

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 1149/MB/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]

IN THE MATTER OF:

M/S. ALLIANCE BIOMEDICA PRIVATE LIMITED

[CIN: 51397TN1999PTC041883]

Registered Office: Flat No. 15, Ashirwad

30, Pulliyur 1st Lane, II Main Road, Trustpuram

Chennai — 600024, Tamil Nadu.

...Operational Creditor

V/s

M/S. BIOMEDICON SERVICES (INDIA) PRIVATE LIMITED

[CIN: U33110MH2005PTC156761]

Registered Office: No. 215, Damji Shamji Industrial Complex

Near Golden Palace Hotel, 9 LBS Marg, Kurla (West)

Mumbai-400070, Maharashtra.

...Corporate Debtor

Pronounced: 02.07.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances:

Operational Creditor: Adv. A. Ganapatheeswaran a/w Adv. Shweta Nisar

Corporate Debtor: Adv. Satya Prakash Yadav a/w Adv. Rohit G. Verekar

ORDER**[Per. K. R. SAJI KUMAR, MEMBER (JUDICIAL)]****1. BACKGROUND**

1.1 This Company Petition No. C.P. (IB) No. 1149/MB/2022 (Application) was filed on 26.09.2022 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Alliance Biomedica Private Limited, the Operational Creditor (OC), through Mr. J. Kumar, Director of the OC, authorised *vide* Board Resolution dated 12.07.2022 for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Biomedicon Services (India) Private Limited, the Corporate Debtor (CD).

1.2 The total amount of default alleged is Rs.2,18,39,839/- (Two Crore Eighteen Lakh Thirty-Nine Thousand Eight Hundred Thirty-Nine Rupees) comprising of principal amount of Rs. 1,60,24,900/- along with interest of Rs. 58,14,939/-, calculated at the rate of 18 (Eighteen) per cent. per annum during the period from 09.04.2020 to 12.07.2022. The OC's alleged outstanding dues are based on 4 (Four) unpaid invoices issued by the OC during 2020-2021, in lieu of supplying 'Integra-CUSA Excel Ultrasonic Surgical Aspirator/Dissector system' with accessories (CUSA Machine Products) to the CD.

1.3 The date of default as mentioned in Part IV of the Application is 09.03.2020 to 02.02.2021, i.e., the dates on which the invoices issued by the OC remained unpaid for supplying CUSA Machine Products to the CD. As the CD defaulted in payment of its outstanding dues, the OC prays that CIRP may be initiated in respect of the CD under Section 9 of the IBC.

2. CONTENTIONS OF OC

- 2.1 It is submitted that the OC is engaged in the business of supply of healthcare equipment to hospitals as well as providing training to the end users on-going basis while the CD is a private company, engaged in the business of healthcare services.
- 2.2 The Ld. Counsel for the OC submits that the CD had received certain awards for supplying CUSA Machine Products to HLL Infra Tech Services Limited, a subsidiary of HLL Lifecare Limited, which is a Government of India Enterprise, *vide* Award of Procurement Orders dated 17.12.2019 and 26.02.2020. However, due to CD's inability to directly place order for CUSA Machine Products with the manufacturer, M/s. Integra Lifesciences Corporation, New Jersey, the USA (Integra), the OC imported the CUSA Machine Products from Integra at the CD's request and supplied the same at the CD's address at Delhi, on 09.03.2020, following which the CD issued Purchase Orders *vide* Nos. BIO/SER/20-21/485 and BIO/SER/20-21/486 dated 17.07.2020 to the OC.
- 2.3 It is further submitted that the OC had informed the CD about its reluctance to undertake the warranty of the CUSA Machine Products and that it was made clear that the CD had to claim all the warranties directly from Integra. The OC issued several invoices to the CD, in lieu of supply of the CUSA Machine Products *vide* first invoice No. 19964 dated 07.03.2020. However, the CD failed to make payment against the following invoices resulting in the outstanding amount:

Sr. No.	Date of Invoice	Invoice No.	Invoice Amount (Excluding GST) (In Rs.)	Payable Amount (In Rs.)	Interest as on 12.07.2022 (@18% p.a.) (In Rs.)	Total Amount due as on 12.07.2022 (In Rs.)
1.	09.03.2020	19770	11071252.80	11399803.14	4570540.25	15970343.40
2.	06.11.2020	00248	4428502.00	2479961.24	704444.88	3184406.10
3.	04.01.2021	00377	1396350.00	1563912.00	399504.53	1963416.50
4.	02.02.2021	00473	518950.00	581224.00	140449.20	721673.20
Total				16024900.38	5814938.86	21839839.20

2.4 The OC requested the CD for settling the outstanding dues, but it failed to make payments against the invoices despite being repeatedly reminded of the same. The OC has produced copies of emails exchanged between the OC and the CD during 2020-2021, as well as Mobile and WhatsApp Chats for the said period.

2.5 Therefore, the OC issued demand notice dated 11.12.2021 under Section 8 of the IBC demanding Rs. 2,01,64,468/- with interest. The CD, *vide* its reply dated 24.12.2021, denied any liability and also contended fraud committed by the OC in collusion with Integra and poor quality of CUSA Machine Products and services supplied by the OC. The disputes raised by the CD in its reply were denied by the OC in its rejoinder notice dated 02.05.2022.

2.6 The OC further submits that, after issuance of OC's Demand Notice under Section 8 of the IBC dated 11.12.2021, the CD filed Commercial Suit No. CS(COMM) No. 83/2022 against Integra and the OC before the Ld. District

Judge, Saket (East), Delhi, which was returned by the Court on the ground of lack of jurisdiction and the CD filed the same *vide* CS(COMM) No. 105/2023 before the Ld. District Judge (Commercial Court) (East), Karkardooma Courts, Delhi.

2.7 The OC has provided Affidavit dated 12.07.2022, under Section 9(3)(b) of IBC, regarding absence of dispute over unpaid operational debt along with the Ledger Account of the CD for the period of 01.04.2022 to 12.07.2022, and the Certificate dated 11.07.2022, issued by the OC's auditor. In the circumstances, the OC prays that CIRP may be initiated in respect of the CD.

3. CONTENTIONS OF CD

3.1 The CD, *vide* its reply dated 18.09.2023, contended that there was pre-existing dispute between the parties over poor quality of CUSA Machine Products imported and supplied by the OC as well as the amount as claimed by the OC. There was a tripartite deal among the OC, CD and Integra for the import and supply of CUSA Machine Products. The CUSA Machine Products were found to have several manufacturing defects on many instances. Furthermore, the alleged debt claimed by the OC is clearly disputed on account of claims and counter-claims made by the parties. To buttress its contention, the CD relied upon its email dated 13.07.2021 sent to Integra raising various disputes over quality of supplied CUSA Machine Products. The Ld. Counsel for the CD also argued that as held unequivocally by the Hon'ble Supreme Court in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*, [Civil Appeal No. 9405 of 2017], the dispute

between the parties were not merely moonshine or imaginary but based on strong factual position.

3.2 Further, the OC has not approached this Tribunal with clean hands which is evident from suppression of material facts in its pleadings. In the present Application, the OC concealed the involvement of Integra as well as the CD's consistent follow-up with Integra to resolve quality issues regarding CUSA Machine Products manufactured by Integra, imported and supplied by the OC. Moreover, the OC made a perjurious claim in its rejoinder stating that there was no pending litigation filed against it by the CD. A complaint was filed before the Ld. Metropolitan Magistrate, Patiala House Court, New Delhi (Metropolitan Magistrate) in Ct. Case No. 550/2022. The Ld. Metropolitan Magistrate issued summons to the OC for its fraudulent role along with Integra for supplying defective CUSA Machine Products to the CD. The CD has produced the email dated 01.03.2021 and the Memo of Parties and the order dated 08.11.2023 in Ct. Case No. 550/2022, passed by Ld. Metropolitan Magistrate, *vide* its Additional Affidavit dated 08.01.2024 to substantiate its points.

3.3 It is further submitted that the purpose behind filing of the present Application is sheer harassment of the CD for recovery, which is not the objective of the IBC. In view of the above, the CD submits that the Application deserves to be dismissed.

4. REJOINDER OF OC

4.1 The OC submitted that there was no tripartite agreement involving Integra, and, the present matter is solely between the OC and the CD since the CUSA

Machine Products were supplied to the CD by the OC. Further, the CD gave instructions to make invoices for only some of the items, while certain other items remained in CD's possession and the CD failed to return them or make payments despite repeated requests from the OC.

4.2 The OC further submitted that the CD's contention of pre-existing dispute over poor quality of supplied CUSA Machine Products and service issues is false since the CD did not object to the quality of CUSA Machine Products supplied during March to June 2020. Moreover, the CD's contention of pre-existing dispute is only moonshine one and the CD failed to provide any evidence for proving its contention, while the email dated 13.07.2021, is related to communication between Integra and the CD, which does not bind the OC as it had no knowledge of the said email. Further, the unpaid amount with interest calculated at the rate of 18 (Eighteen) per cent. per annum is clearly an operational debt.

4.3 It is submitted that the criminal proceedings filed by the CD before Ld. Metropolitan Magistrate, Delhi is not applicable to the OC since it is not a party to it. Also, the OC was not liable to service issues regarding the supplied CUSA Machine Products since the OC had already informed the CD that the service issues were to be independently handled by Integra, and, only after acceptance of such condition by the CD, the OC imported and supplied the CUSA Machine Products to the CD in 2020.

5. ANALYSIS AND FINDINGS

5.1 We have perused all the documents and pleadings and heard both the Ld. Counsel for the OC and the CD.

5.2 The issues to be adjudicated in the present Application are whether (i) there existed any dispute between the parties before filing the Application and (ii) whether the Application is filed solely for the purpose of initiation of CIRP in respect of the CD or as a substitute for extraneous considerations outside of the objectives of IBC.

5.3 Upon perusal of available documents, we find that the CD had first raised a dispute over defective CUSA Machine Products by email on 01.03.2021 with Integra. Various defects in the CUSA Machine Products were highlighted by the CD in the Table attached to the said email, depicting “*Not working*”; “*OUT OF BOX FAILURE*”; and “*Intermittent error at present working*”. Later, the said email was replied to by Integra on 10.03.2021, by keeping the OC also in the loop, *inter alia*, stating that “*As discussed earlier in our meeting that **this can be claimed by Alliance only.***” (Emphasis supplied), that means, only the OC herein would be able to agitate as to the claims with Integra and not by the CD. Since the email dated 01.03.2021 was forwarded to the OC (mnandu@alliancebiomedica.com) on 10.03.2021 by Integra, it is presumed that the OC was aware of the issue regarding the quality of the CUSA Machine Products manufactured by Integra and supplied through it. It is on record that by mail dated 13.07.2021, the CD further notified Integra of their intention to close business with them over various reasons including “*CUSA Handpiece failure issue for items imported by Alliance*” (Emphasis supplied). This shows that there were issues relating to quality of CUSA Machine Products manufactured by Integra and supplied through the OC. According to the OC, it was never notified of this email dated 13.07.2021, as stated in their rejoinder notice dated 02.05.2022, and, also, in their rejoinder

filed before the Bench on 26.10.2023. However, we find that *vide* email dated 06.10.2021, sent by the CD (Email: sunil@biomedicon.net) to the OC (Email: mnandu@alliancebiomedica.com), the dispute was raised by the CD, *inter alia*, stating that “**All the hand-piece billed in this invoice are defective and other four hand-piece received along with CUSA Machine Products are also defective and the same has been informed to you by our service team.**” (Emphasis supplied). Moreover, we find that in the CD’s email dated 13.07.2021 to Integra, the issue viz., “**Settlement of Nandu pending payment of 6 Nos of CUSA Machine Products**” (Emphasis supplied) was also raised as item 2. All these point to pre-existence of dispute raised by the CD.

5.4 Further, the series of emails produced by the OC in relation to reminders sent by them to the CD for payments contain the email IDs, viz., mnandu@gmail.com and mnandu@alliancebiomedica.com indicating that Mr. Nandagopal Mannam (Nandu), was in fact notified of the defects in the CUSA Machine Products manufactured by the CD and supplied by the OC. Mr. Nandagopal Mannam is one of the Directors of the OC as per MCA records. The emails dated 01.03.2021; 13.07.2021; and 06.10.2021 were prior to the issuance of demand notice dated 11.12.2021 by the OC. Furthermore, in its reply to the notice under Section 8 of the IBC dated 24.12.2021, it had raised the existing dispute between the parties by providing copy of the email dated 13.07.2021. All the above, indicate existence of disputes between the OC and the CD before Section 8 notice was issued to the CD.

5.5 As regards the intention of the OC in filing the present Application, it is seen that the OC has not made any averment in the Application regarding

involvement of a third entity, viz., Integra, in the transactions between the OC and the CD except producing copy of the plaint dated 20.12.2021, claiming to be served on it by the CD as advance notice for the proposed Commercial Suit filed by the CD against it and Integra. In the rejoinder, the OC submitted that the present matter is solely between the OC and the CD and that there was no tripartite agreement involving Integra. The Ld. Counsel for the OC argued that the CUSA Machine Products were supplied by the OC to the CD without any involvement of Integra. He further argued that the OC had already informed the CD by its email dated 02.03.2020 at 02:09 PM that it would not take up any guarantee issue for the CUSA Machine Products, as that was to be dealt with by Integra. By reply to this email dated 02.03.2020 at 03:12 PM, the CD requested the OC to handle first year warranty issue as the CD would not have paperwork to do the same. However, the OC by another email on 02.03.2020 at 05:11 PM informed the CD that warranty cannot be taken up by it. However, there is no formal agreement among the parties as to warranty. From this, it appears that the OC is attempting to blow hot and cold at the same time by initially denying involvement of Integra and after the CD produced email communications connecting Integra, it changed its stand. Further, the CD has brought on record the Criminal Complaint No. 550/2022 filed before the Ld. Metropolitan Magistrate, Patiala House Court, New Delhi under Sections 409, 420 and 120B of the erstwhile Indian Penal Code, 1860. However, during the final hearing on 23.01.2024, the OC submitted that it was unaware of the Complaint Case. We find that the Order taking cognizance and issuing summons *vide* Order dated 08.11.2023 by the Ld. Metropolitan Magistrate was placed on record by the CD on 18.11.2023. We

also find that Integra and its officials are arrayed as accused Nos. 1 to 5 and the OC and its Directors as accused Nos. 6 to 10. The Ld. Metropolitan Magistrate fixed 16.01.2024 for appearance of accused in the Complaint Case. The Ld. Counsel for the OC argued that so long as summons is not received by the parties, they cannot acknowledge the Criminal Complaint. However, we are unable to subscribe to this position taken by the OC as the Ld. Metropolitan Magistrate has already issued summons. We, therefore, hold that the OC does not agitate a consistent case, thereby coming to the only conclusion of suppression of material facts.

5.6 It is well established legal principle that when material facts are suppressed by one party, the other party is entitled to relief. In any case, there exist claim and counter claim between the parties and also civil and criminal proceedings instituted by the CD against the OC. The Adjudicating Authority is not a forum to deal with all the above. All that we need to deal with in summary jurisdiction is whether there exists operational debt and default and whether there were any pre-existing disputes as regards quality, quantity, etc., of goods or services.

5.7 Further, the records reveal that the Commercial Suit No. 83/2022 was filed by the CD before the District Court, Saket, Delhi on 06.01.2022 which was later withdrawn by the CD due to jurisdictional issues and filed before the District Court, Karkardooma, Delhi on 15.03.2023 as Commercial Suit No. 105/2023. Criminal Complaint was filed by the CD against the OC and Integra on 12.04.2022. This Application was filed by the OC on 26.09.2022. The Hon'ble NCLAT, New Delhi in *R.B. Singh and Anr. Vs. Rashmi Cement Limited* [Company Appeal (AT) (Insolvency) No. 1187/2023], held that when

the creditor is using insolvency as a substitute for debt recovery procedures and the intent is to make an attempt to obtain an advantage or upper hand in recovering their dues, this needs to be stone-walled as IBC cannot be allowed to be misused as a substitute forum for collection of debt. We feel that the sole purpose of filing of this Application is not insolvency resolution of the CD but with extraneous considerations for recovery of money and settlement of civil and criminal disputes. When an application under Section 9 of the IBC is not intended for insolvency resolution of the CD, it is only to be rejected.

5.8 It is a settled position of law as well as the judgment rendered by the Hon'ble Supreme Court in *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.*, [(2018) 1 SCC 353] that "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6) of the IBC. Further, in *Alpha Tech Projects (India) Pvt. Ltd. Vs. JMD Ltd.*, [Company Appeal (AT) (Insolvency) No. 530 of 2018], the Hon'ble NCLAT, New Delhi has laid down that once the corporate debtor raises objection before issuance of demand notice under Section 8(1) of the IBC, the application cannot be entertained. The same view is also adopted in *Amrop India Private Limited Vs. The Hi-Tech Gears Limited*, [Company Appeal (AT) (Insolvency) No. 1251 of 2023] that a debt which is highly disputed and requires a proper and thorough adjudication does not fall within the purview of the summary jurisdiction of the Adjudicating Authority.

5.9 To summarise, there are Commercial Suit and Criminal Complaint among the OC, the CD and Integra pending adjudication. The term "dispute" under Section 5(6) of the IBC includes, *inter alia*, a suit relating to the existence of

the amount of debt and the breach of a representation or warranty. In the present matter, there is evidence to demonstrate that there existed disputes as regards amount of debt and breach of representation and warranty. The Hon'ble Apex Court in Mobilox (Supra), also held that the Adjudicating Authority must reject the application under Section 9(5)(2)(d) of the IBC if notice of dispute has been received by the operational creditor from the corporate debtor or a suit relating to a dispute is pending between the parties. We have noted that in the reply dated 24.12.2021 to the Demand Notice, the CD had raised the dispute of poor quality of CUSA Machine Products and services provided by the OC including alleged fraud committed against the CD by the OC and Integra which needs to be decided by the competent Court having jurisdiction.

5.10 Hence, we infer that the debt claimed herein is disputed which requires a proper and thorough adjudication by competent Court of law which cannot be determined in a summary proceeding such as this. In the view of the factual and legal position as discussed above, we **reject** the application.

ORDER

This Application bearing C.P. (IB) No. 1149/MB/2022 under Section 9 of the IBC, filed by M/s. Alliance Biomedica Private Limited, the OC, for initiating CIRP in respect of M/s. Biomedicon Services (India) Private Limited, the CD is **rejected**.

We make it clear that any observations made in this Order shall not be construed as expressing opinion on merits. The OC's rights available as per law before any judicial/quasi-judicial forum shall not be prejudiced on the grounds of rejection of the present Application. No orders as to costs. Ordered accordingly.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

//Tanmay Jain//