

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH-I

CP (IB) 245/MB/C-I/2022

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Nanz Med Science Pharma Private Limited

[CIN: U24100DL2006PTC156756]

Nanz Med Science Pharma Private Limited, Village Rampur Ghat, Poanta Sahib, Dist. Sirmaur, Himachal Pradesh - 173025

...Operational Creditor

Versus

Elder Projects Limited

[CIN: U74140MH2005PLC151865]

301-302, 3rd Floor, Plot No. 174, Kunthu Commerce Centre, Near Ayappa Temple, Bangur Nagar, Goregaon West, Mumbai - 400090

... Corporate Debtor

Order Delivered on 31.03.2023

Coram:

Hon'ble Member (Judicial) : Mr. H.V. Subba Rao

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Operational Creditor : Adv. K P Anil Kumar, Adv. Priyanka Kumar, Adv. Roshni Vipani, Adv. Chinmay Apte

For the Corporate Debtor : Adv. Darshit Dave i/b. AVP Partners

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. The present Company Petition is filed by Mr. Manmit Singh Malhotra, the director of **Nanz Med Science Pharma Private Limited**, on behalf of **Nanz Med Science Pharma Private Limited** (hereinafter referred to as the “**Operational Creditor**”) under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of Corporate Insolvency Resolution Process (hereinafter referred to as “**CIRP**”) against **Elder Projects Limited** (hereinafter referred to as the “**Corporate Debtor**”).
2. The Corporate Debtor is company incorporated on 09.03.2005, under the Companies Act, 1956 and has its registered office at 301-302, 3rd Floor, Plot No. 174, Kunthu Commerce Centre, Near Ayappa Temple, Bangur Nagar, Goregaon West, Mumbai - 400090. Its Company Identification Number (CIN) is **U74140MH2005PLC151865**. Therefore, this Bench has the jurisdiction to entertain this Petition.
3. The **total amount of debt** claimed is **Rs.1,18,58,507/-** (Rupees One Crore Eighteen Lakh Fifty-Eight Thousand Five Hundred and Seven

Only) along with interest @24% per annum from the due date of payment till the date of actual payment. The **date of default is** .

Submissions made by the Ld. Counsel of the Operational Creditor by the way of Petition:

4. The Operational Creditor is in the business of external preparations, formulation of hand sanitizers, disinfectants, and API. During the course of the business, the Operational Creditor used to supply their products to the Corporate Debtor on the basis of Purchase Orders. The Operational Creditor has been supplying goods to the Corporate Debtor on the basis of the Purchase Orders issued from 2019 to 2020 and these supplies took place between 18.04.2019 and 02.03.2021.
5. For the material supplied, invoices were also sent from time to time. While the Corporate Debtor was paying for the materials supplied as per invoices, for the period from 16.03.2020 to 07.05.2020 the invoices remain unpaid. The total value of these invoices amounts to Rs.1,18,58,507/-.
6. The invoices are admitted and accepted. The amount due is also an accepted fact. The invoices were to be paid on or before the due date mentioned in the invoices. However, the Corporate Debtor defaulted in the payment from the period between 16.03.2020 to 07.05.2020.

7. The Corporate Debtor made no payment outstanding despite several notices. Finally, on 24.09.2021 the Operational Creditor issued a notice u/s 8 of the Insolvency and Bankruptcy Code, 2016 (the Code) demanding the payment of unpaid operational debt.
8. The Corporate Debtor though replied to the said notice through their lawyer, took a stand that they are not required to make the payment. The Purchase orders are admitted, the invoices are admitted and the debt is also admitted. Despite this, the payment remains unpaid. The Corporate Debtor neither paid the demanded amount nor has adequately raised any dispute as required under IBC, 2016 in the reply dated 14.10.2021.

Submission of the Corporate Debtor by the way of Affidavit in Reply:

A. The present Petition is bad for misjoinder of cause of action.

9. Operational Debt admittedly comprises of amounts which are due under several invoices which admittedly pertains to various distinct purchase orders. Amounts which are said to have arisen under distinct purchase orders cannot be clubbed in one petition. Especially, when admittedly the terms of payment in the purchase orders and the date of default in the purchase orders are distinct.

10. A single petition cannot be filed when there are different dates of default arising from the distinct purchase orders.
11. The Operational Creditor has combined multiple claims arising out of different purchase orders therefore seeks to pursue multiple cause of actions in one Petition which is impermissible under the IBC Code.

B. The Present Petition is incomplete

12. Operational Creditor has failed to annex crucial documents to the present Petitions including the Operational Creditor's bank statements for the relevant time period. These Bank Statements ought to prove that amounts claimed by the Operational Creditor in the present petition have already been received by the Operational Creditor.
13. The Operational Creditor has failed to annex a copy of the certificate issued by the Financial Institution maintaining accounts of the Operational Creditor confirming that there is no payment towards the Operational Debt.
14. The Operational Creditor has not annexed the purchase order as the same would outline the terms of payment, this is only done to circumvent the bar under Section 10A of the IBC Code.

15. The Operational Creditor has failed to mention the date of default in the Petition. The Demand Notice in Form 3 requires the date of default to be explicitly mentioned in the notice so that on the basis of documents the debt amount and the date of default could be ascertained.
16. Aforesaid Petition is liable to be dismissed in view of the judgements where in time and again it has been emphasised that in order to maintain sanctity and solemnity of the proceedings in law courts, it is necessary that parties should not make false or knowingly, inaccurate statement or misrepresentations, and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the court.

C. The captioned Petition is barred by the provisions of Section 10A of the IBC.

17. The Corporate Debtor vide purchase orders dated 6 February, 2020 placed order for AM PM (*ALCOHOLIC RUB IN HAND DISINFECTANT*), 300 ML for 10,00,000/- quantity. In the said purchase order the terms of the payment admittedly as agreed upon are "as agreed mutually between the parties". Purchase order dated 06.02.2020 is annexed and marked as Exhibit "B".

18. The terms of payment orally agreed between the parties were that payment was to be done after the delivery of goods within 45 days.
19. The Goods were only received on 9th March 2020, 17th March 2020, 18 March 2020 and 20th March 2020, thus the payment was to be done after 45 days. The date of default is thus beyond 25th March 2020 which admittedly falls under the purview of Section 10 A of the IBC Code.
20. The Corporate Debtor vide purchase orders dated 6th March, 2020 placed order for *M & E Plus 100 ML for 50,000/- quantity*. In the said purchase order the terms of the payment admittedly as agreed upon are ***"30% advance and balance after 30 days of delivery"***. Purchase order dated 06.03.2020 is annexed and marked as Exhibit "C". Admittedly the goods were to be supplied immediately under the purchase order dated 6th March 2020.
21. The Goods were delivered on 7 May 2020 i.e., after delay of almost 2 months, thus the payment was to be done after 3 days. The date of default is thus beyond 25 March 2020 which admittedly falls under the purview of Section 10 A of the IBC Code.
22. The date of default squarely falls under Section 10A of the IBC Code and thus the Petition is not maintainable.
23. Section 10A of the IBC Code reads as under:

10A. Suspension of Initiation of corporate insolvency resolution process.

Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.

24. The operation of Section 10A of IB Code was extended for a period of three months from 25 September 2020 by a notification dated 24 September 2020 issued by the Ministry of Corporate Affairs. It was further extended by three months from 25 December 2020 by a

notification dated 22 December 2020 issued by the Ministry of Corporate Affairs. Annexed and marked as Exhibit 'D' and 'E' are copies of the notifications dated 24 September 2020 and 22 December 2020 issued by the Ministry of Corporate Affairs respectively.

25. The effect of Section 10A of the IBC is that no application can ever be filed under section 7, 9 and 10 of the IBC Code in respect of any default alleged to have taken place between 25 March 2020 and 25th March 2021.
26. Therefore, on the pleaded case of the Operational Creditor that the date of default by the Operational Creditor construed from the terms of payment of the purchase order beyond 25 March 2020 and admittedly fall under the period prescribed under Section 10A of the IBC Code thus, the captioned Petition is ex facie barred by the provisions of Section 10A of the IBC.

D. The Operational Creditor is guilty of suppressio veri and suggestio falsi

27. The Operational Creditor has failed to even plead or specify the details of the transaction and the various purchase orders issued in favor of the Operational Creditor.

28. The Operational Creditor has failed to point out that the Operational Creditor had failed to deliver goods on time and had failed to adhere to the time schedule as mentioned in the Purchase order.
29. The Operational Creditor has not even disclosed the monies and the part payments received by the Operational Creditor. Admittedly, the Corporate Debtor has paid a sum of Rs. 4 Crores to the Operational Creditor even though the goods were not delivered on time.
30. The Operational Creditor has not produced any document whatsoever to demonstrate that the Corporate Debtor has defaulted in its repayment and/or to show how the money received by the Operational Creditor was adjusted.

E. The Operational Creditor has suppressed various correspondences which shell out the disputes between parties prior to the issuance of demand notice.

31. Vide an email dated 24 February 2020, the Corporate Debtor had informed and requested the Operational Creditor to improvise on packaging of the bottles. Since the bottles were loosely packed and thus were not intact in the box and kept tilting which leads to the bottles getting damaged and resulting in spillage and exposing the hand

sanitizers. The copy of the email dated 24 February 2020 is annexed and marked as Exhibit 'F' to the Reply.

32. On 24th March, 2020 Government of India vide a Notification imposed a ban on exports of all ventilators including artificial respiratory apparatus or oxygen therapy apparatus or any other breathing appliance falling under any Indian Trade Clarification based on Harmonized System of Coding hereinafter referred to as "ITCHS Code" and also imposed a ban on exports of all sanitizers falling under any ITCHS Code with immediate effect. The copy of the Notification issued by Government of India dated 24 March 2020 is annexed and marked as Exhibit 'G' to the Reply.
33. The above ban on the exports of all sanitizers falling under any ITCHS Code came to be lifted sometime in the month of June 2020. Hence, the Corporate Debtor could only ship the balance sanitiser bottles to Singapore only after June.
34. Vide an email dated 17th April, 2020, the Corporate Debtor informed the Operational Creditor that as per the purchase order dated 6 February, 2020 placed order for *AM PM (ALCOHOLIC RUB IN HAND DISINFECTANT), 500 ML for 10,00,000/- quantity*. The Corporate Debtor had received 2,64,000 quantity of the bottles and the same were shipped

to Singapore. Further 1,32,000 bottles were received, on 17th March 2020, 18 March 2020 and 20th March 2020 but the Corporate Debtor was not able to ship these to Singapore due to the ban of exports of sanitizers and thus these bottles were stuck at the Port. Admittedly the 1,32,000 bottles were to be received before 4th March 2020. Therefore, admittedly there is delay on account of operational creditor to supply the goods. The copy of the email dated 17 April 2020 is annexed and marked as Exhibit 'H' to the Reply.

35. Admittedly, the Operational Creditor failed to deliver the goods within the time as agreed upon between the parties.
36. Vide an email dated 17 April, 2020 the Corporate Debtor called upon the Operational Creditor seeking various details with regards to the production, delivery and transfer price of the remaining 6,00,000 bottles of *AMPM (ALCOHOLIC RUB IN HAND DISINFECTANT), 500 ML*. The copy of the email dated 17th April, 2020 is annexed and marked as Exhibit 'T' to the Reply.
37. Vide an email dated 17th April, 2020 the Operational Creditor addressed a reply thereby informing that the transfer price cannot be confirmed at this stage since the ban on exports of sanitizers was not lifted yet and informed about the short supply of dispensers. The copy of the email dated 17th April 2020 is annexed and marked as Exhibit 'J' to the Reply.

38. Vide an email dated 1 June, 2020 the Corporate Debtor informed the Operation Creditor about No Object Certificate received for export of 1,32,000 bottles to Singapore which were stuck at the Sea Port and the Operation Creditor was also called upon to inform about the supply of remaining 6,00,000 bottles. The copy of the email dated 1st June, 2020 is annexed and marked as Exhibit 'K' is annexed and marked as Exhibit 'K' to the Reply.
39. Vide an email dated 1 June, 2020 the Operational Creditor addressed a reply thereby advising us to change the purchase order to ethanol based hand sanitizer, M&E formulation as there was a shortage of isopropyl alcohol and due to the shortage the price of the same has gone up from Rs.95 to Rs.200. The copy of the email dated 1 June, 2020 is annexed and marked as Exhibit 'L' to the Reply.
40. The Purchase Order once issued after negotiating the terms of the contract and the price of the goods then it cannot be altered because of change in market prices of the raw materials. Admittedly, the Operational Creditor has agreed upon the price of goods and has delivered almost fifty percent of the goods. The Operational Creditor cannot re-negotiate the price of the goods especially when there is no term in the contract allowing the Operational Creditor to re-negotiate the prices after the issuance of the purchase order.

41. The Corporate Debtor had not received the remaining 200,000 bottles of AM PM (ALCOHOLIC RUB IN HAND DISINFECTANT), 500 ML. The Operational Creditor failed to deliver the goods on time which in turn led to the goods not being delivered on time to the company in Singapore. Infact, it is the Corporate Debtor who is entitled to compensation for the late delivery of goods.
42. Operational Creditor is claiming future interest at 24% p.a. from the due date till the date of actual payment. Admittedly, the purchase order does not provide any provision for interest on delayed payment nor do the tax invoices make any provision for interest on delayed payment.

F. Suppression of Demand Notices

43. The Operational Creditor had addressed two demand notices i.e. One demand notice dated 24.09.2021 under Form 3 and Second demand notice dated 24.09.2021 under Form 4.
44. The Operational creditor has not produced on record the demand notice dated 24.09.2021 under Form 4. The Operational Creditor cannot issue two demand notices, the operational creditor under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, has to choose to issue a demand notice under Form 3 or under Form 4.

45. The Demand notices are bad in law, as the said demand notice or the Company Petition does not explicitly mention any date of default.

Findings:

46. We have heard both the parties and perused the records.
47. We note that as per the submissions of the Operational Creditor, the invoices for the period from 16.03.2020 to 07.05.2020 remained unpaid, owing which a default was committed by the Corporate Debtor.
48. The Corporate Debtor has brought to our notice that the terms of payment orally agreed between the parties were that payment was to be done after the delivery of goods within 45 days.
49. The goods were delivered on 9th March 2020, 17th March 2020, 18th March 2020 and 20th March 2020, thus the payments were to be done within 45 days from the date of delivery. The date of default is thus beyond 25th March 2020 which admittedly falls under the purview of Section 10 A (*supra*) of the IBC Code.
50. Hence, the above default as alleged by the Operational Creditor falls under the purview of Section 10A of the Code.
51. Apart from the above, we also note that the Operational Creditor has failed to mention the date of default in Part 4 of the Petition.

52. Considering the same, the Adjudicating Authority hereby deems fit that the present petition be dismissed.
53. The petition bearing **CP (IB) 245/MB/C-I/2022** filed by **Nanz Med Science Pharma Private Limited**, the Operational Creditor, under section 9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against, the Corporate Debtor, **Elder Projects Limited** is rejected.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

31.03.2023

SAM

Sd/-

H.V. SUBBA RAO
Member (Judicial)