



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

CP (IB) No. 207/MB-IV/2021

Under Section 9 of the I&B Code, 2016

In the matter of:

Kay Emm Biomedicals Private Limited

[CIN: U24232CH2001PTC024631]

...Operational Creditor/Applicant

V/s

Transasia Bio-medicals Limited

[CIN: U33110MH1985PLC036198]

...Corporate Debtor/Respondent

Order Dated: 19.04.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Vishal Phal i/b Ms. Sunita
Sonawane, Advocates.

For the Respondent(s) : Mr. Avinash Khanolkar a/w
Mr. Abhijeet Deshmukh,
Mr. Aatir Saiyed and Mr. Harsh
Sharma i/b Khurana and
Khurana, Advocates.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an application bearing C.P. (IB) No. 207/MB-IV/2021 filed by Kay Emm Biomedicals Private Limited, the Operational

Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Transasia Bio-medicals Limited, Corporate Debtor.

- 1.1 The Operational Creditor is a Company. The Application is filed by Mr. Rajesh Aggarwal, Managing Director of the Operational Creditor, duly Authorised vide Board Resolution dated 01.06.2019, passed by Board of Directors of Operational Creditor, claiming total outstanding amount of Rs.2,10,46,339.81/- (Rupees two crore ten lakh forty-six thousand three hundred thirty-nine and eighty-one paise only).
- 1.2 The date of default is stated to be 01.04.2018 in Part-IV of the Petition. The Petition is filed on 27.01.2021.
2. The case of the Operational Creditor is that:
 - 2.1 The Operational Creditor has entered into a yearly Clearance and Forwarding Agent Agreement dated 01.04.2018 with Corporate Debtor in the year 2009, which was extended from time to time and the latest Agreement was executed on 01.04.2018, which was valid up to 31.03.2019. By the said Agreement, the Operational Creditor was appointed as Clearance and Forwarding Agent for the goods manufactured/marketed/distributed by the Corporate Debtor.
 - 2.2 The Operational Creditor was to operate and be responsible to receive the stocks from Corporate Debtor, keep the stocks in warehouse, process the order received from the customer, dispatch the material after receiving the invoice from the

Corporate Debtor and processing of insurance claim for damaged and short materials of the Corporate Debtor, for which the Corporate Debtor was liable to pay service charges at the decided rates to the Operational Creditor.

- 2.3 As per the terms and conditions of the Agreement, the Operational Creditor used to raise a monthly bill upon the Corporate Debtor and the Corporate Debtor is liable to pay the bill amount within 30 days from the date of bill.
- 2.4 Since 2009 till March 2017, the Corporate Debtor was regular in making payment of monthly bills to the Operational Creditor. Though the Corporate Debtor failed to pay the monthly bills, considering the long business relationship, the Operational Creditor executed the fresh Agreement with the Corporate Debtor on 01.04.2018, the Corporate Debtor paid the amount of Rs.10,44,289.22, Rs.5,99,256.52 and Rs.2,68,156.82 to the Operational Creditor on 23.03.2018, which was adjusted towards the previous outstanding bills of the Corporate Debtor.
- 2.5 As per the said Agreement, the Operational Creditor furnished two Bank Guarantees of Rs.50,00,000/- each aggregating to Rs.1,00,00,000/- from HDFC Bank, as surety for the stocks that were to kept in the premises of the Operational Creditor, which were valid till 30.05.2019. The Corporate Debtor also agreed to pay the GST and service charges for the transportation of the goods.
- 2.6 As the Corporate Debtor defaulted in making payments of monthly bills, the Operational Creditor has terminated the Agreement in the month of August 2018 and after termination the

Corporate Debtor took away its entire stocks lying with the Operational Creditor. On the date of termination of Agreement, as per the invoices raised since April 2017 till August 2018, the outstanding amount was Rs.1,10,46,339.81 including the freight charges of Rs.12,22,171/-.

- 2.7 The Operational Creditor has farther claimed refund of amount of Bank Guarantee of Rs.1,00,00,000/- encashed by the Corporate Debtor without giving notice to the Operational Creditor upon its invocation on 26.06.2019.
- 2.8 The Operational Creditor issued the Demand Notice dated 13.08.2019 in Form 3 upon the Corporate Debtor claiming total outstanding of Rs.2,10,46,339.81. In the said Demand Notice, the Operational Creditor informed that they were withdrawing the first Demand Notice dated 09.08.2019. The Corporate Debtor has replied to the said Demand Notice vide its letter dated 22.08.2019 disputing the claim amount of Operational Creditor and stated that they have paid the entire invoice amount to the Operational Creditor and paid TDS on the said amount. The Corporate Debtor further submitted in its reply to Demand Notice that the outstanding invoice amount was adjusted towards the Debit Notes issued by the Corporate Debtor to the Operational Creditor.
- 2.9 The Operational Creditor has filed certificate issued by HDFC Bank under section 9 (3) (c) and also filed the Affidavit under section 9 (3) (b) as required under the Code.
3. The Corporate Debtor has filed its Affidavit-in-reply dated 23.09.2021 stating there is pre-existing dispute between the Operational Creditor and



the Corporate Debtor before issuance of Demand Notice and further submits as under:

- 3.1 The Operational Creditor expressed its inability to carry out the business due to which the agreement was terminated in August 2018. On the termination of Agreement, the Corporate Debtor carried out a stock audit at the premises of the Operational Creditor and found that there was a stock difference of Rs.90,60,275/- and the same was communicated to the Operational Creditor through E-mail dated 20.11.2018.
- 3.2 There has been an ex-parte order passed by the Sales Tax Department, raising demand of Rs.57,04,259/- for Assessment Year 2016-17 and a further demand of Rs.39,42,159/- for Assessment Year 2015-16 has been raised against Corporate Debtor for non-filing of Form F and Form C due to the negligence and breach of duty by the Operational Creditor.
- 3.3 The Operational Creditor failed to issue the proof of delivery of goods delivered to the customers, which is evidenced from the email dated 22.02.2019 forming part of petition, therefore, the Corporate Debtor forced to encash the unconditional bank guarantee on 26.06.2019.
- 3.4 Further, debits notes were raised by the Corporate Debtor upon the Operational creditor for various reasons.
- 3.5 The Operational Creditor issued a demand notice dated 09.08.2019 for an amount of Rs.1,10,46,339.81. Later, the Operational Creditor issued another Demand Notice dated 13.08.2019 for an amount of Rs.2,10,46,339.81.

- 3.6 The invocation of Bank Guarantee is not an Operational Debt. The Operational Creditor has produced a certificate under section 9(3)(c) issued by HDFC Bank and as per this certificate, the Operational Creditor has not received any amount from the Corporate Debtor since 01.04.2017 and the same contradicts the statement of accounts. The statement of accounts proves that the Corporate Debtor has deposited in the account of Operational Creditor on 27.04.2017, 07.07.2017, 09.08.2017, 24.08.2017, 21.09.2017, 10.11.2017, 29.12.2017, 09.03.2018, 17.03.2018, 23.03.2018 a total of Rs.59,08,252.97 by NEFT during the Financial Year 2017-18. The Ledger account of the Corporate Debtor appearing in the books of accounts of the Operational Creditor reveals that they have raised invoices aggregating to Rs.98,24,168.81 but no credit entries of Rs.59,08,225.97 paid by the Corporate Debtor is appearing in the said ledger.
- 3.7 The payments made by the Corporate Debtor also reflected in Income Tax website in Form 26AS aggregating to Rs.84,21,350 reflecting TDS of Rs.3,90,196/- during Financial Year 2017-18. The balance amount works out to Rs.14,02,818.81 only. The Operational Creditor has taken credit of TDS of Rs.3,90,196/- while filing their return of income.
4. The Operational Creditor has submitted the Affidavit-in-Rejoinder dated 27.01.2022.

Findings:

5. We have heard the arguments of the Learned Counsel for Operational Creditor and Corporate Debtor.

5.1 We find from the perusal of the Petition and documents enclosed thereto that the Operational Creditor acknowledged the stock difference through E-mail dated 22.12.2018 for a sum of Rs.58,45,050/- determined on MRP, however, the Operational Creditor itself admitted that if computed on basis of distributor price, it will come to 30 lacs and offered to settle it at Rs.25.00 lacs. This e-mail is forming part of the petition. Further, a statement giving details of debit notes raised by the Corporate Debtor upon the Applicant for total sum of Rs.2,03,09,050.25 from 31.03.2018 to 29.09.2019 is annexed with the Petition, hence the same are in knowledge of the applicant and have been received by it. The Operational creditor was under obligation to obtain written receipt of delivery of goods from the customers of the Corporate debtor in terms of clause 2.11 of the Service Agreement dated 01.04.2018 between the parties; were to be stored for 3 years; and were to produced to the Corporate Debtor within 24 hours of its demand, however, the same were not produced despite demanded by the Corporate Debtor by mail dated 22.02.2019 also forming part of the Petition. Further, the Operational creditor was also under obligation to obtain statutory declaration forms i.e. 'C' and 'F' form under clause 2.26 of the agreement and was to obtain registration, make compliances and respond to notices of VAT/GST authorities. Further, clause 2.27 seeks indemnification of the Corporate Debtor in case the Operational Creditor defaults in compliance with VAT/GST Regulations or demands arising from failure to obtain statutory declaration forms from the customers of the Corporate Debtor.

5.2 However, the Operational Creditor has refuted that it had such obligations under the agreement till August, 2018, but the Operational creditor has not filed agreement prior to 1.4.2018 to support this contention. However, as stated in preceding para(s), the claims of the Corporate Debtor on the issues raised in reply are tenable in view of the Agreement dated 01.04.2018. Accordingly, we find substance in the contention the contentions of the Corporate Debtor that it has counter claim in terms of agreement against the Operational creditor and its admissions in relation to stock is correct and such counter-claims of the Corporate Debtor far exceeds the amounts claimed to be in default in the present admission, as a sum of Rs.2,03,09,050.25 is claimed by way of debit notes and amount admitted to be recoverable on account of stock difference. In view of this, we feel that there exists a prior dispute in relation to amount claimed as debt and such dispute requires adjudication, hence this petition can not be maintained in view of specific bar in section 9 of the Code and the decision of the Hon'ble Supreme Court in case of *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (2018) 1 SCC 353*. In view of this, we feel that this petition deserves to be dismissed.

ORDER

6. The petition bearing CP (IB) 207/MB-IV/2021 filed by Kay Emm Biomedicals Private Limited, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP)

against Transasia Bio-medicals Limited, Corporate Debtor, is hereby
Dismissed.

7. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present Petition.

Sd/-

Prabhat Kumar
Member (Technical)

19.04.2023

Sd/-

Kishore Vemulapalli
Member (Judicial)