
(2022) 09 NCLT CK 0038
In the National Company Law Tribunal
Case No : CP (IB) No. 323/Chd/HP/2019

Optinova Ab

APPELLANT

Vs

Bio Med Health Care Product Pvt. Ltd

RESPONDENT

Date of Decision : 08-09-2022

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(6), 8(1), 8(2)(a), 9, 9(5)
Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 — Rule 6

Citation : (2022) 09 NCLT CK 0038

Hon'ble Judges : Harnam Singh Thakur, Member, (J); Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : Abhishek Naik, Abhijai Singh Panwar

Final Decision : Dismissed

Judgement

Harnam Singh Thakur, Member (Judicial)

1. The present petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by Optinova AB, a company incorporated under laws of Finland (for brevity 'Petitioner') through its Power of Attorney Holder, Mr. Soumen Sanyal with a prayer to initiate the Corporate Insolvency process against Bio-Med HealthCare Products Private Limited, (for brevity 'Corporate Debtor').

2. The petitioner company is incorporated under laws of Finland, having its Business ID:0686671-0 and having its corporate office at Industrivägen 5 AX-22410 Godby, Åland, Finland. The petitioner is a global supplier of advanced tubing solutions for the global medical device industry and fluoropolymer tubing for challenging industrial applications.

3. The Corporate Debtor is a private limited company, incorporated under the provisions of Companies Act, 1956 on 09.01.2002 bearing CIN

U33112HR2002PTCO34806 as per master data (Annexure-3 of the petition).

4. Brief facts pertaining to the matter stated by the petitioner are as follows:

4.1 The Operation Creditor is a leading global supplier of advanced tubing solutions for the global medical device industry and fluoropolymer tubing for challenging industrial applications. During the course of business, particularly between October 2017 and March 2018, the Operational Creditor had supplied medical tubing to the Corporate Debtor against various purchase orders placed by the Corporate Debtor amounting to Euro 320,406.72 equivalent to Rs.256,32,537.60 [@ conversion rate of 1 Euro = Rs.80 (approx.)], but the Corporate Debtor has defaulted in making payment against the invoices raised for the supply of medical tubing. Copy of said invoices along with purchase order and Good receipt notes are attached as Annexure-A4. Since the Corporate Debtor had not paid the said amount despite several reminders, the Operational Creditor had issued Demand Notice in FORM - 3 dated 20.02.2019. In response to the same, the Corporate Debtor sent a reply dated 01.03.2019 acknowledging the debt, but stated that a sum of Euro 206,024.32 had already been paid to the Operational Creditor and the balance Euro 111,887.23 would be paid in monthly installments of Euro 10,000 starting from March, 2019 and that invoices for amount Euro 2,495.17 have not been received by them. It also attached with its reply a page of a purported complaint dated 14.01.2019 filed before the Commissioner of Police, Faridabad. In response to the reply letter dated 01.03.2019, the Operational Creditor vide its response letter dated 06.03.2019 denied receiving any payment as alleged by the Corporate Debtor and also pointed out about the incomplete copy of the purported complaint filed before the Commissioner of Police, Faridabad. Vide its second letter dated 12.03.2019, the Corporate Debtor reiterated its earlier stand and stated that the contents of the police complaint are part of police investigation. The Operational Creditor has since obtained a certificate dated 11.03.2019 from its Banker i.e., NORDEA Bank, Finland that the alleged sum of Euro 206,024.32 has not been credited in the account of the Operational Creditor till date. Even after receipt of the aforesaid Demand Notice in Form 3 dated 20.02.2019, the Corporate Debtor has not paid the said amount nor raised any valid disputes as required under Section 5(6) of the Insolvency and Bankruptcy, Code, 2016 in its reply dated 01.03.2019. Lately, the Operational Creditor received a message on 27.03.2019 from the Corporate Debtor that a sum of Euro 9,728.80 has been paid. Later, another message was received on 09.05.2019 that a sum of Euro 9,975.00 has been paid. It is still not clear what these payments are for.

5. In response to the notice of petition, the respondent/Corporate debtor filed its reply vide Diary No.4632 dated 06.09.2019, whereby the following averments has been made as stated below.

5.1. It is submitted that for the past several years the Corporate Debtor purchased medical products from the operational-creditor based on various purchase order agreements etc. executed/approved between both the parties.

The amount remitted by the Corporate debtor to the operational creditor was in the Helsinki Branch of Nordea Bank located at Trade Finance Centre, Eleksiskiven Kat, 3-5, VC 683, Helsinki, Finland-00020. The above said was the only bank account where the corporate debtor used to remit funds owed to the operational creditor.

5.2. It is further submitted that on March 26, 2018, the Corporate Debtor purportedly received an email from Mr. Lars Rasberg (Vice President-Sales; Optinova/Operational Creditor) stating that all further payments were to be made to their Bank of America account located in New York, United States of America (hereinafter referred to as "BOA Account"). Copy of the said email is attached as Annexure-3 of the reply. Thereafter, three additional emails dated 02.04.2018, 12.04.2018 and 19.04.2022, sent by the Operational Creditor to the Corporate debtor to advising them of the change of Bank Account details. Copy of these emails are attached as Annexure-4. In lieu of the above said transactions Corporate Debtor directed its banker to divert all payments for the Operational Creditor to the Bank of America Account. Copy of the said email is attached as Annexure-5.

5.3. The Corporate Debtor requested the authorisation for the same from Operational Creditor and in response received an email send by Mr. Lars Rasberg. Thereafter, the said authorisation letter was sent to the banker of Corporate Debtor to make the payments. Subsequent to such instructions, the Corporate Debtor banker sent them an email dated 02.06.2018 stating that fund transfer failed due to invalid account details. Upon receiving the email, the Corporate Debtor forwarded the same to Mr. Lars Rasberg asking him to confirm and cross check the Bank of America account details. In response to the above email, the Corporate Debtor received an email from Mr. Lars Rasberg stating that he was out of office. Copies of the emails are attached as Annexure-9.

5.4. Following the above transactions, Corporate Debtor received an email where new bank account details has been provided i.e., Chase Bank, New York, United States of America. The Corporate Debtor made the payment to the above account in the tranches as EUR 77, 909.19. Another payment of EUR 50,725. In total, EUR 206,024.32 was remitted to the Corporate Debtor to the Chase account upto 30.07.2018.

5.5. It is averred that on 13.11.2018, Corporate Debtor Director Mr. Deepak C. Arora had a meeting with Mr. Lars Lundberg and Mr. Soumen Sanyal of Optinova at a conference in Germany. At the same meeting Corporate Debtor apprised the operational creditor of the above mentioned facts and circumstances. The details of the payment made to the operational creditor were shared with the official of the operational creditor who had met Mr. Arora in the meeting at Germany. Copy of the said email dated 13.11.2018 is attached as Annexure 15. The Operational Creditor made a formal reply dated 10.12.2018 stating that Optinova will not at this stage, file a legal case against the party conducting fraud against Bio-Med and it has not suffered any direct financial loss and asked the Corporate Debtor

to pay the outstanding dues. The officials of the Operational Creditor mentioned they have never changed or replaced their Nordea Bank Account.

5.6. The Corporate Debtor has stated that it was noticed that several emails from the Operational Creditor were not sent from the domain name <optimova.com>, which is the official domain name of Optimova, but were instead sent by the domain name <optimova.com>, which allegedly did not belong to the Operational Creditor, as claimed by them.

5.7. It is further submitted that the Corporate Debtor has not attempted to evade its liability in any manner whatsoever and it accepts that from the total amount of EUR 320,406.72 (Three Hundred and Twenty Thousand Four Hundred and Six Euros and Seventy Two Eurocents) as demanded by the Operational Creditor, EUR 206,024.32 (Two Hundred Six Thousand Twenty Four Euro and Thirty Two Eurocent) is disputed at the moment ("Disputed Amount"), and that EUR 2495.17 (Two Thousand Four Hundred and Ninety Five Euro and Seventeen Eurocents) is not payable as no invoices were issued to the Corporate Debtor for the same, and that an amount of EUR 111,887.23 (One Hundred Eleven Thousand Eight Hundred Eighty Seven Euro and Twenty Three Eurocents) ("Balance Amount") was not paid by the Corporate Debtor at the time of the receipt of the Operational Creditor's Demand Notice dated February 20, 2019 ("Demand Notice").

5.8. So far, the Corporate Debtor has paid an additional amount of EUR EUR 49,664.65 (Forty Nine Thousand Six Hundred Sixty Four Euro and Sixty Five Eurocents), and that it shall continue to remit funds to the Operational Creditor every month till the Balance Amount is not fully paid. Copies of the payment confirmation/receipt for these payments made to the Operational Creditor are attached as Annexure 19.

5.9. Further it has been stated by the Corporate Debtor that subsequent to the receipt of the Demand Notice, the Corporate Debtor has paid a total amount of EUR 57,741.50 out of an amount of EUR 111,887.23 which was not paid by the Corporate Debtor at the time of the receipt of the Demand Notice dated 20.02.2019. Also an amount of EUR 12,997 has been paid to Optimova Asia Pacific Co. Ltd., the sister concern of the operational creditor.

6. The petitioner/operational creditor has filed its rejoinder denying the averments and pleadings made by the respondent/corporate debtor stating that Corporate Debtor evading its liability of paying the dues and the Corporate Debtor and its banker i.e., Axis Bank in collusion with each other are both guilty of gross negligence. It is further submitted that the email ID lars.rasberg@optimova.com, through which the communication exchanged is a totally different domain name and the other alleged emails that were sent from email IDs with domain names different from that of the operational creditor i.e., lars.rasberg@optimova.com, customerservice@optimova.com and customerservice@optiinova.com. The operational creditor has further denied

that the bank account in Bank of America belongs to/or is in the name of 'Optinova Asia Pacific Co. Ltd.' i.e. the Thailand entity of the OC and the bank name is Nordea Bank not Nordia Bank. The operational creditor has also raised issues with respect to the averments made by the corporate debtor and denied by stating that the CD has suppressed material information and reiterated its stance as mentioned in the main petition.

7. We have heard the learned counsel for the petitioner as well as corporate debtor and have also perused the records.

8. Before proceeding further the first issue to be examined by this Adjudicating Authority while examining an application under Section 9, which is as follows:-

(i). Whether there is an operation debt as defined exceeding Rs.1.00 Lac?

(ii). Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid ?

(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 operation debt in relation to such dispute.

9. In the instant petition the Demand Notice dated 20.02.2019 has been duly served and reply has been received from the respondent corporate debtor where the alleged amount of default is in dispute. After perusal of the record, it has come to the notice of this Bench that respondent/corporate debtor has paid a substantial amount out of the amount in default mentioned in part-4 of Form-5 i.e., EUR 320,406.72. The same has been transferred to a wrong bank situated in the United States of America as prima-facie it appears that a cyber fraud has been committed against the Corporate Debtor. The same is verified from the payment transferred by the banker of Corporate Debtor i.e., Axis Bank, which is attached with the reply to the Demand Notice at Annexure-7 of the main petition . Since, there is exchange of communication between the parties dated 14.12.2018, whereby formal reply has been made by the operational creditor to Mr. Deepak C. Arora at Annexure-16. The fact that a fraud has been committed has been apprised to the Operational Creditor can be observed from the reply by respondent corporate debtor dated 14.12.2018 to the letter dated 10.12.2018 issued by the petitioner/operational creditor. The investigation with respect to the transaction history between the parties has been dealt with by the Operational Creditor in its email dated 21.12.2018, whereby, it has stated that respondents banker i.e., Axis Bank has not followed Uniform Rules of Collections, 1995 Revision.ICC Publication No.522. The same is attached at page No.89 of the reply submitted by respondent/corporate debtor. Further, the respondent/corporate debtor has submitted complaint to Commissioner of Police, Faridabad dated 14.01.2019, with regard to the alleged fraud committed against the respondent corporate debtor much before the date of default.

10. After much deliberation on the above facts and circumstances and the law

involved in the present petition. It is observed that in "Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited? 2017 1 SCC OnLine SC 353", the Hon'ble Supreme Court held 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 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."

In the said case, the Hon'ble Supreme Court held as to what are the facts to be examined by the Adjudicating Authority while examining an application under Section 9, which is as follows:

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

(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(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."

11. From the aforesaid decision, it is amply clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. In the case at hand it has come to the notice of this Adjudicating Authority that the 'operational debt' is under dispute as the cyber fraud has been

stated to be committed against the respondent corporate debtor which is still under investigation. Moreover, the proceedings before this Adjudicating Authority are not in the nature of recovery proceedings. In light of the above, we direct the operational creditor to approach the appropriate forum for proper redressal of its grievance.

12. In the given facts and circumstances, where there is a pre-existing dispute between the parties about the operational debt, the petition is liable to be rejected, in terms of Section 9(5) of IBC, 2016. Therefore, the claim of the petitioner is rejected and the petition stands dismissed, however, without any order to the costs.