

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH-II, CHENNAI**

IBA/98/2020 filed under section 9 r/w
Rule 6 of the Insolvency Bankruptcy
Code, 2016 r/w Rule 6 of the Insolvency
and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016.

In the matter of M/s. BHN Surgicals Private Limited

M/s. MEDI Biotek (India) Private Limited

4/29, Letangs Road, Portion C,
Vepey, Chennai - 600007

---Operational Creditor

V/s

M/s. BHN Surgicals Private Limited

(CIN: U33112TN2005PTC058036)

10 (Old No. 7 & 8),
Dr Radhakrishnan Nagar,
Arumbakkam, Chennai - 600106

---Corporate Debtor

Coram:

R. SUCHARITHA, MEMBER (JUDICIAL)

B. ANIL KUMAR, MEMBER (TECHNICAL)

For the Operational Creditor: *Shri. B. Sarath Babu, Advocate*

For the Corporate Debtor : *Shri. R. Chandra Mohan, Advocate*

Shri. Rohan Rajasekaran, Advocate

ORDER

Per: B. ANIL KUMAR, MEMBER (TECHNICAL)

Order pronounced on: 27.04.2021

It is an Insolvency and Bankruptcy Application filed under Section
9 of the Insolvency and Bankruptcy Code, 2016 (in short, **IB Code**,

IBA/98/2020

In the matter of M/s. BHN Surgicals Private Limited



2016) r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short, **IB Rules, 2016**) by M/s. MEDI Biotek (India) Private Limited (hereinafter referred to as **“Operational Creditor”**) for initiation Corporate Insolvency Resolution Process (in short, **CIRP**) against M/s BHN Surgicals Private Limited (hereinafter referred to as **“Corporate Debtor”**) on the ground that the Corporate Debtor failed to pay an amount of INR 22,75,514/- along with an interest of INR 8,48,192/- @18% per annum computed as on 03.09.2019 towards the supply of medical appliances (surgical instruments) and certain loans and advances.

2. On perusal of this company petition, the Operational Creditor is the supplier, trader and manufacturer of medical appliances and instruments and appliances for measuring, checking, testing etc.

3. The Corporate Debtor viz M/s. BHN Surgicals Private Limited is a Private Company, which was incorporated on 17.11.2005 vide CIN: U33112TN2005PTC058036 under provisions of the Companies Act, 1956. The Corporate Debtor is engaged in the business of manufacturing and marketing wide range of surgical products.

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4. The learned counsel for the Operational Creditor stated that the Operational Creditor had supplied medical appliances to the Corporate Debtor for which the invoices were duly raised by them. It was further submitted that the Corporate Debtor accepted the supply of surgical instruments and also the loans and advances advanced by the Operational Creditor were accepted by the Corporate Debtor and in this regard the Operational Creditor produced Debit Notes and Bank Account Statements. Thereafter, the Corporate Debtor failed to make the payment for the outstanding due of INR 22,75,514/- which comprises of the following:

S.No.	Particulars	Date of Default	Amount of Default (INR)
1.	Advance against Purchase	08.02.2017	17,55,669.00
2.	Loan granted on 12.07.2016 06.08.2016 03.04.2017	10.09.2016 05.10.2016 02.06.2017	2,71,000.00
3.	Material Supplied	20.11.2016 (being 30 days from 21.10.2016, i.e., the date of invoice)	2,48,845.00
		Total	22,75,514.00

5. It is further submitted by the learned counsel for the Applicant, considering the default committed by the Corporate Debtor, the Operational Creditor has issued a demand notice on 03.09.2019 in terms of the Insolvency and Bankruptcy Code, 2016 to the registered office of the Corporate debtor demanding the outstanding dues as on 03.09.2019 being INR 31,23,706/- (inclusive of an interest of INR 8,48,192/- @ 18% per annum on the default amount). In response to the demand notice, the Corporate Debtor through its Advocate, vide its reply dated 09.09.2019, denied the contentions made by the Operational Creditor in its demand notice. In fact, the Corporate Debtor made a counter claim against the Operational Creditor for an amount of INR 26,80,000/- towards the medical equipment supplied and commissions which was claimed to have been suppressed by the Operational Creditor in its Demand Notice. The Corporate Debtor also referred to the email correspondence between the Corporate Debtor and the Operational Creditor, wherein the Operational Creditor stated in its email dated 17.06.2017 that, as per books of accounts of the Corporate Debtor, owes an amount of INR 10,00,000/- to the MBT



Group of Companies and on the contrary an amount of INR 31,23,706/- is being claimed in the demand notice and by way of this, intimated the pending disputes between the parties.

6. Since the Corporate Debtor failed to pay off the debt, the Operational Creditor has filed application bearing IBA/98/2020 to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor before this Tribunal under the Insolvency and Bankruptcy Code, 2016.

7. The Corporate Debtor filed its counter to the Application filed by the Operational Creditor wherein it is claimed that the Application is not maintainable on the following grounds:

a) The alleged claim of the Operational Creditors is in the nature of loans and advances, which is evident from the Application. Section 5(21) of the IB Code, 2016 is exhaustive in nature and covers a debt in relation to only goods, services, employment or dues to the government and any other claims cannot be passed off as an operational debt.



- b) The Corporate Debtor relied on the order dated 20.08.2020 passed by the Hon'ble NCLAT in Company Appeal (AT) Insolvency No. 752 of 2019 wherein the Hon'ble NCLAT had ruled that advance payments even for supply of goods or services cannot be treated as "operational debt".
- c) The only claim which can be categorised as operational debt is with respect to the invoice dated 21.10.2016 towards supply of goods for which an amount of INR 2,48,845/- is payable by the Corporate Debtor. However, it is hopelessly time-barred and thereby barred by limitation.
- d) The Application suffers from the information by way of *Suppressio veri suggestio falsi*, in so far as the pre-existing disputes have been intentionally suppressed. The Operational Creditor is liable to pay the Corporate Debtor an amount of INR 26.84 Lakh towards goods supplied, apart from commission payable for the years 2014-15 to 2017-18 which were demanded from the Operational Creditor much before the demand notice was issued on the Corporate Debtor. Emails dated 16.06.2017

and 17.06.2017, capturing the email correspondence between the parties with respect to the pending dues from each other, was relied upon by the Corporate Debtor as proof of existence of dispute.

8. Heard the submissions made by the Learned Counsel / Authorized Representative for both the parties and perusal of the documents submitted by the Operational Creditor and the Counter filed by the Corporate Debtor and after the oral submissions made by the both parties , the following are our findings:

a) The Hon'ble Apex Court in *Mobilox Innovations Private Limited vs. Kirusa Software Pvt. Ltd.* observed as follows:

40. 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.

b) There is a pre-existing dispute between the parties which is evident from the email correspondence between the parties which was produced before this Adjudicating Authority by the Corporate Debtor along with its Counter. The Corporate Debtor had duly replied to the demand notice of the Operational Creditor and the disputes between them are pointed out in its reply.

9. In view of the Apex Court's observation and the existence of dispute between the parties, this Adjudicating Authority has to reject the application.



10. Accordingly, this application is **hereby dismissed**.

11. The Registry is hereby directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional by way of e-mail.

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

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(R. SUCHARITHA)
MEMBER (JUDICIAL)

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