

**In the National Company Law Tribunal
Kolkata Bench
Kolkata**

Before Shri Jinan K.R., Hon'ble Member (J)

C.P. (IB) No. 799/KB of 2018

In the matter of:

An application u/s. 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:

M/s. SHRM Biotechnologies Private Limited, a company incorporated under the Companies Act, 1956 having its registered office at Poddar House, Humaipur, P.O. Abdalpur, Madhyamgram, Kolkata 700155;

... **Applicant/Operational Creditor**

-Versus-

M/s. VAB Commercial Private Limited, a company incorporated under the Companies Act, 1956 having its registered office at 46/A, Amherst Street, Kolkata 700009 and also having office at premises No. 3A, Auckland Place, 10th Floor, Site No. 10A, Kolkata 700016.

... **Respondent/Corporate Debtor**

Counsel appeared:

1. Mr. Akash Sharma, Pr. CS] For the operational
] creditor



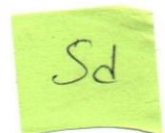
Order pronounced on 11/10/2018

ORDER

1. This is an application filed by SHRM Biotechnologies Private Limited/operational creditor u/s. 9 of the Insolvency and Bankruptcy Code, 2016 (In short, **I & B Code**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process as against the VAB Commercial Private Limited/corporate debtor claiming that an amount of Rs.3,63,122/- is due from the corporate debtor and despite demand notice delivered to the corporate debtor, the corporate debtor failed to pay the debt, hence this application.

2. Briefly stating the facts as the following:-

(a) The operational creditor has been carrying on the business of providing organised and comprehensive services and training in the field of bio-pharmaceuticals and bio-technology and has also been producing hygienic quality feeds for cattle. Since the operational creditor has been looking for an investor to enter into a Joint Venture for optimum capacity utilisation of its feed plant and for expanding its business for producing cattle feed to fish feed, the operational creditor had approached the corporate



debtor for arranging an investor. Accordingly, on the basis of the mandate letter issued by the operational creditor to the corporate debtor, the operational creditor paid a sum of Rs.3,00,000/- (Rupees Three Lakhs) only to the corporate debtor as initial advance as agreed between the operational creditor and the corporate debtor.

(b) From the mandate letter issued by the corporate debtor to the operational creditor for signature, it is conspicuously clear that in the event the corporate debtor is not able to arrange for a deal with the prospective investor, the entire amount paid by the operational creditor as initial advance would be refunded to the operational creditor. It is also conspicuously clear from the mandate letter that the corporate debtor would serve as advisor to the operational creditor for a period of 3 months from the date of confirmation of the assignment, i.e., the date of execution of the mandate letter.

(c) The operational creditor had signed the mandate letter in favour of the corporate debtor on 07/09/2016 and paid the initial advance of Rs.3,00,000/- (Rupees Three Lakhs) only for service sought to be rendered by the corporate debtor. However, the corporate debtor has failed and neglected to arrange any deal with the prospective investor nor the corporate debtor has



refunded the said sum of Rs.3,00,000/- to the operational creditor as was agreed between the operational creditor and the corporate debtor.

(d) Since the corporate debtor has failed to provide the requisite services to the operational creditor, the operational creditor is entitled to an interest @ 18% compounded quarterly calculated on the said sum of Rs.3,00,000/- (Rupees Three Lakhs) only amounting to Rs.63,122/- (Sixty three thousand one hundred twenty-two) only. Thus, the corporate debtor is liable to pay the operational creditor a sum of Rs.3,63,122/- (Rupees Three Lakh Sixty Three Thousand One Hundred and Twenty Two) only on account of principal and interest. The applicant has sent demand notice on 02.01.2018. The notice was delivered to the corporate debtor on 09.01.2018. No reply or notice of dispute was raised on the side of the corporate debtor. The applicant also did not propose any Insolvency resolution professional. Upon the said contention, the applicant prays for admitting the application.

3. The respondent/corporate debtor did not turn up despite delivery of notice of admission.

4. Heard the Ld. Pr. CS appearing on the side of the operational creditor/applicant. Perused the records.



5. An interesting question arises for consideration, in the case in hand as to whether return of advance in breach of terms in the mandate letter signed and executed by the operational creditor in favour of the corporate debtor dated 07/09/2016 comes under the purview of operational debt?

6. The operational creditor is a company carrying on the business of providing organised and comprehensive services and training in the field of bio-pharmaceuticals and bio-technology and has also been producing hygienic quality feeds for cattle. In order to run its business and to get investors who may invest in the joint venture sought to be initiated by the operational creditor and to get advice as requested by the applicant, a mandate letter was issued by the corporate debtor. Satisfying the terms in the mandate letter the applicant has signed the letter agreeing to the terms in it on 07/09/2016.

7. In terms of the mandate letter, the corporate debtor was paid the initial advance of Rs. 3 Lakhs (Rupees Three Lakhs only) by the operational creditor for the services agreed to be rendered by the corporate debtor. It is alleged that the corporate debtor has failed and neglected to furnish any detail of the prospective investors, thereby committing breach of terms in the mandate letter. Despite breach of terms in the mandate letter, the

corporate debtor has not refunded the advance amount of Rs. 3 Lakhs (Rupees Three Lakhs) paid by the operational creditor to the corporate debtor. Since the corporate debtor has failed to provide the requisite service to the operational creditor, the operational creditor claims refund of Rs.3 Lakhs with interest @ 18%, compounded quarterly. According to the operational creditor, they are entitled to claim interest at the aforesaid rate to the tune of Rs.63,122/- thereby claimed a total sum of Rs. 4,63,122/-.

8. Claiming the above said amount, the operational creditor has issued a demand notice on 02/01/2018. The demand notice was served on the corporate debtor on 09/01/2018 (Track Consignment at page 88 proves delivery of demand notice on 09/01/2018).

9. Ld. Pr. CS submits that despite service of demand notice on 09/01/2018, the corporate debtor did not send a reply nor raised any dispute and also did not turn up before the Adjudicating Authority to contest the application and therefore, the application is liable to be allowed.

10. He would further submit that the amount claimed by the operational creditor falls under the definition of debt as defined u/s. 3(11) of the I & B Code. Section 3(11) defines “**debt**”

means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt". No doubt this definition does not mean or cover a refund of advance money paid to the corporate debtor for rendering service to the operational creditor. What is to be looked into is whether the applicant should be considered as an operational creditor within the meaning of Section 9 read with Section 5(20) of the Code.

11. Section 5(20) of the Code defines Operational creditor. It reads as "***operational creditor***" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;".

12. So to claim that the applicant is an operational creditor, what is to be due to the operational creditor must be an operational debt. An operational debt is defined u/s. 5(21) of the Code.

13. It reads as "***operational debt***" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and

payable to the Central Government, any State Government or any local authority;”.

14. A reading of Section 5(21) of the Code, it is clear that the debt includes a claim in respect of provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, State Government or any local authority. The applicant in this application does not come under the category of Central Government, State Government or any local authority nor fall within the definition of sub-section (21) of Section 5 of the Code. So the question is whether refund claim of advance paid for rendering service by the corporate debtor would fall within the meaning of a claim in respect of provision of goods; or services including employment.

15. Admittedly, the applicant herein neither did render any service to the corporate debtor nor did provide any goods to the corporate debtor. There is also no agreement entered into as such in connection with any service or services of goods by the operational creditor to the corporate debtor nor did the corporate debtor enter into an agreement with the operational creditor. What is relied upon is a mandate letter. What I understood is that the corporate debtor is a service provider dealing with the

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financial advice and issued mandate letter dated 16/08/2016 prescribing certain terms and conditions so as to provide advice to the operational creditor and that letter has been signed by the operational creditor and has paid Rs. 3 Lakhs (Rupees Three Lakhs) as advance. Alleging breach of term on the side of the corporate debtor, this application was filed contending that the applicant is an operational creditor. Hon'ble Principal Bench, NCLT, New Delhi in **Sajive Kanwar V. AMR Infrastructure (CP.No.(ISB)-03 (PB) 2017** discussed in detail the definition of Operational Creditor. It is good to read the following paragraph in the said order. It reads as follows:-

"In order to fall within the four corners of 'Operational Creditor' as per Section 9 of the IBC, it must be shown that he is a person to whom an 'Operational Debt' is owned or it is legally assigned/transferred as is patent from a bare perusal of Section 5(20) of IBC. The expression 'Operational Debt' has been defined by Section 5(21) of IBC and it must fulfill following substantive elements namely:

- (a) Debt arising out of provisions of goods; or***
- (b) services; or***
- (c) out of employment***

It also covers dues arising under any law for the time being in force and payable to the Central or State Government or local authority. It is doubtful whether it would include all debts other than 'Financial Debt' because we do not find any such 'Legislative intendment' from the Part II of IBC which deals with 'Insolvency and Liquidation for Corporate Persons'."

16. The operational creditor, in the case in hand, does not fall within the above referred 3 elements of the definition of operational creditor. Therefore, I am of the considered view that the claim of the applicant here in this case does not fall within the definition of operational debt. Therefore, I come to a conclusion that the applicant herein is not an operational creditor as defined u/s. 5(20) read with Section 5(21) of the I & B Code and therefore, this application requires no consideration. It is liable to be dismissed.

In the result, the petition is dismissed.

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


(Jinan K.R.)
Member (J)

Signed on this, the 11th day of October, 2018.

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