

IN THE NATIONAL COMPANY LAW TRIBUNAL**NEW DELHI (COURT NO. IV)****Company Petition No. IB-1294/ND/2018**

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

IN THE MATTER OF:**ABDOS POLYMERS LIMITED****...APPLICANT/OPERATIONAL CREDITOR****VERSUS****M/S CALLINA CARE OVERSEAS PRIVATE LIMITED****...RESPONDENT/ CORPORATE DEBTOR***ORDER DELIVERED ON: 05.07.2021***CORAM:****DR. DEEPTI MUKESH****HON'BLE MEMBER (JUDICIAL)****MS. SUMITA PURKAYASTHA****HON'BLE MEMBER (TECHNICAL)****For the Applicant** : Mr. Kanwal Chaudhary Adv,**For the Respondent** : Mr. Rahul Jain, Adv

MEMO OF PARTIES**ABDOS POLYMERS LIMITED**

Registered office at:

8/1 Hardutral Chamaria Road

Howrah 711101

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

CALLINA CARE OVERSEAS PRIVATE LIMITED

Registered office at:

C-21 First Floor

Hauz Khas New Delhi 110016

...RESPONDENT/ CORPORATE DEBTOR

ORDER

AS PER SUMITA PURKAYASTHA (MEMBER TECHNICAL)

1. The present application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), 2016 (for brevity 'the Rules') by Abdos Polymers Limited (for brevity 'Applicant') through Mr. Sunil Kumar Gupta (Manager- Finance & accounts in the Applicant Company) with a prayer to initiate the



Corporate Insolvency process against M/S Callina Care Overseas Pvt Ltd (for brevity 'Corporate Debtor').

2. The Applicant Abdos Polymers Limited, claimed to be the Operational Creditor, is engaged in the business of Manufacture of plastic products, PP woven sacs bags and fabrics having its registered office at 8/1 Hardutrai Charia Rd Howrah. The identification number of the Applicant company is CIN:U25206WB1994PLC063054.
3. The Respondent M/S Callina Care Overseas Pvt Ltd is a company incorporated on 20.12.1999 under the Companies Act, 1956 having its registered office at C-21 First Floor Hauz Khas New Delhi 110016 and CIN U74140DL1999PTC102884. The Respondent is engaged manufacturing and export of Polypropylene Woven sacks to various customers outside India.
4. As per the averments made in the application, in the course of business, the Corporate Debtor had approached the Operational Creditor and purchased goods. The Corporate Debtor is an old customer of the Operational Creditor and have business relations from the year 2000 onwards. After due delivery of the goods (PP Sacks) the Operational Creditor had raised various invoices between 19.11.2015 and 29.12.2015 which remains partly unpaid. The debt fell due on 01.02.2016 with respect to the partly unpaid invoices amounting to Rs. 10,96,184.- along with interest @24% per annum of Rs. 3,22,278/-. The total amount of debt due is Rs.14,18,462/-.



5. The Applicant was constrained to issue demand notice dated 01.11.2017 under Section 8 of the Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, calling upon the Corporate Debtor to pay an amount of Rs.14,18,462/- with respect to the outstanding invoices including interest @24% per annum as per the invoice which is claimed by the Applicant from the Corporate Debtor. The notice was served upon the Corporate Debtor vide speed post and registered post and delivered on the address of the Corporate Debtor on 16.12.2017 as per the address reflected on the MCA website. As per the tracking report the item was shown to be delivered on 16.12.2017 however, that same was returned with a remark "Left" mentioned on the envelope.
6. The Corporate Debtor has not issued any reply against the issue of the Demand Notice dated 01.11.2017. The Operational Creditor has complied with the mandatory provisions of Section 9(3) (b) and (c) of the Code.
7. The Applicant filed this application dated 24.09.2018 as an Operational Creditor praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor for its inability to liquidate their claim of Rs.14,18,462/- towards unpaid invoices for the goods supplied by the Operational Creditor.
8. Notice with respect to the application was issued to the Corporate Debtor vide order dated 11.10.2018 of the Adjudicating Authority.



The Adjudicating Authority directed the Applicant to serve the application to the Directors at the factory address vide order dated 13.11.2018. Further the Applicant was directed to serve the copy of the order to the Corporate Debtor through email vide order dated 13.12.2018. On non appearance of the Corporate Debtor before the Adjudicating Authority, the Corporate Debtor was proceeded ex parte vide order dated 02.01.2019. Further the order was reserved by the Special Principal Bench and pronounced on 15.02.2019 as:

“ 1. Against the same Corporate Debtor, NCLT, New Delhi Bench (Court No. IV) have admitted another petition namely M/s Jaswant International Private Ltd. v. M/s. Canines. Care Overseas Private Limited, [(IB)-1060(ND)/2018 vide order dated 31.01.2019. As per the provisions of Section 11 of the Code, 2016 another Corporate Insolvency Process cannot be initiated against a corporate debtor that is undergoing a corporate insolvency resolution process. However, it is needless to add that the petitioner would be entitled to file her claim before the Insolvency Professional namely Shri Piyush Moona, email id piyushmoona@gmail.com, Registration No. IBBI/IPA-001 /IP-P00990/20 17-18/ 11630 in accordance with law which shall be duly considered.

2. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, interalia, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which arc to apply at various stages of Corporate



Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else the Interim Resolution Professional/Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer or passing an appropriate order.

3. It is made clear that if for any reason the Appellate Tribunal set aside the order dated 31.01.2019 then the petitioner shall be entitled to file appropriate application for revival of the petition or file a fresh petition.”

9. Further CA No. 475/ND/2019 application was filed by Operational Creditor seeking revival of the captioned petition IB-1294/ND/2018 which was originally filed, as during the CIRP, the Corporate Debtor in (IB)-1060(ND)/2018 settled the matter, where the CIRP order was passed. The Resolution Professional issued a written intimation on 02.08.2019 to the present Operational Creditor informing about the CIRP order being set aside against the Corporate Debtor in (IB)-1060(ND)/2018 and intimating the present applicant to pursue any



remedy available to it under the law. Hence the application CA No. 475/ND/2019 seeking revival of the captioned petition IB-1294/ND/2018 was allowed on 25.10.2019 and Notice was issued to the Corporate Debtor.

10. The Corporate Debtor filed its reply dated 24.11.2019 and submitted that there is a pre-existing dispute between the Operational Creditor and the Corporate Debtor. The Corporate Debtor has submitted that the Operational Creditor supplied sub standard products during the year 2014-2015. The Corporate Debtor vide email dated 07.08.2014 stated that the goods (PP sacks) supplied by the Operational Creditor did not meet the specification prescribed by the Customers. Subsequently vide email dated 27.03.2015 the Corporate Debtor informed the Operational Creditor that out of the total quantity of the goods (PP sacks) supplied approx 4.23% comes as a wastages and the Operational Creditor was requested to visit the Corporate Debtor's factory for verification of the same. Despite raising a concern the Operational Creditor failed to take any steps to rectify the same. Thereafter, by email dated 01.02.2016, the Corporate Debtor further informed the Operational Creditor that on account of delay on in supplying the goods (PP Sacks) the foreign customer has reduced the price of the raw material by INR 10/- per kg, by way of damages. In the email dated 01.02.2016 the Corporate Debtor had further stated that the total wastage comes to 1.5 tonnes and therefore, requested the Operational Creditor to settle the losses



sustained by Corporate Debtor. Pertinently, no response was issued by the Operational Creditor. The copy of the said emails have been annexed.

11. The fact that the raw material supplied by the Operational Creditor is of sub-standard quality stands further confirmed from the letter dated 25.03.2016 sent by Corporate Debtor 's customer rejecting the entire shipment of the raw material thereby causing a loss of USD 60030 to the Corporate Debtor. Another email dated 08.04.2016 was sent by the Corporate Debtor, requesting the Operational Creditor to resolve the issue relating to the losses sustained by the Corporate Debtor on account of the delay in supply of the goods (PP sacks) and the substantial amount of wastage in the goods (PP Sacks) supplied. Along with the email dated 08.04.2016, the Corporate Debtor had also sent a letter dated 08.04.2016 specifying the calculation of deductions made by its customers on account of delay in supply of goods and for the defective Material supplied. These deductions are in addition to the loss of USD 60030 sustained.

12. The Corporate Debtor stated that all the aforementioned emails, which were sent much prior to the filing of the present application, clearly shows that there is a pre-existing dispute, with counter-claim being made by the Corporate Debtor as regards the delay in supply of the goods and further wastage of approximately 1.5 tonnes that is required to be compensated by the Operational Creditor.



13. In “**Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC OnLine SC 353**”, the Hon’ble Supreme Court analysed the meaning of dispute with respect to Operational Creditors and observed:

“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.”



“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(iii) Whether there is existence of a dispute between the parties or the record of the 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?”

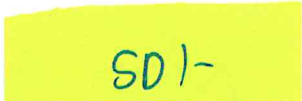
If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the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

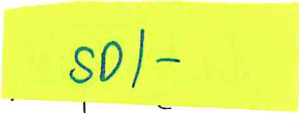
14. The date of default is 29.12.2015 which is the date of the last invoice issued which was unpaid, and the present application is filed on 24.09.2018. Hence the application is not time barred and filed within the period of limitation.
15. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.
16. From the aforesaid decision, it is clear that the dispute must exist before the receipt of demand notice or invoice. Be that as it may, on appraisal of the arguments advanced by the Ld. Counsels, it emerges that there were disputes existing prior to the issuance of the Demand



Notice. We find that in the e-mail dated 07.08.2014, 27.03.2015, 01.02.2016, 25.03.2016 and 08.04.2016 stating the deficiency in the goods (PP sacks) supplied and that the foreign customer had rejected the entire shipment of raw material supplied by the Operational Creditor, causing a loss of USD 60030 to the Corporate Debtor establishes that the Operational Creditor was aware of the dispute prior to issuance of Demand Notice dated 01.11.2017. A pre-existing dispute does not entitle the Operational Creditor to seek Insolvency Resolution of the Corporate Debtor.

17. In view of the above, this Bench is of the view that the prayer for initiating Corporate Insolvency Resolution process against the Corporate Debtor is not sustainable.
18. Application is therefore rejected and disposed off in terms of above order.


Sumita Purkayastha
Member (T)


Dr. Deepti Mukesh
Member (J)