case of delayed payments, to be charged at the rate of 21% per annum. Bank statements are also attached as **Exhibits '4 & 4A'** at pages 11-32. The total debt due and payable to the Operational Creditor is Rs.49,67,309.00 (Rupees forty-nine lakh sixty-seven thousand three hundred and nine only), as mentioned at page 10 of the Petition.
6. The Operational Creditor had served a Demand Notice in Form 3 dated 22.04.2019 on the Corporate Debtor (**Exhibit '5'**, pp.33-39) in terms of section 8 of the IBC. The Corporate Debtor has not replied to the Demand Notice.
7. Mr Amit Gharte, Learned Counsel appeared on behalf of the Corporate Debtor and made his submissions.
8. In its reply dated 26.08.2019, the Corporate Debtor has set up the following defence:-
 - (a) The Corporate Debtor had replied to the Statutory Notice dated 22.04.2019 issued by the Petitioner. In the reply, it has

been specifically brought to the notice of the Operational Creditor that the goods supplied were faulty and of low quality, having no use to the Corporate Debtor except selling the same as scrap (para 2 at page 122 of the Reply);

- (b) The factum of the goods being faulty were brought to the notice of the mediator, one Mr Anup Kulkarni, on 28.05.2018 itself (para 3 at page 122 of the Reply);
- (c) The Corporate Debtor sold the supplied material as scrap for a sum of ₹2,80,000/-. A loss of ₹27,70,320 was caused to the respondent, with an additional loss of ₹4,80,000/- in manufacturing of scrap material. The Corporate Debtor also had to hire a godown for storing the scrap material, and this is valued at ₹7,20,000/-. All in all, a sum of ₹2,73,972/- is recoverable from the Operational Creditor (para 3 at page 123-124 of the Reply);
- (d) The Corporate Debtor has invoked Arbitration Clause provided under the Sales Contract dated 07.03.2018, on 28.06.2019, and this fact has been intimated to the Operational Creditor (para 4 at page 125 of the Reply);
- (e) The petition is liable to be rejected as Notice of Dispute has been brought to the notice of the Operational Creditor through the mediator, Mr Anup Kulkarni (para 6 and 7 at page 125-126 of the Reply);

- (f) By invoking the Arbitration Clause and replying to the Statutory Notice, the Corporate Debtor has raised the existence of a Dispute, and therefore, in terms of the ratio laid down by the Hon'ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited*, the petition should be rejected (para 8 at page 127 of the Reply).
9. We have heard the arguments of both sides and perused the records. The Corporate Debtor has stated that the claim of the Operational Creditor is not valid, on the ground that there is a pre-existing dispute. The Corporate Debtor has invoked Arbitration Clause and also replied to the Statutory Notice bringing to the notice of the Operational Creditor.
10. What has been referred to as "Statutory Notice" in the Reply filed by the Corporate Debtor is actually a legal notice simpliciter issued by the Counsel for the Operational Creditor. It cannot be treated as a reply to the Demand Notice. The dates are significant here:
- (a) The first "legal notice" simpliciter issued by the Counsel for the Operational Creditor is dated 08.04.2019. The Demand Notice under the IBC came to be issued by the Operational Creditor on 22.04.2019, which has been duly served on the Corporate Debtor on 24.04.2019, as per acknowledgement at page 39 of the Petition. The reply to the earlier legal notice simpliciter dated 08.04.2019 came to be issued by the Corporate Debtor only on 14.06.2019.

- (b) There was no reference whatsoever to the IBC or proceedings thereunder in the legal notice simpliciter dated 08.04.2019. However, in the reply dated 14.06.2019, which purports to be a reply to the said legal notice simpliciter, the Corporate Debtor has specifically mentioned in para 6 that the proceedings under IBC cannot be invoked.
- (c) It is clear from this one statement that the reply, though ostensibly stated to be a response to the legal notice alone, was actually drafted after receipt of the legal notice dated 08.04.2019 and the Demand Notice dated 22.04.2019.
11. Invoking of arbitration clause mentioned in the Agreement dated 07.03.2018 after receipt of the Demand Notice dated 22.04.2019, cannot be sustained. The dispute must exist prior to the issue of Demand Notice under section 8(1) of the IBC, as held by the Hon'ble Supreme Court on 21.09.2017 in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited* [(2018) 1 SCC 353]. The relevant para is quoted below:
- “What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing - i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.”*
12. Apart from the reply to the legal notice to the effect that the Agreement between the parties provides for arbitration, there was nothing on record to suggest that the Corporate Debtor raised any

pre-existing dispute. In the absence of any evidence to suggest that dispute was raised prior to the issue of demand notice, the dispute cannot be held to be pre-existing by merely inviting attention to the arbitration clause.

13. With regard to the submission of the Corporate Debtor in para 8(b) *supra*, we observe that the Corporate Debtor has not confirmed whether the material supplied by Operational Creditor was sold as scrap is with the due concurrence of the Operational Creditor. Further it is strange to observe that it received only Rs.2.80Lakh from selling of scrap where as Corporate Debtor incurred Rs.4.8Lakh in manufacturing of scrap i.e. Rs.2Lakh excess of realised value. We have also noted that no one has adjudicated the amount of loss incurred by the Corporate Debtor to the tune of Rs.27,70,320/- and the proof of the above has not been submitted. Therefore, we are of the view that the above submissions are without any justification, documents and do not hold any water.
14. Therefore, the application made by the Operational Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount of one lakh rupees stipulated under section 4(1) of the IBC. Therefore, the default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits

this Petition and orders initiation of CIRP against the Corporate Debtor.

15. The Operational Creditor has not proposed the name of any Interim Resolution Professional (IRP) in the matter.

16. It is, accordingly, hereby ordered as follows: -

(a) The petition bearing **CP(IB) 2144/MB/C-IV/2019** filed by **M/s Rasayano, a proprietorship concern represented by its proprietor, Mr Purushottam G Khetan**, the Operational Creditor, under section 9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Katariya Pet Private Limited [CIN: U74999PN2016PTC166634]**, the Corporate Debtor, is **admitted**.

(b) There shall be a moratorium under section 14 of the IBC, in regard to the following:

(i) 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;

- (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Sarfaesi) Act, 2002;
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium,-
- (i) 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;
 - (ii) The provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator.
- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating

Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (f) Since the Operational Creditor has not proposed the name of any Interim Resolution Professional (IRP) in the matter, the IRP shall be appointed by this Adjudicating Authority by a separate order. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out her functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.
- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

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- (h) The Operational Creditor shall deposit a sum of Rs.1,00,000/- (Rupees one lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) The Registry is directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-

RAVIKUMAR DURAISAMY
Member (Technical)

06.12.2019

Sd/-

RAJASEKHAR V.K.
Member (Judicial)