

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 232/9/JPR/2019

(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:

NARAYAN ORGANICS PRIVATE LIMITED

...Operational Creditor

Versus

PRAYAG POLYTECH PRIVATE LIMITED

...Corporate Debtor

MEMO OF PARTIES

Narayan Organics Private Limited

CIN: U24110GJ1992PTC017951

R/o Plot No. 1305/6/A+B Phase 4,

G.I.D.C., Naroda, Ahmedabad

Gujarat-382330

...Applicant

VERSUS

Prayag Polytech Private Limited

CIN: U28994RJ1982PTC012328

R/o C-587, Phase-1, Industrial Area,

Bhiwandi, Alwar, Rajasthan - 301019

...Respondent

For the Applicant : Jatin Chawla, Adv.
For the Respondent : Virendra Ganda, Sr. Adv.
Karan Pratap Singh, Adv.
Ayandeb Mitra, Adv.

Order Pronounced On: 02.03.2023

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This Application is filed by M/s Narayan Organics Private Limited through its authorised signatory Mr. Dahyabhai Narandas Patel ('Operational Creditor' / 'Applicant'), seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against Prayag Polytech Private Limited ('Corporate Debtor' / 'Respondent'), under Section 9 of the Insolvency and Bankruptcy Code 2016 ('IBC' / 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules').
2. The Applicant, M/s Narayan Organics Private Limited, is a manufacturer and supplier of Copper Phthalocyanine Crude Blue and its derivative. Their registered office is located at Plot No. 1305/6/A+B Phase 4, G.I.D.C. Naroda, Ahmedabad-382330. The alleged default on the part of the Respondent for the non-payment of operational dues amounting to Rs. 98,11,034/- (Rupees Ninety-Eight Lakh Eleven Thousand and Thirty-Four Only) including an amount of Rs. 7,31,989 (Rupees Seven Lakh Thirty-One Thousand Nine Hundred Eighty-Nine Only) being an interest @18% per annum.

3. The Corporate Debtor, Prayag Polytech Private Limited, is a private limited company incorporated under the Companies Act, 1956, on 16.08.1982, having CIN: U28994RJ1982PTC012328. The Respondent has its office situated at -c- 587, Phase-1, Industrial Area, Bhiwandi, Alwar, Rajasthan-301019. The Corporate Debtor has an Authorised Share Capital of Rs. 15,00,00,000/- (Rupees Fifteen Crores Only) and Paid-Up Share Capital of Rs. 7,94,93,700/- (Rupees Seven Crore Ninety-Four Lakh Ninety-Three Thousand and Seven Hundred Only).
4. The details of the transactions leading to the filing of this Application are averred by the Applicant *vide* Diary No. – 1788/2019 dated 04.09.2019 are as follows:
- a. The Applicant is a manufacturer and supplier of Copper Phthalocyanine Crude Blue and its derivatives. The Applicant supplied Beta blue, Alfa Blue Pigment on the demand made by the Corporate Debtor by way of a purchase order. Copy of the purchase orders placed to the Applicant is annexed as Exhibit-C of the Petition. The Respondent is a manufacturer of Colour and additive, Black, White, and Mono Concentrate/ SPC Masterbatches.
 - b. Further the Corporate Debtor has failed to make the payment of outstanding invoices from 29.05.2017 to 27.09.2018 amounting to Rs. 87,13,230/- (Rupees Eighty-Seven Lakh Thirteen Thousand Two Hundred Thirty Only) and Debit Note for the Bank Interest of Rs.

3,65,815/- (Rupees Three Lakh Sixty-Five Thousand Eight Hundred Fifteen Only) from 02.06.2017 to 25.12.2017. Copy of invoices along with the debit note issued by the Applicant annexed as Exhibit-D of the Petition.

- c. The Applicant submits that the Corporate Debtor is also liable to pay an interest of Rs. 7,31,989/-(Rupees Seven Lakh Thirty-One Thousand Nine Hundred Eighty-Nine Only) @18% per annum as per the terms of invoices.
- d. Thus, the Applicant issued a Demand Notice under
- e. Form 3 along with Form 4 dated 15.04.2019 by speed post and through E-mail dated 20.04.2019 to the Corporate Debtor under Section 8(1) of the Code. Copy of the Demand Notice annexed as Exhibit-H of the Petition.
- f. The Corporate Debtor has made a reply to Demand Notice via E-mail dated 22.04.2019 where no substantial objections have been made by the Corporate Debtor. Copy of reply to the demand notice annexed as Exhibit-K of the Petition.
- g. The aforementioned details, as reflected in Part IV of the Application, are as follows:

Part IV

PARTICULARS OF OPERATIONAL DEBT

1. Total Amount of Debt, Details of Transactions on account of which debt fell due, and the Date from which such debt fell due.	Date of Invoice / Due date if Interest	Due Date	Outstanding (A)	Interest Outstanding @18% (B)
	27.05.2017	25.08.2017	3,65,427	1,02,720
	02.06.2017	31.08.2017	2,86,574	79,707
	25.12.2017	25.03.2018	79,241	13,990
	10.01.2018	10.04.2018	9,22,063	1,55,513
	06.08.2018	04.11.2018	22,18,400	1,46,597
	08.09.2018	07.12.2018	14,24,850	70,969
	08.09.2018	07.12.2018	10,17,750	50,692
	27.09.2018	26.12.2018	15,08,040	60,983
	27.09.2018	26.12.2018	12,56,700	50,819
	Total Outstanding		90,79,045	7,31,989
	Total Outstanding due (A+B) = 98,11,034/-			
	Total amount of debt: Rs. 98,11,034/- (Rupees Ninety-Eight Lakh Eleven Thousand Thirty-Four Only)			
2. Amount claimed to be in default and the date on which the default occurred	Amount Claimed to be in default: Rs. 98,11,034/- (Rupees Ninety-Eight Lakh Eleven Thousand Thirty-Four Only) Total Principal Amount: Rs. 90,79,045/- Total Interest Due: Rs.7,31,989/- Date from which Debt fell Due: 26.12.2018			

5. The Applicant has filed an additional affidavit in compliance of the order dated 06.09.2019 stating that several cheques were issued by the Corporate Debtor and got dishonoured, details of the same are as follows:

Date of Cheque	Cheque No.	Amount	Return Date	Reason
06.12.2018	284322	10,17,750	19.01.2018	Fund Insufficient
07.12.2018	284321	14,25,850	19.01.2018	Fund Insufficient
12.12.2018	284405	12,56,700	19.01.2018	Drawers signature not as per the mandate
27.12.2018	001627	15,08,400	19.01.2018	Account Blocked
27.12.2018	001628	12,56,700	19.01.2018	Account Blocked

6. Notices were issued in the aforesaid Application, and the Respondent filed a Reply *vide* Diary No.2741/2019 dated 25.11.2019 stating that: -

- a. The Applicant has not approached the Tribunal with clean hands and concealed material information to place itself as an Operational Creditor.
- b. The Corporate Debtor submits that there is no operational debt within the meaning of Section 5(21) of the Code. The purchase order annexed by the Applicant does not bear any signatures of the Corporate Debtor. Further, there is neither any proof of delivery of goods nor any acknowledgment of a debt.
- c. The Corporate Debtor contends that there is an existence of a dispute under Section 5(6)(b) read with Section 8(2)(a) of the Code. The Corporate Debtor submits that the dispute in respect of the quality of

goods subsisted even before the issuance of the Demand Notice dated 15.04.2019.

- d. It is pertinent to note the Corporate Debtor *vide* E-mail dated 22.04.2019 and reply to the demand notice dated 06.05.2019 has informed the Applicant that the goods supplied by the Applicant are defective and suffered from grave infirmities. Further, the goods supplied by the Applicant were not within the specified range of the melting floor index and the color value. The goods supplied by the Applicant altered significantly in quality parameters from that of the samples tendered at the time of negotiations.
- e. The Corporate Debtor mentions that the supply of inferior quality goods by the Applicant resulted into a substantial loss to the revenue of the Corporate Debtor.
- f. Further the Corporate Debtor submits that a debit note issued by the Applicant was not validated by the Respondent. The Applicant has issued the two debit notes dated 27.12.2017 however the same are rejected by the Corporate Debtor in view of the dispute with respect to the quality of the goods supplied.
- g. The Corporate Debtor relied on the Judgement of the Hon'ble Supreme Court in *Swiss Ribbons Vs Union Of India in Writ Petitions. Civil Nos. 99/2018*

*“12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. **The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.** The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor’s assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.”*

6. The Applicant filed its rejoinder *vide* Diary No. 1381/2021 dated 15.07.2021, submitting the following:
- a. The Applicant submits that the board resolution annexed by the Corporate Debtor with the reply does not specifically empowers Mr. Milan Agarwal to file the reply in the present matter.
 - b. The Applicant falls within the ambit of the definition of Operational Creditor further the Corporate Debtor has not denied the fact that the purchase order was issued by the Respondent.

- c. The Applicant submits that the Respondent never raised any issues regarding the quality of goods before the issuance of the demand notice under section 8 of the code. Further, the Corporate Debtor has not produced any iota of corroborative evidence in support of its allegation pertaining to the quality of the goods.
- d. The Applicant mentions that the dispute is raised at a belated stage which in no way can be deemed to be a pre-existing dispute and it is also worthwhile to state herein that not even an iota of evidence has been adduced by the Corporate Debtor till date.
- e. It is pertinent to mention that on one hand, the Corporate Debtor is claiming that no goods were received from the Applicant, and on the other hand the Corporate Debtor is claiming that goods were of inferior quality.
- f. Furthermore, goods were supplied to the Corporate Debtor in the year 2017-18 and till date, no steps were taken by the Respondent to return the same if the quality of goods was inferior.
- g. The Applicant submits that the Debit Note was raised in lieu of interest charged by the Bank towards LC and the same can be corroborated from transaction advice another is towards delayed payment annexed at page no. 82 & 34 of the Petition.
- h. It is submitted by the Applicant that raising a dispute in regard to the quality of goods being inferior/substandard or defective after the issuance of the Demand Notice would not constitute a prior and pre-existing

dispute contemplated under law as a defence to initiation of Corporate Insolvency Resolution Process. The Applicant has relied on the Judgement of Hon'ble National Company Law Appellate Tribunal ('NCLAT') *Rajeev K Aggarwal Vs Panipat Texo Fabs Pvt. Ltd. and anr. Company Appeal (AT) (Insolvency) No. 715 of 2018 dated 27.11.2018.*

7. The Respondent, through an additional affidavit, has placed certain e-mail correspondence on record *vide* Diary No. 505/2022 dated 23.02.2022. It is stated that:

- a. The Corporate Debtor attached e-mail communications to the present affidavit which clearly proves the pre-existence of dispute in the present matter.
- b. As per an e-mail dated 09.06.2015, the Respondent raised an issue with the Operational Creditor that there is no marking on the batch supplied by Applicant. In response to the above the Applicant admitted the mistake that a wrong grade has been delivered to the Respondent.
- c. The e-mails dated 09.06.2015, 29.02.2016, 06.09.2018, and 06.10.2018 highlight the true nature of the dispute. Copy of e-mails dated 09.06.2015, 29.02.2016, 06.09.2018, and 06.10.2018 are annexed as Annexure – 2 of the Additional Affidavit.
- d. Further the Respondent submitted by way of this additional affidavit that the Operational Creditor has filed a commercial suit titled as Narayan Organics Private Limited Vs Prayag Polytech Private Limited & Ors.

bearing CS No. 3609/2021 before the Hon'ble City Civil/Small Cause Court at Ahmedabad.

8. The Applicant has filed a counter affidavit to an additional affidavit *vide* Diary No. 1332/2022 dated 04.05.2022 wherein it is stated that:

- a. The Applicant submits that the E-mails attached by the Respondent *vide* additional affidavit are from the year 2015 to 2016 whereas the default was committed by the Corporate Debtor between 2017 and 2018. Further, the said E-mails do not transpire pre-existing disputes whereas the same only depicts a discussion and opinion with regard to day-to-day business transactions between the Operational Creditor and Corporate Debtor.
- b. Further it is pertinent to mention that in the additional affidavit, the Respondent has placed upon a record of a Civil suit filed by Applicant in the year 2021 which is post-filing of the present application under section 9 of the code. A suit filed prior to issuance of the Demand Notice under section 8(1) of the Code would constitute a pre-existing dispute between the parties. Since the said suit is not filed prior to the issuance of the Demand Notice, the said suit cannot be considered pre-existing dispute. Additionally, the Applicant relied on the following judgments:

I. CIL Australia North Pty. Ltd. Vs Sharp Corp Ltd.;
CA(AT)(Insolvency) 319-2019

II. MCL Global Steel Pvt. Ltd. Vs Essar Projects India Ltd. & Anr.

CA (AT) No. 29-2017

9. The Corporate Debtor filed their written submission *vide* Diary No. 139/2023 dated 17.01.2023 it is stated that:

- a. The Corporate Debtor submits that there is no admitted debt that is due and payable in fact and in law.
- b. The Corporate Debtor has time and again raised disputes in relation to the quality of goods. The series of E-mails showing that there is a pre-existing dispute are given as follows:

S. NO.	EMAIL AND PAGE NOS. OF THE ADDITIONAL AFFIDAVIT	CONTENT
1.	<i>June 9, 2015@Pg. 5</i>	<i>Multiple issues in the supplied product</i>
2.	<i>June 15, 2015 @Pg. 5</i>	<i>Petitioner acknowledged the issues in product pointed out in email dated June 9, 2015</i>
3.	<i>September 26, 2015 @Pg.9, October 9, 2015 @Pg. 8, December 12, 2015 @Pg. 11, February 5, 2016 @Pg. 13, August 31, 2018 @Pg. 19-20, September 5, 2018 @Pg. 17-18, September 6, 2018 @Pg. 17</i>	<i>Petitioner used to send Pre-shipment samples to Respondent. Respondent had clearly stated that any goods dispatched without first supplying a pre-shipment sample for approval, will not be taken by Respondent.</i>

4.	<i>October 6, 2018 at 10:32 am @Pg. 22</i>	<i>FPV very poor. Quality of goods extremely weak and poor. Complaints received from customers.</i>
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c. Further the Corporate Debtor relied on the following judgments:

- I. Mobilox Innovations Private Limited Vs Kirusa Software Private Limited, (2018) 1 SCC 353*
- II. M/s Aggarwal Veneers Vs Fundtonic Service Pvt. Ltd. CA (AT)(Ins) No. 968 of 2020*
- III. K. Kishan v. Vijay Nirman Co. (P) Ltd., (2018) 17 SCC 662*
- IV. Vidarbha Industries Power Limited VS Axis Bank Limited (2022) 8 SCC 352*

10. We have heard the Learned Counsels for the parties and perused the averments made in the Application, Reply, Rejoinder, Additional Affidavit, and the Documents enclosed with the Application.

11. This Adjudicating Authority has perused all the relevant papers and found them in order. The Registered Office of the Respondent is situated in the state of Rajasthan. Therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this matter is within the purview of Laws of Limitation, as the cause of action arose in 2018, and the Application was filed before this Adjudicating Authority in 2019. Hence, the period of three years after the default occurred had not been exhausted at the time of filing this

Application. Therefore, the present Application has been filed within the prescribed period of limitation.

12. Before we delve into the facts of the case it is important to mention that as per Section 8(2)(a) of the Code, *‘existence of a dispute if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoices in relation to such dispute’* can interdict Section 9 proceedings under the Code. This section is restrictive in nature for filing an application under Section 9 of the Code i.e., if a valid existence of dispute or record of the pendency of a suit or arbitration proceedings which existed before the issuance of demand notice, is shared with the Creditor, within 10 days, it is presumed that there exists a pre-existing dispute between the parties with respect to the goods or services supplied by the Creditor.
13. Furthermore, the Hon’ble Supreme Court of India, in the matter of *‘Mobilox Innovative Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353’*, held 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.”

14. The word ‘dispute’ as defined under Code includes a suit or arbitration proceedings relating to the existence of the amount of debt; the quality of goods or services; or the breach of a representation or warranty. It is true that the definition must fit under the parameters as defined under the code but at the same time it must stand on a test as laid down in the recent judgment of the Hon’ble Supreme Court in *M/S S.S. Engineers Vs Hindustan Petroleum Corporation Ltd. & Ors. in Supreme Court in Civil Appeal No. 4583 OF 2022* whereby the following has been held:

“31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor.

32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by

an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.”

15. From the data produced before us, it is pertinent to mention these documents along with a description to understand the correspondence between the parties to the case:

- a. Email dated 09.06.2015 was preferred by the Respondent to the Applicant stating that there is no marking of batch no. on the goods supplied and also mentioned that getting lots of problems with the goods supplied.
- b. E-mail dated 15.06.2015 was preferred by the Applicant to the Respondent wherein the Applicant is acknowledging the issues in packing & product.
- c. E-mail dated 06.10.2018 was preferred by the Respondent to the Applicant has mentioned that the FPV is very poor, and the quality is so weaker and poor. The Respondent also submitted complaints from the customers received.

Copy of the above-mentioned E-mails are attached as Annexure-1 of the additional affidavit filed by the Corporate Debtor *vide* Diary No. 505/2022 dated 23.02.2022.

16. It is abundantly clear from the above-mentioned Email correspondences that there exists a pre-existing dispute between the parties. In the present matter at hand, the conditions laid down under Section 9 of the Code are not fulfilled in the present application.
17. In view of the foregoing, *inter-alia* pre-existing disputes between the parties, we have no option but to reject the prayer of the Operational Creditor to initiate proceedings under Section 9 of IBC.
18. Hence, the Application is Dismissed. The Order in the present matter is made in terms of Section 9 (5) (ii) of IBC, 2016, and based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority.
19. Let the copy of the Order be served to the parties and IBBI.

DEEP CHANDRA JOSHI
(JUDICIAL MEMBER)

PRASANTA KUMAR MOHANTY
(TECHNICAL MEMBER)