

**NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT- V**

C.P. 889/IB/MB/2022

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Voxtur Bio. Ltd.

Plot No. A-1, Royal Compound, Village Kaman Tamanmal, Kaman Bhiwandi Road, Taluka Vasai, District Palghar – 410208

**..... Operational Creditor/
Petitioner**

Vs

Rexel India Pvt Ltd

Office No. 407 to 414, 4th Floor, Insignia, 46, Sassoon Road, Pune – 411001

..... Corporate Debtor

Order Pronounced On: 27.09.2023

Coram:

Hon'ble Ms. Reeta Kohli, Member (Judicial)

Hon'ble Ms. Madhu Sinha, Member (Technical)

Appearances

For the Petitioner:

For the Respondent: Mr. Saurabh Kokane

Per: Ms. Reeta Kohli, Member (Judicial)

ORDER

1. The above Company Petition is filed by **Voxtur Bio. Ltd.** hereinafter called as the ("**Operational Creditor**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against **Rexel India Pvt Ltd** hereinafter referred to as the ("**Corporate Debtor**") by invoking the provisions of Section 9 Insolvency and Bankruptcy code (hereinafter called "**Code**") read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for a Resolution of Operational Debt of Rs. 1,63,94,658/- along with interest.
2. The case of the Petitioner captioned in Company Petition No. 889 of 2022 is that he has supplied Covid-19 Antibody based Rapid Test kits, VTM Viral Transport Medium & Covid-19 Antigen based Rapid Test kits etc. to the Corporate Debtor. All invoices of the material supplied have been tabulated and placed on record as Exhibit-J. The case of the Petitioner/Operational Creditor is that an amount of Rs. 1,27,28,772/- of the Operational Creditor is due towards the Corporate Debtor. The total amount after adding the interest element has been computed as 1,63,94,658/-. The case of the Petitioner/Operational Creditor further is that the requisite demand notice under Section 8 of IB Code in Form 3 was issued on 24.06.2022 annexed as Exhibit-L. The Demand Notice-Exhibit-L was replied to by the Advocate of the Corporate Debtor vide his response dated 07.07.2022, annexed as Exhibit-M. The case of the Petitioner is that vide the demand notice, the Respondent/Corporate Debtor was called upon to make the payment of the due amount against the pending invoices stated above within a period of 10 days of the receipt of the letter or otherwise he shall initiate Corporate Insolvency Resolution Process against the Respondent/Corporate Debtor.
3. While referring to the document, Exhibit-M which is a letter in response to the demand notice, the case of the Petitioner is that it is the first time after the receipt of the demand notice that the Respondent has raised the issue of defective Covid-19 Antigen based Rapid Test kits. The submission of the Petitioner is that it is an afterthought on the part of the Corporate Debtor just to

get out of the CIRP. It is further stated that it is an attempt to wriggle out of their contractual obligation to pay the due amount to the Petitioner/Operational Creditor. In response to this letter dated 07.07.2022 of the Corporate Debtor, the Operational Creditor through letter dated 11.07.2022 Exhibit 'N' made an attempt to project that the dispute between the Corporate Debtor and the Government Supplier has nothing to do with the Operational Creditor and his due amount. He also made reference to Para 5 of Exhibit-N. The relevant portion is being reproduced hereunder for ready reference:-

... the pre-existing dispute between your client and government undertaking (third party to the claim raised by the my client) in respect to supply cannot affect the legal course opted by my client under Insolvency and Bankruptcy Code, 2016 and does not fall within the category of dispute as specified under Section 8(2)(a) of Insolvency and Bankruptcy Code, 2017 as my client is not a party to the said dispute. In any case, my client has made independent inquiry from UPMSCCL and has come to know that they have not raised any dispute as to quality and nothing is due and payable by UPMSCCL to your client"

The attention of the Court was also drawn to the contents of Para-8 of this letter which too is being reproduced as under: -

... it is a matter of record and an admitted fact that there was no agreement between your client and my client regarding back to back payment arrangement i.e. 50% advance and remaining balance on receipt of payment, moreover it was 100% payment on placing purchase order for purchase of Covid-19 Antigen Rapid Test Kit"

4. The perusal of the above paras make it amply clear that the Petitioner/Operational Creditor is making attempt to submit that the pre-existing dispute between the Corporate Debtor and the Government undertaking with respect to the supply cannot affect the legal rights of the Petitioner under

Insolvency and Bankruptcy Code. It was further submitted that in the independent inquiry made by the Petitioner from UPMSCCL, they have come to know that no such dispute regarding the quality has been raised by the government supplier and none of the dues of the Corporate Debtor are pending towards UPMSCCL. The Petitioner while drawing the attention to the contents of Para-8 has stated that there was no agreement between the Respondent i.e. Rexel India Pvt Ltd and the Petitioner/Operational Creditor i.e. Voxtur Bio Ltd regarding the back to back payment arrangement i.e. 50% advance and remaining balance after receipt of payment. Further, it has been drawn to our attention that the 100% payment was to be made while placing the purchase order for purchase of Covid-19 antigen rapid test kit. In addition, Petitioner also referred to Exhibit-D; copy of the Invoice where it is clearly stated that "goods once sold will not be taken back under any circumstances" so as to reassert that the Corporate Debtor cannot be permitted to hold back the payment on the alleged ground of defective kits.

5. In response to the averments of the Petitioner, the Counsel for the Respondent/Corporate Debtor drew the attention of the learned Court to document Annexure-D annexed along with his reply dated 03.12.2021 stating therein that the Operational Creditor was very well informed of the defective kits vide its email dated 03.12.2021 and it was all in the knowledge of the Petitioner much prior to the issuance of demand notice dated 24.06.2022 under Section 8 of Insolvency and Bankruptcy Code. The attention of the Hon'ble Court was drawn to Clause 2 and 3 of the email dated 03.12.2021 wherein it is stated as under:-

"Agreed payment term as per the said PO is 50% advance and balance on receipt of payment from our customer. We have so far paid Rs. 1,83,10,068/- to you as advance.

As you are aware, we have not received payment of Rs. 2,39,74,453/- from our customer due to defects in the kits. Please refer the attached letter from our customer. Customer is also demanding the replacement of the defective kits".

6. Counsel for the Respondent further referred to communication dated 22.11.2021 (copy of this letter was forwarded to the Petitioner/Operational Creditor) received from his own client where the Corporate Debtor was informed that the goods supplied by them were faulty. Vide this communication, it was stated that it has been more than 5 months of informing the defective goods but the same have not yet been replaced. In the said eventuality, it was stated that you pick the material from various locations of the customers and replace the same within 15 days. The invoices so raised by the Corporate Debtor were stated to be not acceptable and the details of invoices against supply of goods and accepted kits were tabulated as under: -

| <i>INV DATE</i> | <i>INV. NOS</i> | <i>QTY SUPPLY</i> | <i>ACCEPTED QTY</i> | <i>REJECTED QTY</i> |
|-------------------|------------------------|-----------------------|-------------------------|-------------------------|
| <i>31.12.2020</i> | <i>2020/CIMH/10069</i> | <i>157000</i> | <i>49630</i> | <i>107370</i> |
| <i>08.01.2021</i> | <i>2020/CIMH/10212</i> | <i>140000</i> | <i>51359</i> | <i>88641</i> |
| <i>12.01.2021</i> | <i>2020/CIMH/10319</i> | <i>150000</i> | <i>56250</i> | <i>93750</i> |

Thus the Operational Creditor was not only well informed about supply of defective kits but was also asked to get the same picked up at its own cost.

7. The attention was further drawn to the communication dated 03.01.2022 annexed as Annexure-E vide which the Corporate Debtor brought to the notice of the Operational Creditor that his supplier informed him that in view of the faulty kits, the same have been rejected by UPMSCL and require replacement. It was brought to the notice of the Petitioner that due to this reason, the payment of the Corporate Debtor to the tune of Rs. 2,39,74,453/- is overdue for more than 365 days. It was also stated that they have been duly paid the advance amount of Rs. 1,83,10,068/- and the balance payment is to be made on receipt of the same from their clients. The attention was further drawn that the Corporate Debtor further made reference to the communication dated 23.02.2022 annexed as Annexure-E wherein it was again brought to the notice

to the Petitioner that UPMSCCL has rejected the kits and have not paid. The attention was drawn wherein the Corporate Debtor has stated, "*we do not intend to hold your payments, neither we have any ill intentions*". The Counsel for the Corporate Debtor also referred to the letter dated 04.01.2022 from the client of the Respondent/Corporate Debtor wherein he was informed that the faulty antigen rapid test kits have been rejected by their customer and stated that, "*we had informed you to replace the kits but no action till date has been taken*". Vide this communication dated 04.01.2022, the Corporate Debtor was asked to make arrangement to pick the material from various locations and replace the same within 7 days. It was further stated that in case you fail to do the needful, it will be assumed that all damages and consequences arising out of this, shall be your sole responsibility. The details of the depots were categorically tabulated. This communication from the client of the Respondent/Corporate Debtor was also brought to the attention of the Operational Creditor intimating him to pick up the defective kits and replace the same with defect free kits. But the Operational Creditor never bothered to do the needful, by replacing the defective kits, deserve no indulgence and the present Petition thus deserves to be dismissed.

8. After having gone through the pleadings and also arguments advanced by both the learned Counsels, this Court is of the considered opinion that the submissions by the Counsel for the Petitioner stating the Corporate Debtor for the first time is taking defence of the kits being defective only after the receipt of the demand notice under Section 8 of IBC seem to be factually incorrect. The perusal of the various documents i.e. the communication dated 03.12.2021, 02.11.2021 and 03.01.2022 clearly establishes that not only the factum of kits being defective but the same having been rejected by the client (end-customer) of Corporate Debtor and also the factum of the same lying at various depots awaiting replacement was brought to the attention of the Operational Creditor on various occasions. It is the Operational Creditor who has failed to replace these defective kits with defect free kits. Thus, in view of the same, we are unable to accept the contention of the Petitioner stating that its only after the receipt of notice under Section 8 that the defence of defective kits have been raised. Reference to the

above documents clearly depicts that much before the issuance of the demand notice, Respondent/Corporate Debtor had apprised the Petitioner of the supply of defective kits. It was also brought to his notice that the clients of Respondent have already rejected the material. It was also brought to their notice that the defective kits have been rejected and the same are stated to be lying at various locations. The Petitioner was clearly informed of picking up the defective kits and replacing the same. The Counsel for the Petitioner when put to these documents, accepted the factum of the communication but stated that there was no such clause in the agreement that the Respondent/Corporate Debtor can withhold their payments in any eventuality. The perusal of the pleadings show that no such agreement has been placed on record by the Petitioner to substantiate his arguments. On the contrary, reference has been made to Clause 2 of mail dated 03.12.2021 as under:-

"Agreed payment term as per the said PO is 50% advance and balance on receipt of payment from our customer. We have so far paid Rs. 1,83,10,068/- to you as advance".

9. In any case, as is borne out of the record, notice of demand was issued by the Petitioner to the Respondent on 24th June 2022 i.e. much after the Respondent having confronted the Petitioner with respect to defective supply of RTPCR kits as is evident from the above stated documents. The Respondent also had brought this to the notice of the Petitioner regarding the defective supply of kits much before the issuance of demand notice. He also brought to the attention of the Petitioner, the communication received from his own clients regarding the defective supply and the rejection of the same. The same is evident from the perusal of document (Annexure-F) dated 17.12.2021, initiating arbitration against the Respondent/Corporate Debtor.
10. It is pertinent to mention to certain relevant precedences on their issue of pendency of dispute, as is evident in the present case. The learned NCLT Jaipur Bench in CP/IB/216/9/JPR/2020 held that the dispute between the parties can

be inferred even from the correspondence between the parties. Para 12 to 14 of the order reads as under: -

"12. We have a number of judgments showing light on the aspect of pre-existing dispute under Section 9 of the Code. Conjoint reading of Section 8 and Section 9 of the Code shows that an Operational Creditor can trigger the CIRP, when there is an undisputed debt and a default in payment thereof. In the present case, the Corporate Debtor had raised dispute with respect to deficiency in service vide the e-mails dated 10.05.2018 to 15.08.2018 to the extent of stating that if the goods are not delivered till 14.05.2018 the Corporate Debtor will not be paying for the services, which was prior to issuance of Demand Notice under Section 8 of the Code. The Applicant had knowledge of the said dispute as well which is visible from its e-mail replies.

13. In Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd., para 34, the Hon'ble Supreme Court laid down what the Adjudicating Authority has to examine in an application under Section 9.

Para 34 is as follows:-

34. Therefore, the Adjudicating Authority, when examining an application under Section 9 of the Code will have to determine:

- (i) Whether there is an "Operational debt" as defined exceeding Rs. 1 lakh? (See Section 4 of the Code)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*
- (iii) Whether there is existence of a dispute between the parties or the record of the 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 pendency of a suit or arbitration proceeding filed before the receipt*

of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act. "

However, the defence has to be plausible and while not examining it on merits, it must not appear as a moonshine defence.

14. The correspondence between the parties herein clearly shows that a dispute had already arisen between the parties after the alleged services were rendered by the Applicant, which were not upto mark as mentioned by the Corporate Debtor. The exchange of e-mails between the parties is enough to show that there was pre-existing dispute with respect to the services rendered by the Applicant. Further, in view of the order of the Hon'ble Supreme Court in M/s S.S. Engineers vs. Hindustan Petroleum Corporation Ltd. & Ors. we are not inclined to commence CIRP of the Corporate Debtor".

12. Also, in Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (Civil Appeal No. 9405/2017), it was ruled by Hon'ble Supreme Court that, "what this Adjudicating Authority needs to see is, whether a dispute truly exists in fact and is not spurious, hypothetical or illusory". In the said judgment, the Hon'ble Apex Court amplified, "what is important is that the existence of dispute must be pre-existing i.e., it must exist before the receipt of the Demand Notice or invoice as the case may be. While examining the proposition regarding pre-existing dispute, we may usefully espouse that after the judgement of Hon'ble Supreme Court in Mobilox Innovations Pvt.

Ltd. (ibid), the definition of dispute has become inclusive and would mean not only the pending suit or arbitration proceedings, but also the controversy espoused in the letters written by Corporate Debtor to Operational Creditor regarding the quality of Goods or service. Therefore, as the Corporate Debtor had espoused the dispute by sending missives to the Operational Creditor, much before issuance of Demand Notice by Operational Creditor, in terms of Section 8 (1) of the IBC, 2016, and had also brought the existence of dispute to the notice of Operational Creditor by way of its reply under Section 8 (2) of the IBC, 2016, to the Operational Creditor, we are satisfied that pre-existing dispute between the parties was there. We are also satisfied that the dispute is not spurious or hypothetical. As it may, we have not commented upon the nature of dispute or the fault of the parties qua the same. In the present proceedings what we are required to see is whether dispute existed prior to issuance of Demand Notice and we have recorded our satisfaction only limited to this extent i.e., the existence of dispute.

11. Further it deserves to be added that while examining an application under Section 9 of IBC, 2016 we may not be oblivious about the financial health of the Corporate Debtor. The object of IBC is to ensure that the insolvent company is put back of its feet and not to disarray a solvent and sound company. The forum of NCLT cannot be allowed to be misused or adduced with ulterior motives and be used for recovery of its dues. After having appreciated the arguments of both the Counsels and from the perusal of the aforesaid facts and circumstances and also the documents, we are of the considered opinion that the contention of the Petitioner deserves to be rejected not only on the strength of the factual matrix but also on the basis of the law laid down.

In view of the above stated discussions and findings as above, we are of the considered opinion that the present Petition is misconceived and devoid of merits thus deserves to be rejected. Ordered accordingly.

Sd/-
MADHU SINHA
MEMBER (TECHNICAL)

Sd/-
REETA KOHLI
MEMBER (JUDICIAL)