

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 841 (ND)/2020

IN THE MATTER OF:

**KEDRION BIOPHARMA INC.
400 KELBY STREET FORT LEE,
NJ 07024 USA
THROUGH ITS SPECIAL POWER OF ATTORNEY HOLDER
MR. NAVEEN MADAN,
DIRECTOR FINANCE**

**HAVING RESIDENCE AT:-
A1003, DELHI STATE NPEF CGHS
APARTMENTS, PLOT NO. 1, SECTOR 19,
DWARKA, NEW DELHI- 110075**

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

**M/S WIZAMAN IMPEX PVT. LTD.
15, CHELMFORD COUNTRY CLUB,
GHITORNI- SOUTH DELHI,
NEW DELHI-110030**

**ALSO AT:
301, JMD REGIONS SQUARE,
MAIN MEHRAULI GURGAON ROAD,
GURGAON,
HARYANA 122001**

....RESPONDENT/CORPORATE DEBTOR

SECTION: U/S 9 of IBC, 2016

Order delivered on: 06.10.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

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For the Applicant/Operational Creditor: Ms. Suruchi Suri, Advcate.

For the Respondent/Corporate Debtor:

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

1. The present petition has been filed under Section 9 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency Resolution Process of the Respondent/Corporate Debtor on grounds of its inability to liquidate its operational debt.

2. The facts mentioned in the application in brief are as follows:
 - i. The Operational Creditor is a corporation registered and organised under the laws of State of Delaware, USA and is engaged in the business of manufacturing of Pharmaceutical products, particularly plasma products such as Rhogam, an Anti-D immunoglobulin.

 - ii. The Corporate Debtor had represented to the Operational Creditor/Applicant that it had the necessary approvals and licences from the concerned authorities in addition to the necessary expertise, facilities and organisation for the distribution and sale of pharmaceutical products.

 - iii. Based on the assurances, the Operational Creditor entered into a Distribution Agreement dated 21.03.2014 (hereinafter referred to as the 'Agreement') with the Corporate Debtor for the



purposes of distribution and sale of its pharmaceutical products only until the subsidiary/Indian affiliate of the Operational Creditor namely Kedrion India Biopharmaceuticals Pvt. Ltd. was capable of doing so.

- iv. During the course of its business operations, the Operational Creditor raised several invoices upon the Corporate Debtor with respect to the sale and distribution of its pharmaceutical products. However, no amount has been received by the Operational Creditor against any of the three invoices namely invoice no. 'DMI 4169626' dated 19.12.2013 amounting to USD 25,800/-, invoice no. 'DMI 4174867' dated 25.04.2014 amounting to USD 6,32,1001- and invoice no. 'DMI 4202417' dated 23.05.2014 amounting to USD 604,055.401-.
- v. On 31.12.2015, it was confirmed and acknowledged by the Corporate Debtor that the total outstanding amount on the said date as reflected in the Operational Creditors records was USD 1,261,9551/-. As on 18.01.20 16, it was further confirmed by the Corporate Debtor that the total outstanding amount payable to the Operational Creditor/Applicant was USD 1,26,9551/-.
- vi. On 02.02.2017, the Corporate Debtor duly acknowledged and admitted the outstanding dues due and payable to the Operational Creditor as on 31.12.2016 being USD 901,9551/-.
- vii. As mutually agreed between the parties, the Operational Creditor issued a credit note dated 15.12.2017, amounting to USD 3,60,000/- in favour of the Corporate Debtor towards the



potential losses incurred qua the management of the Rhogam business in India and for the compensation for loss incurred on account of the short shelf life products supplied to Directorate of Health Services, Maharashtra (DHS). This operational credit note was issued by the operational creditor in good faith, as an offset, as no loss has in fact been incurred by the Corporate Debtor, and further no claim has been filed by DHS against the corporate Debtor before the arbitrator in the arbitration proceedings bearing no. '21 of 2017' arising out of the disputes between the Corporate Debtor and DHS with regard to the supply of short shelf life products.

- viii. As per the invoices mentioned here in above, the total consideration for the sale of products received by the Corporate Debtor was Rs. 9,42,03,330/-.
- ix. Pursuant thereto, the Operational Creditor approached the Corporate Debtor on several occasions to settle the aforesaid dues, however the same was to no avail, as the Corporate Debtor has neither settled the dispute nor cleared the admitted liability towards the outstanding dues payable to the Operational Creditor.
- x. The Operational Creditor was constrained to issue a demand notice dated 25.07.2019 to the Corporate Debtor inter-alia demanding a sum of USD 901,000/- as the amount due towards the aforesaid operational debt. The said demand notice was undelivered and returned with a remark "no person found



on this address", despite being delivered at the registered office address of the Corporate Debtor on which parties had been corresponding in the Past.

- xi. On 07.08.2019, the Corporate Debtor was again served with a demand notice of the said date at the new registered office address as per the MCA records, inter-alia reiterating/urging the same facts as mentioned in the aforesaid Demand Notice dated 25'07'2019 and also demanding the payment of the outstanding operational debt. The Corporate Debtor on 17.08 2019 replied to the said demand notice issued by the Operational Creditor, whereby the Corporate Debtor disputed the admitted and acknowledged dues payable to the Operational Creditor basis the dispute pending between DHS and the Corporate Debtor with regard to the supply of short shelf life products.
- xii. Thus, in light of the aforesaid factual position, the Corporate Debtor has committed default as defined under Section 3(12) of the I&B code and the aforesaid outstanding amount absolutely qualifies as an Operational Debt within the meaning of Section 3(11) read with Section 5(21) of the I&B Code. Hence, the Corporate Debtor is liable to repay the said Operational debt as per the relevant provisions of I&B Code.
- xiii. Hence, the applicant has filed the present application under the Code for initiation of corporate insolvency resolution process.



3. We have heard the Ld. Counsel for the petitioner and perused the averments made in the application, Ld. Counsel for the petitioner submitted that in course of business transaction, on the basis of Distribution Agreement dated 21.03.2014, the petitioner has raised several invoices and the first invoice was of dated 19.12.2013 and the last invoice was of dated 23.01.2014.
4. He further submitted that the Corporate Debtor has in defaulting the payments in respect of aforesaid invoice.
5. He further submitted that on 31.12.2015, the Corporate Debtor has confirmed and acknowledgement of debt and again on 18.01.2016 same was confirmed by the Corporate Debtor vide confirmation letter dated 18.01.2016 to the Auditor of the Operational Creditor regarding the outstanding dues and again on 22.02.2017, the Corporate Debtor was duly acknowledged the outstanding amount.
6. He further submitted that on 15.12.2017, the Operational Creditor had issued the credit note amounting to USD 360000/-in favour of the Corporate Debtor towards the potential losses incurred qua the management of the Rhogam business in India and he further submitted that in view of the acknowledgement made by the Corporate Debtor, the application is within time.
7. In the light of the submissions raised on behalf of the petitioner, we have gone through the averments made in the application and the documents enclosed with the application and we noticed that at page 40, the petitioner has enclosed the Distribution Agreement which was executed on 21.03.2014 and we further noticed that the first invoice



was raised by the petitioner on 19.12.2013 and the due date of payment was 18.04.2014 and the last invoice was raised by the petitioner on 23.01.2014 and the due date of payment was 23.05.2014 and on the basis of invoices, the date of default is the date of payment, it means since the amount was not paid on 23.05.2014, therefore, on that day the default had occurred.

8. In view of the Article 137 of the Limitation Act, the petitioner was required to file an application within 3 years from the date, when the right to apply accrues and since due date of payment was of 23.05.2014, therefore, the petitioner was required to file the application within three years from the date of first default that is from 23.05.2014 but the present application has been filed on behalf of the petitioner on 30.06.2020, therefore, it is much after the period of three years.

9. At this juncture, we would like to refer the submissions made on behalf of the petitioner that the Corporate Debtor has acknowledged the debt on various dated, therefore, we would like to consider the documents enclosed by the petitioner in support of its contention that the period of limitation shall shift from the date of acknowledgement of debt. We have again gone through the documents enclosed with the application and we noticed that the petitioner at page 63, 65, 66 and 67 enclosed four documents and on the basis of that documents, the petitioner claimed that the present application is not barred by limitation. The documents are of the dated 18.01.2016, 07.07.2016 and 02.02.2017 and last one upon



which the petitioner has placed reliance is of dated 15.12.2017 after going through these documents we noticed that, the document dated 15.12.2017 is a credit notice memo issued by the petitioner and not by the respondent, therefore, in our considered view that this credit note cannot be treated as an acknowledgement of debt. So far the document dated 07.07.2016 is concerned of course, in this document, there is a signature of the director of the respondent company, which is addressed to the Deutsche Bank AG regarding the payment of the pending invoices and the two invoices are referred which are of dated 26/12/2013 and if we accept that this letter will be treated as acknowledgement of debt under Section 18 of the Limitation Act then the limitation shall run from the date of acknowledgement i.e. from 07.07.2016.

10. At this juncture, we would also like to refer the documents which is at page 66 of the application, this is not written by the respondent rather it is written by the petitioner to the respondent, therefore, in our considered view, in view of Section 18 of the Limitation Act it cannot be treated as acknowledgement of debt.

11. ^{→ this} Even if letter is also treated as acknowledgement of debt then the limitation shall run from the date i.e. 02.02.2017, whereas the present application is filed on 30.06.2020, which is much after the period of 3 years as required under Article 137 of the Limitation Act, so, on this ground also, the present application in our considered view is barred by limitation, hence, we have no option but to reject the prayer of the petitioner to issue the notice upon the respondent and



we are of the considered view that the present application is barred by limitation is liable to be dismissed.

12. Accordingly, the present application stands dismissed, as barred by limitation.

-Sd-

K. K. VOHRA

Member (T)

-Sd-

ABNI RANJAN KUMAR SINHA

Member (J)