

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH (COURT-II)**

**Company Petition No. (IB)-764(ND)/2021**

**IN THE MATTER OF:**

**Dadha Pharmacare**

Through its Authorized Representative  
Registered office at:  
No 29, Sector-4, Ballabgarh, Faridabad,  
Haryana-121004

**...Applicant/  
Operational Creditor**

**VERSUS**

**M/s Nava Healthcare Pvt. Ltd**

Registered office at:  
B-702, Vasundhara Apartments,  
Plot No. - 16, Sector 6, Dwarka,  
New Delhi - 110075

**... Respondent/  
Corporate Debtor**

**Under Section: 9 of IBC, 2016**

**Order Delivered on: 11.01.2024**

**CORAM:**

**SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)**

**SH. L. N. GUPTA, HON'BLE MEMBER (T)**

**PRESENT:**

**For the Applicant** : Mr. Vivek Jain, Ms. Suchitra Kumbhat, Mr.  
Abhinav Jain, Advs.

## **ORDER**

**PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)**

Facts of the case as derived from the application are as follows: -

- (i) That the Applicant (OC) is part of one of the oldest pharmaceutical Chemists and Druggist company involved in the field of manufacturing marketing and distributing licensed drugs, pharmaceuticals and chemicals etc.
- (ii) The Respondent (Corporate Debtor) is in the business of providing drugs and is also a pharmaceutical company having its registered office at B-702, Vasundhara Appt, Plot 16, Sector-6, Dwarka, New Delhi-110075.
- (iii) The Applicant and the Respondent entered into a 'Clearing and Forwarding Agreement' dated 30.01.2020, having the ramification of appointment of the Applicant as Clearing and Forwarding Agent (CFA) for All India Operations with Mother Warehouse for the products manufactured, marketed and distributed by the Respondent (Corporate Debtor).
- (iv) In terms of the clause 18 of the executed agreement, the Operational Creditor deposited an amount of Rs. 1,50,00,000/- (Rupees One Crore Fifty Lacs Only) as fully secured and refundable Security Deposit, refundable within 14 days after the termination of the contract by either side.
- (v) It was agreed between the parties that a Minimum Guarantee Commission (MGC) amounting to 2% of the net sales of Rs.

6,50,000/- (Rupees Six Lac and Fifty Thousand Only) excluding GST less TDS whichever was higher per month was payable by the Respondent (CD) to the Applicant. The business commenced w.e.f. 30.09.2020. The physical goods (Inward) and (Outward) were carried with proper complied invoices were supported by the E-way Bill. Nevertheless, the flow of volume and value of both the Inward and Outward stocks was below the agreed expectation and the Respondent (CD) failed to make even a single dispatch of products to their distributor, as stipulated in the Clearing and Forwarding Agreement (C&F Agreement). It failed to sustain the clothing stock at any given point of time both in terms of volume and value since the commencement of operation viz. 01.10.2020.

- (vi) A scheduled meeting with agenda was held between the representatives of Applicant (OC) and Respondent (CD), wherein the Respondent explicitly confirmed point to point agenda with personal handwritten comments and signed the same as minutes of discussion on 23.10.2020, which were duly agreed upon. During the meeting, it could transpire that the Drug License for the CD's Nilothi warehouse had already expired, resultantly, the stocks lying there were to be shifted to Applicant's warehouse at Faridabad. In the meeting, it was also agreed upon that the reimbursement of monthly MGC, Expenses and Interest on Security Deposits would be cleared as per terms and conditions of executed Agreement. Subsequently, despite the confirmation and commitments made in the meeting dated 23.10.2020 the

Respondent failed to comply with the terms of the agreement (supra). On reminders sent by the Applicant, the Respondent agreed to pay the dues by 31.03.2021. The commitment was made in terms of the e-mail dated 16.02.2021. As the Respondent failed to act in terms of the agreement, the same was terminated by the Applicant on 15.09.2021.

(vii) The Respondent failed to do weekly reimbursement of MGC/Interest/Expenses/Hamali and Freight charges in spite of debit note being raised. Out of the amount of Rs. 12,71,895, payable to the Applicant before 07.11.2020, only an amount of Rs. 2,50,000/- was paid on 30.11.2020 and 13.11.2020. The remaining outstanding of Rs. 10,21,895 could not be paid. The Respondent also committed default in making the payment towards MGC/Interest/Expenses/Hamali and Freight charges amounting to Rs. 8,92,610/- (Rupees Eight Lakh Ninety-Two Thousand Six Hundred and Ten Only), which was payable before 07.12.2020, as per the terms of C&F Agreement.

(viii) The Respondent did not pay the MGC/Interest/Expenses/ Hamali and Freight charges amounting to Rs. 51,04,773/-, for the months of October, November and December of the years 2020 and for the months of January, February and March of the years 2021.

2. The details of the Security Deposit cheques issued in favour of the Corporate Debtor liable to be refunded to the Operational Creditor, as mentioned in Part- IV of the application reads thus: -

<b>Cheque no. along with date</b>	<b>Amount</b>
Kotak Bank 000130 – Dt: 30/01/2020	Rs 50,00,000/-
HDFC Bank 00012 – Dt: 01/10/2020	Rs 50,00,000/-
HDFC Bank 00013 – Dt: 28/10/2020	Rs 50,00,000/-

3. The statement of outstanding invoices raised by the Operational Creditor reads thus: -

<b>S. No.</b>	<b>D/N No.</b>	<b>Amount</b>
1.	MGC/1020/001 (October 2020)	Rs. 300,000/-
2.	MGC/1020/002 (October 2020)	Rs. 767,000/-
3.	MGC/1020/003 (October 2020)	Rs. 75,000/-
4.	MGC/1020/004 (October 2020)	Rs. 20,000/-
5.	DN/001/2021 (October 2020)	Rs. 59,085/-
6.	DN/002/2021 (October 2020)	Rs. 17,373/-
7.	DN/003/2021 (October 2020)	Rs. 14,700/-
8.	DN/004/2021 (October 2020)	Rs. 7,807/-
9.	DN/005/2021 (October 2020)	Rs. 2,380/-
10.	DN/006/2021 (October 2020)	Rs. 8,550/-
	<i>Less – Amount Paid - 31.10.2020</i>	(Rs. 150,000)
	<i>Less – Amount Paid - 13.11.2020</i>	(Rs. 100,000)

13.	MGC/1120/007 (November 2020)	Rs. 20,000/-
14.	DN/007/2021 (November 2020)	Rs. 4,360/-
15.	DN/008/2021 (November 2020)	Rs. 1,776/-
16.	DN/009/2021 (November 2020)	Rs. 2,776/-
17.	MGC/1220/008 (December 2020)	Rs. 767,000/-
18.	MGC/1220/009 (December 2020)	Rs. 112,500/-
19.	MGC/1220/0010 (December 2020)	Rs. 20,000/-
20.	DN/010/2021 (December 2020)	Rs. 7,496/-
21.	DN/011/2021 (December 2020)	Rs. 3,516/-
	<i>Less – Amount Paid - 15.12.2020</i>	(Rs. 250,000)
22.	MGC/121/011 (January 2021)	Rs. 767,000/-
23.	MGC/121/012 (January 2021)	Rs. 112,500/-
24.	MGC/121/013 (January 2021)	Rs. 20,000/-
25.	DN/012/2021 (January 2021)	Rs. 10,516/-
26.	DN/013/2021 (January 2021)	Rs. 9,324/-
27.	DN/014/2021 (January 2021)	Rs. 2,676/-
28.	DN/015/2021 (January 2021)	Rs. 1,044/-
29.	MGC/0221/014 (February 2021)	Rs. 767,000/-
30.	MGC/0221/015 (February 2021)	Rs. 112,500/-
31.	MGC/0221/016 (February 2021)	Rs. 20,000/-
32.	DN/016/2021 (February 2021)	Rs. 2,644/-
33.	MGC/0321/017 (March 2021)	Rs. 767,000/-
34.	MGC/0321/018 (March 2021)	Rs. 112,500/-
36.	MGC/0421/020 (April 2021)	Rs. 767,000/-
37.	MGC/0421/021 (April 2021)	Rs. 112,500/-
38.	MGC/0421/022 (April 2021)	Rs. 20,000/-

39.	MGC/0521/023 (May2021)	Rs. 767,000/-
40.	MGC/0521/024 (May2021)	Rs. 112,500/-
41.	MGC/0521/025 (May2021)	Rs. 20,000/-
42.	MGC/0521/026 (June 2021)	Rs. 767,000/-
43.	MGC/0521/027 (June 2021)	Rs. 112,500/-
44.	MGC/0521/028 (June 2021)	Rs. 20,000/-
45.	MGC/0621/29 ( July 2021 )	Rs 767,000/-
46.	MGC/0621/30 (July 2021)	Rs 112,500/-
47.	MGC/0621/31 (July 2021 )	Rs 20,000/-
48.	MGC/0721/32 (August 2021)	Rs 767,000/-
49.	MGC/0721/33 (August 2021)	Rs 112,500/-
50.	MGC/0721/34	Rs 20,000/-
51.	MGC/0821/35	Rs 767,000/-
52.	MGC/0821/36	Rs 112,500/-
53.	MGC/0821/37	Rs 20,000/-
	<b>TOTAL AMOUNT</b>	<b>Rs.1,05,01,273</b>

4. It is the case of the Applicant that the Security Deposit and the outstanding amount payable in terms of the agreement should fetch interest @ 18% per annum, if not paid. The total outstanding amount defaulted to be paid by the Respondent as mentioned in Part-IV (41) of the application is Rs. 1,05,01,273/- + Rs. 1,50,00,000/-.

5. In terms of the averment made in Part-IV (45) of the application, the Applicant had complied with the specific requirement of Respondent of leasing an 8,500-10,000 sft. fully furnished warehouse in Faridabad with a Lock in period of 24 months from 01.10.2020. Besides, in terms of clause 21 of the

Agreement dated 30.01.2020, the rent for remaining 15 months Lock in period amounted to Rs. 26,69,160/- with interest @ 15% per annum. The total outstanding amount defaulted to be paid by the CD, as claimed in Part-IV (1) and (46) is Rs. 2,89,26,534/-. The date of default as referred to in Part-IV (48) of the Applicant is November 2020. Part-IV (48) of the application reads thus:

48. The default occurred when the Corporate Debtor failed to pay the MGC's / Interest / Expenses and freight charges for the month of November 2020 for which Invoices were raised from time to time and duly received and confirmed by Corporate Debtor. But the said payments were not made by the Corporate Debtor. The default is a continuing one and the amounts are payable with interest accruing every day.

6. The Respondent has opposed the plea of admission of the application by filing reply dated 28.06.2022. The salient contentions espoused in the reply are: -

- (a) Since as per the admission made in the application itself, the date of default falls during the period covered by Section 10A of IBC, 2016, i.e. between 25.03.2020 and 23.03.2021, the present application is not maintainable and is liable to be rejected on this ground alone.
- (b) In the application filed by it, the date of default mentioned by the Applicant is 07.11.2020.
- (c) In view of the judgment of Hon'ble Supreme Court in Ramesh Kymal vs. M/s. Siemens Gamesa Renewable Power Pvt. Ltd. in (Civil Appeal No. 4050 of 2020), the provisions of IBC as embodied in Section 10A thereof unambiguously debars the filing of the present application.

- (d) There is contradiction in para 34 and 37 of the Petition, as in para 34, the defaulted dues claimed are upto March 2021 while the same mentioned in para 37, are upto August 2021.
- (e) The claim raised by the Applicant for the period from April 2021 to August 2021 is non-existent and the invoices are fake.
- (f) In terms of the e-mail dated 24.11.2020, the Respondent had asked the Applicant to address the issue regarding the quality and performance of its services as C&F Agent which entailed supervision and reasonable care of the goods stored at the warehouses.
- (g) Since, the Applicant did not perform in terms of the contract, no amount is payable to it.

7. The Respondent raised the issue of deficiency in service of the Applicant as also failure on its part to perform the contract extensively. Para 9 to 15 of the reply reads thus: -

*“9. Refuting the said claim and contention of the Applicant herein, the answering Respondent submits that clearly the services to be rendered by the Applicant herein, as embodied under the subject Agreement, were to be performed in totality giving regard to the terms and conditions of the said Agreement executed between the Respondent and the Applicant herein. However, it is an undisputed fact that the Applicant herein has failed to deliver the services as per the requirements stated in the subject Agreement and to the satisfaction of the Respondent which can clearly be discerned from the Email dated 24.11.2020 of the Respondent herein written to the Operational Creditor, a copy whereof is already enclosed with the Petition, raising certain concerns as*

*regards quality and the performance of the services as C&F Agent which entail supervision and reasonable care of the goods stored at the warehouses in respect whereof the absence of its employee named Mr. Sanjeev Jha from the warehouse during working hours, deployed at the warehouse for the said purpose of diligence and supervision of goods of the Respondent herein, was categorically brought to the knowledge of the Applicant herein. Resultantly, on account of negligence and misconduct on the part of the Applicant's employees, the Respondent's business as regards dispatch of goods and the normal working thereof has been terribly affected. That vide the said communication as encapsulated in the aforementioned mail dated 24.11.2020, the Respondent duly asked the Applicant to address the said issue of negligence to which the Applicant herein, instead of actually addressing the concern of the Respondent, rather went on to make false assurances for redressal of issues and attempted to create an evasive denial of any laches on their part.*

10. *It is pertinent to mention here that the as per the terms of the subject Agreement particularly **Clause-18** thereof which categorically stipulates that only "in consideration of the Agent rendering the services herein above mentioned and subject to the condition that the Agent shall have fully and faithfully performed all their obligations under this Agreement, the Principal shall pay to the Agent following charges, including commission at the rate of 2% of the monthly net sales ", it would not be wrong to submit that the payments whatsoever made to the Applicant by the Respondent herein, as admitted even by the Applicant in its Petition, has been made keeping in view the quality and quantity of the services rendered thereby regardless of any reasons by which the sales of the Respondent have been affected including the prevalent situation of covid-19 pandemic at the relevant period under consideration.*

11. *Besides being aware of the deficiencies in the work performed by the Applicant herein and the Email dated 24.11.2020 expressing dissatisfaction towards the work done by the Applicant and further highlighting the deficiencies therein, the Applicant persistently attempted to harass the Respondent herein for the release of payment that too against the work which has been done so improperly thereby. The Applicant rather than paying heed to the aforementioned requests of the Respondent to take reasonable care of goods chose to indulge in mudslinging and continued to avoid its responsibilities under the said Agreement at one pretext or another causing loss and damage to the Respondent herein.*
12. *The answering Corporate Debtor emphatically states that since the subject agreement executed between the Applicant and the Respondent Corporate Debtor contains series of contractual stipulations and only on upon the fulfillment of the respective roles, duties and obligations enumerated there under the parties were contractually entitled for their respective considerations, however, any failure or departure from the agreed terms shall not only constitute a breach of the contractual terms but without the redressal thereof neither permits nor allows the party in breach to have an unjust enrichment by misusing the provisions of the IB Code.*
13. *The answering Respondent further categorically states and submits that the present Applicant, particularly, in view of the aforementioned deficiency of services as flagged under the email dated 24.11.2020 did not only disentitles the Applicant to the claims raised in the present Application but also saddles the Applicant with consequences to place of record on wrong affidavit under Section 9(3)(b). Needless to state that since the aforementioned Affidavit under Section 9(3)(b) has been sworn and submitted by the Counsel of the Operational Creditor which*

*also is impermissible under law and in view of which as well the present application is liable to be dismissed. Additionally, the Operational Creditor has also failed to comply with the requirements under Section 9(3)(c), the present application is liable to be rejected on this count alone.*

14. *Given the aforementioned facts and circumstances, clearly the Applicant herein has no right to file the present Application as there exists no cause of action in favor thereof and against the Respondent herein which could render the present Petition / application maintainable. The conduct of the Applicant herein, as brought forth in the preceding paras, is not only lackadaisical but reveals an intentional and deliberate attempt on its part to usurp the resources and money of the Corporate Debtor by causing unlawful gain thereto and unlawful loss thereto despite having failed in due performance of the duties and responsibilities on its part.*
15. *More importantly, in view of the facts and circumstances as enumerated above in the preceding paras, it is imperative to mention here that the present Application merely for the reason of existence of an earlier dispute regarding quality of the work done by the Applicant, the factum whereof can be borne from the email exchanges between the parties herein, which was clearly within the knowledge of the Applicant herein much before the issuance of the Notice u/s 8 of the Insolvency & Bankruptcy Code, 2016 thereby, shall be dismissed for being untenable in view of the settled principles of law and the scheme as enshrined under the provisions of the Insolvency & Bankruptcy Code, 2016.”*

8. To buttress the plea, of preexisting dispute, the Ld. Counsel for the Respondent relied upon the judgment of Hon'ble Supreme Court in **Mobilox Innovations Private Limited versus Kirusa Software Private Limited**

(2018) 1 SCC 353. Para 16 of the reply wherein such plea could be raised is reads thus: -

*“16. In the aforesaid regard, reference is drawn to the judgment of the Hon’ble Supreme Court of India in **Mobilox Innovations Private Limited versus Kirusa Software Private Limited** reported in (2018) 1 SCC 353, wherein the Hon’ble Apex Court, taking into consideration the subject matter of pre-existing dispute which indisputably concerns the instant matter as stated above, has opined as hereunder:*

*“It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, 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. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all 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.”*

9. The Respondent has also raised the plea that the Security Deposit/Advance does not constitute operational debt. To buttress the plea, it has relied upon the orders passed by this Tribunal in **Satish Mittal v. Ozone Builders & Developers Pvt. Ltd.** No. (IB)-66(PB)/2017, upheld by Hon’ble NCLAT in Company Appeal (AT) (Insolvency) No. 75 of 2017.

10. Regarding the e-mail dated 17.11.2021, the Respondent submitted that in terms of the e-mail, the Respondent has proposed the 'Return on Investment', which may not be construed as an admission on the part of the Respondent.

11. We heard the counsels for the parties and perused the record. The Agreement dated 30.01.2020 entered into between the parties is on record as Annexure A-2 to the application. As can be seen from the agreement, the Applicant had agreed to give a total payment of Rs. 1,50,00,000/- as fully secured and refundable Security Deposit to the Respondent (which was refundable within 14 days of the termination of the agreement from either side). The clause reads thus: -

*"18. The Agent has agreed to give a total payment of Rs. 1.50,00,000/- (Indian Rupees One Crore and Fifty Lakhs only) as fully secured and refundable Security deposit (to be refunded within 14 days of the termination of the agreement from either side), payable as per the following arrangement: a. Rs 50,00,000 (Indian Rupees Fifty Lakhs only) payable vide cheque no. 000130 RTGS at the time of signing of the agreement on 30th January 2020, against an undated cheque of the same amount drawn in favour of the agents, until the time of commencement of operations.  
b. Rs 50,00,000 (Indian Rupees Fifty Lakhs only) payable vide cheque no. 00131, dated 14th February 2020, drawn in favour of Nava Healthcare Pvt Ltd  
c. Rs 50,00,000 (Indian Rupees Fifty Lakhs only) payable vide cheque no. 000129, dated 28th February 2020, drawn in favour of Nava Healthcare Pvt Ltd*

*In consideration of the Agent rendering the services herein above mentioned and subject to the condition that the Agent shall have*

fully and faithfully performed all their obligations under this Agreement, the Principal shall pay to the Agent following charges, including commission at the rate of 2 % (two percent) of the monthly Net Sales (GST shall be paid additionally) on monthly basis. (Net Sales here represent invoice value without GST for merchandise and promotional items)

**Minimum Guaranteed Commission (MGC):**

MGC is 2 % of net sales or Rs.6,50,000 (Indian Rupees Six Lakhs Fifty Thousand only) /- plus GST less TDS Per Month whichever is higher and this Minimum Guaranteed Commission (MGC) shall be payable every month irrespective of any reasons that may affect the Sales.

In addition to the above the Principal shall also make payment of Interest at the rate of 9.00 % p.a, payable monthly on the amount of security deposit of Rs.1.50,00,000- to be deposited by the Agent. The details of payment schedule are given below:

S. No.	Cheque No.	Date	Amount	Bank	Remarks
1	000130	30-1-2020	50,00,000	Kotak	
2	000131	14-2-2020	50,00,000	Kotak	
3	000129	28-2-2020	50,00,000	Kotak	

Commission (MGC based on Net sales, whichever is higher), interest for deposit and other charges as mentioned above will be paid on a monthly basis by a succeeding month.”

12. Apparently, the agreement was terminated on 15.09.2021, thus the security amount was to be refunded by the Respondent to the Applicant by 29.09.2021. However, we find force in the plea raised on behalf of the Respondent that in terms of the provisions of Section 5(8)(f) of IBC, 2016, the security amount paid in terms of the agreement constitutes financial debt. A debt constitutes operational debt when the claim is in respect of provisions of

goods and services including employment or a debt in respect of payment of dues arising under any law for the time being in force and payable to the Central Government, State Government, any State Government or any local authority. The security amount does not fall in any of the categories referred to in Section 5(1) of IBC, 2016.

13. As far as the balance amount is concerned, we find that the amount defaulted to be paid after 25.03.2021 including the amount mentioned in Part-IV (37) and the rent for Lock in period i.e. Rs. 26,69,160/- does not meet the threshold limit of Rs. One Crore. We may not be oblivious of the fact that with termination of the agreement on 15.09.2021, the clause 21 also stood terminated. In terms of the clause, the Applicant was entitled to refund of the security amount besides seeking adequate compensation to recover the costs/expenses incurred in connection with the warehouse. The clause 21 reads thus: -

*“21. The Principal also agrees and acknowledges that the Agent is leasing a warehouse, setting up a firm, applying for drug licenses and employing sufficient time and resources to enter into this business venture and to mitigate the risk of the Principal failing to transfer stock, commence operations as per payment schedule, the Agent can decide to withdraw from the agreement and seek adequate compensation to recover the costs/expenses incurred in connection with the same, over and above seeking the refund of the Security Deposit in full.”*

14. As far as the proposal dated 17.11.2021 offered by the Respondent is concerned, it includes the amount of Security Deposit of Rs. 1,50,00,000/- and the interest on the total due amount. The amount agreed to be returned

by the Respondent includes the amount of Security Deposit of Rs. 1,50,00,000/- and interest thereon. If we reduce the interest on the security amount of Rs. 1,50,00,000/-, proportionately, the amount of 2,53,938/- Security amount plus interest thereon would not be Rs. One Core i.e. the threshold limit to order commencement of CIRP qua the CD.

15. In view of the aforementioned, the present application is found devoid of merits and is accordingly rejected. The Applicant would, however, be entitled to file a fresh application under Section 7 of IBC, 2016 qua the Respondent for the default committed in refund of the security amount. The present order would not come in the way of the Applicant to resort to the remedies available to it to seek the relief regarding its entitlement to the dues payable to it by the Respondent.

16. **The application stands disposed of accordingly. No cost.**

**Sd/-  
(L. N. GUPTA)  
MEMBER (T)**

**Sd/-  
(ASHOK KUMAR BHARDWAJ)  
MEMBER (J)**