

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
 “CHANDIGARH BENCH, CHANDIGARH”  
 (Exercising powers of Adjudicating Authority  
 under the Insolvency and Bankruptcy Code, 2016)**

**CP (IB) No.57/Chd/Pb/2018**

**Under Section 9 of the  
 Insolvency and Bankruptcy  
 Code, 2016.**

**In the matter of:**

**DELTAS PHARMA,**  
 having its registered office  
 at 1 to 5, 2<sup>nd</sup> Floor, Shreeji  
 Arcade, Opp. Nitin Co.,  
 Dr. Almeda Road, PANCHAKHADI,  
**THANE (West)-400602, India.**

...Applicant-Operational Creditor

Vs.

**INTERNATIONAL MARKETING  
 CORPORATION PVT.LTD.,**  
 having its registered office at  
 Inside Guru Nanak Dev Bhawan,  
 Bharat Nagar Chowk, **LUDHIANA-  
 141008.**

...Respondent-Corporate Debtor

**Judgement delivered on: 23.05.2018**

**Coram: Hon’ble Mr. Justice R.P. Nagrath, Member(Judicial).  
 Hon’ble Mr. Pradeep R. Sethi, Member(Technical)**

For the petitioner : Mr. Pritesh Burad, Advocate.  
 For the respondent : Mr. Rahul Rampal, Advocate.

**Per: Pradeep R. Sethi, Member(Technical)**

**JUDGEMENT**

The petition by the operational creditor in Form 5 is filed by M/s. Deltas Pharma (hereinafter referred to as the Petitioner) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) read with Rule 6 of the

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as the Rules). The petitioner M/s. Deltas Pharma is a proprietorship concern and Mr. Babuu Lal Jain is the sole proprietor. The Corporate Debtor is M/s. International Marketing Corporation Pvt. Limited (hereinafter referred to as the Respondent). As per master data of the respondent at Annexure A of the petition, the authorised share capital of the respondent is ₹1,00,00,000 and the paid up share capital is ₹ 10,00,000/-. The master data also shows that registered office of the respondent is inside Guru Nanak Dev Bhawan, Near Bharat Nagar Chowk, Ludhiana in the State of Punjab. Therefore, the petition lies within the jurisdiction of this Bench of the Tribunal.

2. The respondent is stated to have purchased pharmaceuticals products from the petitioner. It is stated in Part-IV of Form No. 5 that the respondent purchased the products from the petitioner and the total amount of goods purchased by the respondent under Invoice dated 25.03.2015 (Annexure B of the petition) is ₹ 1,54,848. It is further stated that as per the books of accounts of the petitioner, an amount of ₹ 1,46,810 remains outstanding due and payable by the respondent to the petitioner till date and a copy of the ledger account maintained by the petitioner is annexed as Annexure C of the petition. It is also stated that as per commercial terms, the respondent is liable to pay interest on the outstanding amount @ 24% per annum and as per details at Annexure F of the petition, interest of ₹ 82,921.51 has accrued on the aforesaid outstanding amount from 25.03.2015 till realisation which the respondent is liable to pay along with principal outstanding and thereby, the total liability is ₹ 2,29,731.51 along with running rate of interest @ 24% per annum. It is stated that despite repeated reminders, the respondent failed to make payment of the outstanding amount to the applicant. The petitioner sent demand notice (Annexure D)

dated 01.08.2017 in Form 3 of the Rules to the respondent, which was delivered on 09.08.2017 by registered post at the registered office of the respondent-corporate debtor. The postal receipt and postal tracking report are enclosed as Annexure E (colly). It is stated that 10 days passed thereafter and the respondent neither paid the dues to the petitioner nor raised any dispute. Annexure G is the certificate dated 20.09.2017 issued by the Karnataka Bank to the effect that amounting totalling ₹1,46,810/- or any part thereof has not been credited in the account of the petitioner. Prayer is, therefore, made for initiating the corporate insolvency resolution process under Section 9 of the Code read with Rule 6 of the Rules in respect of the petitioner. It is found that in Part III of Form 5, Interim Resolution Professional has not been proposed. We would also observe that in terms of Section 9(4) and Section 16(3) of the Code, the operational creditor is not bound to provide the name of the Resolution Professional to be appointed as Interim Resolution Professional.

3. Notice of this petition was issued to the respondent to show cause as to why the petition be not admitted. The petition has been opposed by the respondent by filing reply. It was stated that the respondent is a healthy company with an authorised capital of ₹ 1 crore and paid up capital of ₹ 10,00,000 and has sufficient reserve and surplus capital as on date. It was stated that the petitioner has alleged that the payment against the goods supplied vide Invoice No. MAR/P2P/550 dated 25.03.2015 amounting to ₹ 1,54,848 has not been received and there is an outstanding of ₹ 1,46,810 against the respondent, whereas, the bare perusal of statement of accounts of the respondent clearly reflects that the payment against Invoice No. MAR/P2P/550 has been made through bank transfer dated 01.12.2015 and the same payment is also reflected in entry dated 1.12.2015 attached with the petition as Annexure C. The copies of the statement of account duly maintained in the course of business of the

respondent and bank statement reflecting payment made are stated to be attached as Annexure R-1 and R-2 of the reply. It is stated that the respondent is doing business with the petitioner since December, 2013 and that the complete statement of accounts maintained in the due course of business reflects the account to be nil and the same fact is also reflected in the balance sheet of the respondent of 2016 attached as Annexure R-3 of the reply. It is, therefore, denied that there is any outstanding amount.

4. The rejoinder has also been filed by the petitioner reiterating that the respondent is under legal liability to pay the amount of ₹ 1,46,810 with interest thereon at 24% per annum and the same is evident from various reminders sent via e-mail by the petitioner to the respondent, which have not been controverted or replied to and a copy of trail e-mails dated 08.03.2016 was placed on record as Annexure L of the rejoinder. It is stated that the amount of last payment being co-incidentally the same amount of the invoice does not merely prove that there is no liability on the respondent, and payment of ₹1,54,848/- with the balance remaining in the account of ₹1,47,821.68 itself creates a doubt since ₹ 7026.68 is excess and further the amount of ₹ 7026.32 was written off by a Journal Entry dated 31.03.2016 and this amount was never communicated or demanded by the respondent.

5. It is stated further that as far as the audited books of account of the petitioner are concerned, an amount of ₹ 1,46,810 is outstanding on account of goods supplied and a copy of the audited ledger account maintained from 10.04.2013 between the parties till date, along with a certificate from its Chartered Accountants as to the final closing balances of the petitioner, is stated to be placed on record as Annexure M (colly) of the rejoinder. It is stated that plant and machineries (i.e. 2 Pouch Filling Machines, each of value of ₹ 1,45,050) of total value of ₹ 290,100 were purchased

for the respondent and the same were lying in the premises and in the custody of the petitioner till 26.03.2015. These were returned to the respondent on 26.03.2015 and a copy of Gate Pass dated 26.03.2015 is relied upon and placed on record as Annexure N (colly) of the rejoinder. It is stated that for the reasons best known to the respondent, they have charged a debit in their accounts statement of ₹ 1,36,830 on 31.03.2015 towards amortisation for One Pouch Filling Machine and this debit note was never raised and communicated by the respondent to the petitioner, because the machines were returned to the respondent as per above mentioned details. It is stated that the certificate issued by the Karnataka Bank Limited is not false and manipulated and in fact before requesting the bank to issue the certificate, the petitioner has served a demand notice dated 01.08.2017 to the respondent which was duly received and accepted and not controverted or replied by the respondent and this itself proves that the amount of ₹ 1,46,810 is accepted by the respondent.

6. During the course of arguments, learned counsel for the petitioner relied on the petition, Form 5 and the rejoinder and pleaded that the duly served demand notice dated 01.08.2017 was not controverted or replied by the respondent and as per the audited books of accounts of the petitioner, an amount of ₹ 1,46,810 is outstanding on account of goods supplied. In reply, the learned counsel for the respondent referred to Part IV of Form 5 and stated that the petition relates to non payment only in respect of one Invoice dated 25.03.2015 for ₹ 1,54,848/- and the copy of the ledger account of the respondent in the account books of the petitioner showed that payment of the amount of ₹ 1,54,848/- was credited on 01.12.2015. It was further pleaded that the accounts statement of the respondent in the books of the petitioner was filed only for the period 01.04.2015 onwards as Annexure C of the petition and that the opening

balance as on 01.04.2015 was a debit of ₹ 4,90,402 therein, but the statement of account for the earlier years was not furnished by the petitioner.

7. It was submitted that the bank certificate of Karnataka Bank Limited filed at annexure G of the petition records that no payment was received in the bank account of the petitioner from the respondent on or after 01.08.2017, whereas the payment had been made much earlier on 01.12.2015. The learned counsel for the respondent referred to the rejoinder filed by the petitioner and stated that there is no evidence filed that the machinery was received back by the respondent and the Gate Pass dated 26.03.2015 (Annexure N of the rejoinder) also did not show any receipt of the machinery by the respondent. In the rejoinder, the learned counsel for the petitioner stated that the accounts of the respondent in the books of the petitioner prior to 01.04.2015 were filed along with the rejoinder. It was also stated that the certificate from Bank of Karnataka was proper, since it covered the period after the issue of demand notice in Form No. 3 and certified that no payment was received in the bank account of the petitioner from the respondent on or after 01.08.2017. It was contended that the Gate Pass clearly showed that the machinery was sent to the respondent on 26.03.2015. It was further submitted that the petitioner was following the first in first out (FIFO method) and by that method, the outstanding of ₹ 1,46,810 was clearly in respect of the invoice dated 25.03.2015 for ₹1,54,848.

8. We have carefully considered the submissions of the learned counsel for the parties and also perused the record. The petition is filed under Section 9 of the Code and one of the conditions for admission of the petition under Section 9(5) is that no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility. Dispute has been defined in Section 5(6) as follows:

”(6) ‘dispute includes a suit or arbitration proceedings relating to –

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty;”

9. The Hon’ble Supreme Court in **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited** (Civil Appeal No. 9405/2017) has held in para No. 40 as under:-

*“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.*

10. In view of the legal provisions and the decision of the Hon’ble Supreme Court of India (supra), the existence of a dispute in the present case is, therefore, being examined.

11. We find that the learned counsel for the respondent is correct in pleading that the petition and Form 5 are in respect of non payment of Invoice No. MAR/P2P/550 dated 25.03.2015 for ₹1,54,848. This is clearly evident from Part IV of Form No. 5 in which the reference has been made only to the above mentioned Invoice dated 25.03.2015 (Annexure B of the petition). Prima-facie, it is evident that the amount of ₹ 1,54,848/- was received by the petitioner and credited in the account of the respondent maintained in the books of the petitioner on 01.12.2015 (Annexure C of the petition). It has been pointed out by the learned counsel for the respondent that the account of the respondent in the books of the petitioner has been filed by the petitioner in the petition only for the period 01.04.2015 to 31.03.2017. This account shows an opening debit balance of ₹4,90,402 showing that there were transactions before 01.04.2015. In the rejoinder filed vide Diary No. 1556 dated 14.05.2018, it is stated in the Index as well as at Page-2 of the rejoinder that the audited ledger account maintained from 01.04.2013 between the parties till date, along with a certificate from its Chartered Accountant as to the final closing balances of the applicant, is filed as Annexure M of the rejoinder. However, annexure M only gives group summary of sundry debtors for the periods 01.04.2013 to 31.03.2014, 01.04.2014 to 31.03.2015, 01.04.2015 to 31.03.2016 and 01.04.2016 to 31.03.2017 along with a certificate of the Chartered Accountant regarding the closing balances of the respondent as on 31.03.2013 to 31.03.2017. The certificate is stated to be as per the information and explanation given and as per the audited balance sheet of the financial years ending 31.03.2013 to 31.03.2017 of the petitioner. Therefore, the certificate of the Chartered Accountant is based on the audited balance sheets and not on the account books and ledger accounts maintained therein. The ledger accounts of the respondent in the

books of the petitioner are filed only for the period 01.04.2015 to 31.03.2017 (Annexure C of the petition) and not for the periods prior to that date.

12. On the other hand, in the reply filed vide Diary No. 1438 dated 07.05.2018 (Annexure R-1), the respondent has filed a copy of statement of accounts of the petitioner in the books of the respondent from 01.04.2013 to 31.03.2016. This account shows nil balance on 31.03.2016. The account of the respondent in the books of the petitioner as on 01.04.2015 shows an opening debit balance of ₹ 4,90,402 (Annexure C of the petition). On the other hand, the account statement of the petitioner in the books of the respondent shows a credit balance of ₹ 81717.68 on 01.04.2015 (Annexure R-1 of the reply). The difference is partly on account of payment by the respondent to the petitioner of ₹ 1,00,000/- accounted for by the respondent on 31.03.2015 and by the petitioner on 06.04.2015. As regards the remaining difference, the reconciliation has not been furnished by the petitioner. The petitioner has only referred to entry dated 31.03.2015 in the books of the respondent by which amount of amortisation for one Pouch Filling Machine retained of valuers 145050 less amortisation of ₹ 8220 already given 24.11.2014 i.e. ₹ 1,36,830 is debited to the account of the petitioner in the respondent's books. The petitioner's claim in the rejoinder is that the plant and machineries i.e. two Pouch Filling Machines (each of value ₹ 1,45,050) of total value ₹ 2,90,100 were purchased for the respondent, which were lying in the premises and in the custody of the petitioner till 26.03.2015 and were returned to the respondent on 26.03.2015. A copy of Gate Pass 26.03.2015 is placed on record as Annexure N (colly) of the rejoinder. The learned counsel for the respondent has pointed out that the petitioner has not filed any evidence to show that the two Pouch Filling Machines were handed over and received by the respondent. We find that the Material Gate Pass dated 26.03.2015 of the petitioner states that the

Pouch Filling Machines were taken out by one Mr. Satveer Singh. However, no evidence is filed or led by the petitioner to show that Mr. Satveer Singh was representing the respondent.

13. Therefore, there is clearly a dispute between the petitioner and the respondent whether the two Pouch Filling Machines continued to be in the possession of the petitioner or were handed over to the respondent. The petitioner's contention in the rejoinder is that the debit in the accounts statement of ₹ 1,36,830 on 31.03.2015 towards amortisation of one Pouch Filling Machine retained was never raised and communicated by the respondent to the petitioner. This contention would also show that the dispute above mentioned, exists. The petitioner has pleaded in the rejoinder that the balance remaining as per the accounts statement of the petitioner in the books of the respondent as on 12.07.2015 was ₹ 1,47,821.68 and this itself creates a doubt why the respondent has paid ₹ 1,54,848 in which ₹ 7026.68 is in excess and further the amount of ₹ 7026.32 was written off by a Journal Entry dated 31.03.2016 and this amount was never communicated or demanded by the respondent.

14. We have observed above that the application in Form No. 5 only relates to non payment of Invoice dated 25.03.2015 amounting to ₹ 1,54,848 and that prima-facie, the payment of this amount of ₹ 1,54,848 was received and recorded in the petitioner's books on 01.12.2015. The doubt raised by the petitioner has therefore, no force, since as per respondent, the payment of invoice amount was being made. The petitioner has referred to the first in first out (FIFO method). However, in view of the dispute, this contention has no relevance.

15. The petitioner has referred in the rejoinder to trail e-mails dated 08.03.2016. We observe that the e-mails (Annexure L of the rejoinder) refers in the first para to

attachment of ledger showing therein outstanding of ₹146810.24. However, a copy of the attachment has not been furnished. Further, the e-mail dated 08.03.2016 available at Annexure L of the rejoinder does not show whether any attachment was sent. We may also state that mere non reply to the e-mail cannot lead to the conclusion that the outstanding of ₹146810.24 is accepted as correct by the respondent. We also add that in view of the discussions made above, the failure to reply to the demand notice in Form 3 dated 01.08.2017 cannot be taken as acceptance of the claim of the petitioner, especially in view of the evidence placed on record by the respondent to show that there was no outstanding as on 31.03.2016 especially when the claim of petitioner was based only on one invoice.

16. Therefore, we find there is dispute relating to the existence of the amount of debt as per Section 5(6)(a) of the Code. The Hon'ble Supreme Court in **M/s. Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited** (Civil Appeal No. 9405 of 2017) supra, has held in Para No. 40 thereof that 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 was also held that the court does not need to be satisfied that the defence is likely to succeed. We find that in view of the observations of the Hon'ble Supreme Court of India and the discussion made above, the dispute raised by the petitioner truly exists in fact and is not spurious, hypothetical or illusory. We, therefore, reject the application.

In result thereof, the application is rejected.

Sd/-  
(Justice R.P. Nagrath)  
Member (Judicial)

Pronounced in open court.

Sd/-  
(Pradeep R. Sethi)  
Member(Technical)

May 23, 2018  
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