IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH
KOLKATA

C.P (IB) No.74/KB/2020

In the matter of

An application under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

And

In the matter of:

Radico Khaitan Limited, having its registered office at Bareilley Road Rampur, Uttar Pradesh, Pin- 244901

… Operational Creditor

Versus

In the matter of:

Concept Biosciences India Private Limited (CIN: U85190WB2008PTC127172), having its Registered office at 1, A.J.C. Bose Road, 3rd Floor (Opp.Lord Sinha Road) B Wing, Kolkata, WB-700020.

…Corporate Debtor

Date of hearing :07/03/2022

Order Pronounced on : 01/04/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)
Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr. Aritra Basu , Adv.] For Operational Creditor
2. Mr. Arnab Dutta, Adv.
3. Ms.Prerana Choudhary, Adv.

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.

2. This petition under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016 has been filed by **Radico Khaitan Limited**, having its registered office at Bareilley Road Rampur, Uttar Pradesh, Pin- 244901,through its authorised signatory namely Mr. Satish Chandra Pandey, vide Board Resolution dated 10th February 2017 (Annexure-C) (hereinafter referred as the Operational Creditor), seeking initiation of corporate insolvency resolution process in respect of **Concept Biosciences India Private Limited (CIN: U85190WB2008PTC127172),** having its Registered office at 1, A.J.C. Bose Road, 3rd Floor (Opp.Lord Sinha Road) B Wing, Kolkata, WB-700020, (hereinafter referred as the Corporate Debtor).

3. It is submitted that in July, 2019, the Corporate Debtor had approached the Operational Creditor for supply of various quantities of Pharma pet bottles to their Baddi plant. The Corporate Debtor had placed various purchase orders through the official mail ID of the Corporate Debtor from August, 2019 to October, 2019 for supply various numbers of pharma pet bottles directly to its various units i.e. Visa Drugs, Benus Biosciences etc. It is further submitted that supply was made as per the terms and specifications in the purchase orders through surface mode of the transportation. The Corporate Debtor had duly received and utilized the goods without any demur and protest and no complaint or dispute was raised by the Corporate Debtor in respect of the quality and quantity of goods.

4. The Operational Creditor duly raised the invoices and sent the same to the Corporate Debtor from 23rd August,2019 to 23rd October, 2019 and delivered the same to the Corporate Debtor. The Operational Creditor usually gives credit facility of payment of 120 days from the date of billing subject to

the condition of providing the post dated cheques by the Corporate Debtor to the Operational Creditor for each consignment.

5. It is submitted that the parties have been doing business for the last 10 years by following this policy only. Only after the supply of the goods, repeated requests and reminders have been sent to the Corporate Debtor to provide the PDC's. It is submitted that the Corporate Debtor has failed to provide the PDC's. Thus, the Corporate Debtor breached the mutually agreed terms and conditions of the transaction and the Corporate Debtor has become liable to pay the invoice value immediately and the credit facilities of 120 days stands void for the Corporate Debtor. It is submitted that the Operational Creditor sent reminders to the Corporate Debtor to make payment but the Corporate Debtor has failed and neglected to do the same and did not pay any heed to the email sent by the Operational Creditor.

6. It is submitted that finally a Demand Notice was issued by the Operational Creditor on 28th December, 2019 by Speed Post and duly delivered to the Corporate Debtor on 29th December, 2019, and by electronic mail on 30th December, 2019. It is submitted that the Speed Post was duly received by the Corporate Debtor on 29th December, 2019. In this connection a copy of the demand notice along with postal receipt and tracking report as downloaded from the Website of India evidencing the proof of issuance and delivery of demand notice is annexed as Annexure-F.

7. It is submitted that the Corporate Debtor did not send any reply to the Demand Notice and did not raise any dispute in respect of the unpaid operational debt.

8. The Operational Creditor has filed affidavit under section 9(3)(b) which is annexed as Annexure-G to the petition. It is submitted that the operational debt became due, and default in payment of the said debt was committed by

the Corporate Debtor on 24th October, 2019. It is submitted that Rs.70,62,007/- inclusive of interest @ 24% pa is due and payable as on the date of demand notice (from 24.10.2019 i.e. date of default to 21st November, 2019 i.e. the date of issuance of demand notice). A copy of the computation showing the details of the outstanding amount and the date of default along with the calculation of interest is annexed as Annexure-H to the petition.

9. It is submitted that the date of default is 24th October, 2019.

10. In the reply affidavit filed by the Mr. Anand Kumar Paramanaka, Director of the Corporate Debtor, it is submitted that the petition is not maintainable as the person who has filed the application does not have the authority to file the application under section 9 of the Code. It is submitted that there are pre-existing disputes between the parties and the Corporate Debtor has raised dispute prior to the issuance of the demand notice dated 20th November, 2019. It is submitted that the Demand Notice is dated 20th November, 2019 but the same was sent on 28th November, 2019, which would be evident from the postal receipt appearing at page 18 of the petition.

11. It is submitted that the demand notice was served on the Corporate Debtor on 29th November, 2019 at 16:43:23 hours. The Email sending the demand notice was mailed on 30th November, 2019 at 3.41 pm. It is submitted that by email dated 17th November, 2019, the Corporate Debtor had duly informed the Operational Creditor that there has been quality issue with regard to the products supplied by the Operational Creditor, and called upon them to take back the goods which had been supplied by the Operational Creditor. In the reply to the said email, the Operational Creditor by its email dated 17th November, 2019 raised frivolous allegations. It is submitted that the Corporate Debtor replied to the said email by its email dated 17th November, 2019 clearly indicating that the Operational Creditor was informed verbally also about the quality of the products, and called upon

the Operational Creditor to take back the goods. The Operational Creditor replied to the said email by its email dated 17th November, 2019 and again raised frivolous allegations. It is submitted that in the said email, the Operational Creditor alleged that the Operational Creditor cannot lift the bottles back or accept rejection until a joint inspection is done. It is stated that the Corporate Debtor readily agreed for the joint inspection and a joint inspection was held and authorised representative of the Operational Creditor who came for joint inspection agreed that there was a quality problem. In spite of that the Operational Creditor did not take any step. It is submitted that the Corporate Debtor by email dated 29th November, 2019 informed the Operational Creditor that the representative of the Operational Creditor has also agreed that there was a quality problem. The Corporate Debtor further informed that as the Corporate Debtor is a manufacturer of medicines, the Corporate Debtor cannot take a risk if there is a quality issue in the bottles. Copies of the said emails exchanged between the parties are annexed collectively and marked as Letter A.

12. The Corporate Debtor further submitted that the demand notice was posted on 28th November, 2019 and delivered on 29th November, 2019. The Operational Creditor has suppressed the emails as mentioned above in the Demand Notice as well as in the petition. It is submitted that the Board Resolution did not authorize Mr. Satish Chandra Pandey to institute a proceedings under section 9 of the Code and that Mr. Satish Chandra Pandey did not have the authority to file the petition and he could not have authorised any advocate to file Vakalatnama on behalf of the Operational Creditor and the petition is liable to be dismissed on that ground alone. The Corporate Debtor has denied and disputed that any sum of Rs.70,62,007/- is due or payable by the Corporate Debtor to the Operational Creditor. It is denied that there has been any default on the part of the Corporate Debtor and or that there was any default on 23rd August, 2019 as alleged. It is denied and disputed that there was any agreement to pay interest @ 24% pa. The Corporate Debtor states that there is no sum due or payable by the Corporate

Debtor. It has been denied that the Corporate Debtor has received the goods without any demur or protest or any complaint or dispute has been raised by the Corporate Debtor in respect of the quality or quantity of the goods.

13. The Corporate Debtor further submitted in the reply that whenever the goods were found as per the specification, the Corporate Debtor would issue post-dated cheques and all the payments have been duly made. However, in respect of the invoices being the subject matter of the present petition , there was quality issue regarding the bottles supplied by the Operational Creditor and even if there is a slight defect or quality problem in the bottles, the Corporate Debtor cannot use the said bottles as per WHO norms and the Operational Creditor was duly informed about the defective quality of the bottles prior to the issuance of the demand notice and thus there was no question of Corporate Debtor providing PDC's to the Operational Creditor. It is submitted that the bottles are still lying at the site of the Corporate Debtor and the Operational Creditor is liable to take back the said bottles as the bottles are defective. The Corporate Debtor has denied that any payment in respect of the invoices is due as alleged. It is denied there is any debt which fell due or that 24th October 2019 is the date of default as alleged. Since no debt is due, the question of any default does not arise and cannot arise.

14. In the **Rejoinder**, the Operational Creditor through Mr. Hemant Kumar Jain, the authorised signatory of the Operational Creditor, submitted that Mr. Satish Chandra Pandey has left the organization and the company has authorised the present deponent Mr. Hemant Kumar Jain to file the present rejoinder affidavit. The deponent denied that the petition is not maintainable because the person who filed the application did not have the requisite authority to file the present application or that the application is liable to be dismissed. It is further denied that the application is not maintainable because there are pre-existing disputes between the parties or that the Corporate Debtor had raised any dispute prior to the issuance of the demand notice dated November 20, 2019 as alleged in the reply affidavit. It is submitted that the allegation of the Corporate Debtor as regards issuance of

demand notice on November 28, 2019 is inconsequential for adjudication of the present application. It is stated that the contents of email dated November 17, 2019 are false and incorrect and are denied. It is submitted that the contents of the email dated 17th November, 2019 does not show that there are any pre-existing disputes between the parties. It is submitted that only after consuming the products sent by the Operational Creditor that the email dated November 17, 2019 was sent by the Corporate Debtor. It is submitted that the email is only an afterthought and the contents thereof are denied and disputed. It is submitted that the Operational Creditor was making supply of the same products since 2010. No complaints whatsoever were ever raised as regards quality. It is submitted that for the purpose of avoiding payments, such frivolous email has been issued as regards the said products that were supplied since 2010. There was no issue in respect of the products and the Corporate Debtor could not have called upon the Operational Creditor to take back the goods. It is evident that the products delivered by the Operational Creditor were used and consumed by the Corporate Debtor. It is further denied in the rejoinder that the Corporate Debtor had indicated to the Operational Creditor regarding quality issues or that the Corporate Debtor called upon the Operational Creditor to take back the products supplied by the Operational Creditor. It is submitted that if at all, the Corporate Debtor contended that there has been any joint inspection for inspecting the products supplied by the Operational Creditor, the same should have been disclosed or produced in the present proceedings. It is submitted that the Corporate Debtor be called upon to produce such joint inspection report if any prepared by any independent inspecting agency. It is denied that the Operational Creditor agreed that there was any quality issue. It is further denied that the notice under section 8 was issued with any ulterior motive or with any mala fide intention or that there was any suppression on the part of the operational creditor or that there was any pre- existing dispute between the parties. The Operational Creditor has denied that the Board Resolution did not authorize Mr. Satish Chandra Pandey to institute the present proceeding under section 9 of the Code or that Mr. Satish Chandra Pandey did not have any authority to file the present petition. The Operational Creditor has reiterated that the petition should be allowed and the admission of commencement of CIRP of the Corporate Debtor.

15. During the course of arguments, Ld. Counsel for the Operational Creditor submitted that the purchase orders had been issued between August 2,2019 and October 9,2019, by the Corporate Debtor to the Operational Creditor, and pursuant to that, supplies were made, goods were duly received by the Corporate Debtor without any objection, demur or protest. The Invoices aggregating to a sum of Rs. 67,71,412/- (Rupees Sixty Seven Lakhs, Seventy One Thousand Four Hundred Twelve) were made over by Operational Creditor to the Corporate Debtor. Ld. Counsel further submitted that despite receipt of Invoices and reminders sent to the Corporate Debtor by the Operational Creditor when no payment was made by the Corporate Debtor, the Operational Creditor had to issue a demand notice under section 8 of the Code on 20th November, 2019 but no reply was sent by the Corporate Debtor to the said notice. Despite expiry of the 10 days from receipt of the notice, the Corporate Debtor failed to bring to the notice of the Operational Creditor, the existence of any dispute or pendency of any suit or arbitral reference.

16. Ld.Counsel for the Operational Creditor further submitted that there is thus no existence of any dispute before the receipt of demand notice dated November 20,2019.

17. It is submitted that the emails disclosed with the Reply Affidavit are vague, spurious and do not disclose any defence. Ld. Counsel has submitted that when the invoices were received by the Corporate Debtor, no objection was raised by the Corporate Debtor and only after expiry of approximately a month from the date of receipt of last invoice, misconceived emails, purporting to alleged deficiency in the said goods were issued by the Corporate Debtor. When the Operational Creditor requested for quality report and particulars regarding quality issues alleged by the Corporate Debtor, no particulars of alleged quality issues were disclosed by the Corporate Debtor.

18. It is submitted that email was issued by the Operational Creditor to the Corporate Debtor on November 17, 2019 indicating that goods cannot be taken back. Ultimately, the goods were never returned by the Corporate Debtor. Thus, the deficiency, if any, in the said goods was waived as the said goods were consumed, utilized by the Corporate Debtor. It is submitted that the email sent by the Corporate Debtor are vague and unsupported by any evidence. No joint inspection was provided as sought for by the Operational Creditor. Ld. Counsel further submitted that the defence put forth by the Corporate Debtor is spurious and illusory. Ld. Counsel has relied upon the order passed by the Hon'ble Supreme Court of India, in the matter of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited reported in (2018) 1 SCC 353; para 51*** *which is reproduced as under:-*

> ***" 51.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."***

Ld. Counsel also relied upon Judgment passed by the Hon'ble NCLAT in the matter of <u>GAC Logistics Private Limited Vs. AI Nafeez Frozen Foods Exports Pvt. Ltd.</u> in Company Appeal (AT) (Insolvency) Nos. 237 and 238 of 2018; para 3,4,and 5. These paras are reproduced as under:-

---

*" 3. Learned Counsel appearing on behalf of the Appellant submits that the Respondent deducted Tax at Source (TDS) and deposited with the Income Tax Department and thereby a frivolous dispute have been raised which cannot be accepted. Reliance has been placed on the decision of Hon'ble Supreme Court in "**Mobilox Innovations Private Limited Versus Kirusa Software Private Limited" - [(2018) 1 SCC 353] held**:*

> *"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 Company Appeal (AT)(Ins) 237 & 238 of 2018 Page 4 of 5 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."*

It is submitted that the Adjudicating Authority was required to separate spurious defence, which has not been examined in the present case.

*4. Similar issue fell for consideration before the Hon'ble Supreme Court in "**Innoventive Industries Ltd. Vs. ICICI Bank and Ors."** – [(2018) 1 SCC 407] wherein Hon'ble Supreme Court held:*

> *"29. The scheme of Section 7 stands in contrast with the scheme Under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the*

> *manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in Subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."*

From the aforesaid decision it is clear that if the dispute is frivolous unsupported by any evidence, the spurious defence is to be rejected. However, on the basis of records and evidence if there appears to be an 'existence of dispute', such case is to be rejected.

5. In the present case, it is not disputed that the Respondent had issued Lawyer's notice dated 12th December, 2015 and disputed the claim on the ground of overcharging. The 'Operational Creditor', was also informed that the 'Corporate Debtor' incurred huge loss due to overcharging. Counter claim was also made by Respondent. Such dispute having raised by Respondent in December, 2015, we are not inclined to accept the plea taken by the Appellant. We find no merit in this appeal. It is accordingly dismissed. No cost".

19. There was no appearance for the Corporate Debtor and the matter is being decided on the basis of reply affidavit and other documents placed on record by the Corporate Debtor.

20. The Operational Creditor has also filed statement of bank account, where the deposits are made or credit received normally by the Operational Creditor in respect of the debt of the Corporate Debtor (Annexure-I).

21. After considering all the pleadings and examining all the documents placed on record, we are convinced that the Operational Creditor has been able to make out a good case for admission of the petition because all the pre requisites of a petition under section 9 of the Code are fulfilled. The

Operational Creditor has delivered a detailed notice on the Corporate Debtor demanding the amount of outstanding debt due from the Corporate Debtor and the Corporate Debtor in spite of having received the said notice committed default in making the payment of the outstanding operational debt.The Corporate Debtor did not choose to send any reply to the demand notice.

22. The Operational Creditor proposed the name of **Mr. Ajay Kumar Agarwal,** to act as an IRP having Registration No. **IBBI/IPA-002/IP-N00608/2018-19/11859**,who has consented vide his affidavit and Form-2 and submitted that he has agreed to accept the appointment as IRP if an order admitting the present application is passed by this Adjudicating Authority. He has further submitted that no disciplinary proceedings are pending against him with the Board of Institute of Insolvency Professionals of ICAI.

23. The petition is otherwise complete in all respects.

24. The Operational Creditor has filed an affidavit under section 9(3)(b), and also the bank statement which indicates that no payment has been received from the Corporate Debtor after service of notice, nor has the Corporate Debtor sent any information or notice to the Operational creditor as regards any pre existing dispute in reply to the said demand notice. The emails stated to have been sent to the Operational Creditor by the Corporate Debtor do not, in our view, constitute any pre-existing dispute which can be termed as a 'genuine dispute' having any substance therein. In view of the aforesaid discussions, we admit the petition with the following orders:-

O R D E R S

i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, is hereby **admitted**.

ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

c) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

ix) **Mr. Ajay Kumar Agarwal**, registered with Insolvency and Bankruptcy Board of India, having Registration No. **IBBI/IPA-002/IP-N00608/2018-19/11859,** Email ID cs.aaa.2014@gmail.com hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective

Resolution Applicant within 105 days from the insolvency commencement date.

xi) The Operational Creditor/Applicant is directed to deposit **Rs.3,00,000/- (Rupees Three Lacs only)** with the IRP appointed hereinabove within three days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

25. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.

26. List the matter on 20/05/2022 for filing of **Progress Report**.

27. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on the 1st day of April, 2022

PJ.