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**NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

ATTENDANCE CUM ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
BENGALURU BENCH, BENGALURU, HELD ON 11.06.2020

THROUGH VIDEO CONFERENCING
CAUSE LIST

PRESENT: 1. Hon'ble Member (J), Shri Rajeswara Rao Vittanala
2. Hon'ble Member (T), Shri Ashutosh Chandra

CP/CA No.	Purpose	Sec	Name of Petitioner	Petitioner Advocate	Name of Respondent	Respondent Advocate
CP(IB) No. 130/BB/2020	For admission	Sec 9 of I&B code 2016	Astrazeneca Pharma India Ltd	NJK Associates	Brosbel Engineering Pvt Ltd	

ADVOCATE FOR PETITIONER/s: N J Kumar

ADVOCATE FOR RESPONDENT/s: _____

ORDER

1. Heard Shri N.J.Kumar, learned Counsel for the Petitioner, through Video Conference.
2. Post the case "**For Orders**" on 12.06.2020, on the question of admission.


MEMBER (T)


MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

C.P. (IB)No.130/BB/2020
U/s. 9 of the IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

Between:

AstraZeneca Pharma India Limited
Block N1, 12th Floor,
Manyata Embassy Business Park,
Rachenahalli, Outer ring road,
Bengaluru – 560 045 - Petitioner/Operational Creditor

And

Brosbel Engineering Private Limited
4th C Main Road, OMBR Layout,
Hagos Villa No.680,
Banasawadi,
Bengaluru - 560 043 - Respondent/Corporate Debtor

Date of Order: 12th June, 2020

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present, through Video Conference:

For the Petitioner : Shri N. J. Kumar
For the Respondent : None

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P.(IB)No.130/BB/2020 is filed by AstraZeneca Pharma India Limited ('Petitioner/Operational Creditor') U/s. 9 of the IBC, 2016,



R/w Rule 6 of I&B (AAA) Rules, 2016, by inter-alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of Brosbel Engineering Private Limited ('Respondent/Corporate Debtor'), on the ground that it has committed default for an amount of Rs.6,02,277/- (Rupees Six Lakhs Two Thousand Two Hundred and Seventy Seven only).

2. Brief facts of the case, as mentioned in the Company Petition, which are relevant to the issue in question, are as follows:

- (1) AstraZeneca Pharma India Limited (hereinafter referred to as Petitioner/Operational Creditor) is engaged inter-alia in the business of manufacturing a broad range of medicines designed to fight diseases in important areas of health care.
- (2) Brosbel Engineering Private Limited (herein after referred to as Respondent/Operational Creditor) is a Private Limited Company, was incorporated on 29.01.2010, under the Companies Act, bearing CIN:U31103KA2010PTC052318. Its Authorised Share Capital is Rs.80,00,000 and that of Paid-up Share Capital is Rs.75,00,000.
- (3) The Petitioner with an intention to purchase fourteen (14) air conditioning units of 2.2 TR, Inverter HI wall Split AC, Daikin Model No.FTKP71 and other ancillary products, has requested the Corporate Debtor for a quotation for the same. In pursuant to further negotiations, the Petitioner placed a Purchase Order bearing No.13100 39946 dated 23.10.2017 for Rs.12,04,554. In accordance with the terms of the Purchase Order, the Petitioner made a payment of Rs.6,02,277/- as advance, i.e. a value of 50% of the total value was to be paid on the proforma invoice raised by the Corporate Debtor.
- (4) It is stated that the Petitioner has written to Corporate Debtor

several times requesting to deliver and install the Products. However, despite Petitioner's repeated requests, Corporate Debtor has failed to deliver the Products in time. The Corporate Debtor further requested an extension of ten (10) days in his email dated 15.11.2017, citing the reason that there was a delay from the manufacture. In spite of the above promise by Corporate Debtor, the Petitioner had to continue to follow up regarding the same. In pursuant to such follow ups, the Corporate Debtor visited Petitioners' office and agreed to obtain the delivery and commence the works on 4th December, 2017 and requested a further payment of Rs.6,02,277 i.e. balance amount. However, as per the initial agreement, the balance payment was to be made only against the submission of the final invoice.

- (5) It is alleged that the Corporate Debtor continued to make false promises, even claimed that he has attempted to deliver the products and was unable to do so and informed Petitioner by email dated 26.12.2017 that the delivery would be possible only after 15 January, 2018. The reasons provided by the Respondent are unreasonable and was merely a tactic to avoid Corporate Debtor's obligation. The Purchase order is abundantly clear on the timings for delivery and also Petitioner was in constant communication with Corporate Debtor to obtain delivery. The Corporate Debtor neither delivered the products nor refunded the advance payment that was made to it. Therefore, considering that the products were never delivered or installed as per the Purchase Order, the Corporate Debtor is liable to refund the advance of Rs.6,02,277 that was paid to it.
- (6) As the Respondent failed to pay the outstanding amount,



the Petitioner got issued a Legal Notice dated 09.05.2018, through its Counsel, by inter-alia demanding the Corporate Debtor to pay the debt owed to the Petitioner. When there was no response from the Corporate Debtor, the Petitioner got issued a Demand Notice dated 15.10.2018 to the Corporate Debtor, under Provisions of the Code, calling upon the Corporate Debtor to pay the outstanding amount of Rs.6,02,277 within ten (10) days from receipt of the letter. Notice served on the Corporate Debtor but not replied or paid the advance amount collected from the Petitioner. Hence, the present Petition.

3. Heard Shri N. J. Kumar, learned Counsel for the Petitioner, **through Video Conference**. We have carefully perused the pleadings of the Party and extant provisions of the Code and Rules made thereunder.
4. As stated supra, cause of action arose in this case by virtue of the Purchase Order dated 23.10.2017 (P.O.No.1310039946), wherein it is ordered for supply of 5KV Voltage Stabilizer units; Supply of Suc. & Dis. Copper piping; Supply of Drain piping works; supply of 2.2 TR Inverter Hi wall split etc., for total amount of Rs.1,204,553.66. Terms of the payment as per order is payment should be made immediately from Invoice Receipt Date. One of the terms of said Purchase order is that the Parties agreed that any dispute or difference arising out of or in relation or connection to this PO shall be attempted to be settled amicably failing which it shall be referred to arbitration to be conducted by the Chief Executive Officer/Managing Director of AZ in accordance with the provisions of Arbitration and Conciliation Act, 1996. However, the Petitioner has not invoked the remedy available for it for refund of advance amount.



5. Ultimately, a Legal Notice dated 09.05.2018 was issued to the Respondent, by inter alia stating that in pursuant to the Purchase Order dated 23.10.2017 for Rs.1,204,553.66, out of which 50% of the total value was paid to the Respondent i.e. Rs.6,02,277/- as advance. However, the Respondent neither delivered the products nor refunded the advance payment made to it. Subsequently, the Petitioner issued another Demand Notice dated 15.10.2018, under the provisions of the Code, by demanding to pay the advance amount of Rs. 6,02,277/-. As per Purchase Order dated 23.10.2017, payment should be 50% against PI and 50% on submission of Invoice and the delivery date is 14.11.2017. When the delivery of goods get delayed on due date, the Petitioner has to take appropriate steps immediately either to pay the remaining balance amount as demanded by Respondent or to take steps to recover the advance amount in terms of agreement. However, the Petitioner chose to invoke the provisions of Code in order to recover advance amount. The dispute involved in the case is whether the Petitioner is liable to pay the remaining balance amount to the Respondent or the Respondent is under obligation to deliver the goods as ordered. And this issue has to be adjudicated first in order to decide the liability of Parties, which cannot be adjudicated in the instant case.
6. The Ms. Mina Patel, the Authorized Representative of the Petitioner Company (Mina Patel) has filed Affidavit dated 19.12.2019, by inter alia stating that the Corporate Debtor has failed to deliver the products in time and they have refused to pay the remaining amount as demanded by the Respondent; the Corporate Debtor neither delivered the products nor refunded the advance payment that was made to it and thus that the Respondent was liable to refund the amount.



7. As stated supra, the Petitioner got issued two (2) Notices dated 09.05.2018 and 15.10.2018, in the first notice dated 09.05.2018, the Respondent was called upon to return advance amount, in any event within fifteen (15) days; whereas, in the second notice dated 15.10.2018, under the provisions of the Code, by inter alia demanded to pay the outstanding amount within ten (10) days from the receipt of the notice. However, the instant Company Petition is filed on 19.12.2019, for the Purchase Order dated 23.10.2017. The Petitioner has not explained the reasons for the delay in filing the instant Company Petition. Moreover, it is not in dispute that the instant case is admittedly seeking to refund the advance amount paid for the supply of AC units in question. It is not the case of Petitioner that it has paid full amount of invoice as demanded by the Respondent to get delivery of goods. The Petitioner has not pointed any agreement or commitment on the part of Respondent to return the advance paid. When there is no specific agreement as to how to deal the goods in question when not delivered, the Petitioner can invoke arbitration clause available in the purchase order, as stated supra. However, the Petitioner chose to issue legal notices to the Respondent to return advance paid. So far as the return of advance amount is concerned, this Adjudicating Authority is not a recovery forum to get back the advance amount paid. The Petitioner has not explained as to why it has not initiated Civil and Criminal prosecution by filing an appropriate Complaint or report before the jurisdictional Court or Police as threatened against Respondent, in its first Legal Notice dated 9th May, 2018. Moreover, invoking provisions of Code is not only alternative remedy available to the Petitioner. The Petitioner failed to make any averment by producing appropriate evidence that the Respondent became insolvent. Whether the Respondent is liable to



return advance paid or not, in the light of refusal of the Petitioner to pay the remaining amount of invoice, cannot be adjudicated in a summary proceedings as contemplated under the provisions of Code. Therefore, the instant Petition is filed with an intention to recover the advance amount paid to the Respondent, which is against the object of Code. The Petition is also barred by latches and limitation.

8. For the above facts and circumstances of the case, we are of the considered opinion that the instant Company Petition is not maintainable under the provisions of Code, and thus it liable to be rejected by giving liberty to Petitioner to invoke any other remedy available to it under any other Law.
9. In the result, C.P. (IB)No.130/BB/2020 is hereby rejected as devoid of merits. We make it clear that this Order will not come in the way of Petitioner to invoke any other remedy available to it, under any other law, so as to get back the advance amount paid by the Petitioner to the Respondent. No order as to costs.

(ASHUTOSH CHANDRA)
MEMBER, TECHNICAL

(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

Shruthi