

SL. No.1

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)

CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 19.04.2024 AT 10:30 AM**

| | |
|---|-------------------------------|
| TRANSFER PETITION NO. | |
| COMPANY PETITION/APPLICATION NO. | Company Petition IB/292/2022 |
| NAME OF THE COMPANY | Mylan Pharmaceuticals Pvt Ltd |
| NAME OF THE PETITIONER(S) | Dotcom Pharma Pvt Ltd |
| NAME OF THE RESPONDENT(S) | Mylan Pharmaceuticals Pvt Ltd |
| UNDER SECTION | 9 of IBC |

ORDER

Orders pronounced, recorded vide separate sheets. In the result, the petition is dismissed with costs of Rs.50,000/-.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH II**

CP(IB) No.292/9/HDB/2022

*Initiation of Corporate Insolvency Resolution Process under Chapter II
of Part II of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the
Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016*

In the matter of M/s.Mylan Pharmaceuticals Private Limited:

M/s.Dotcom Pharma Private Limited,
Having its Registered Office at:
Unit No.5, 9th Floor, Tower A,
Plot No.40, Sector 62 Noida,
Gautam Buddha Nagar,
Uttar Pradesh – 201 301.

....Applicant/Operational Creditor

Versus

M/s.Mylan Pharmaceuticals Private Limited,
Having its Registered Office at:
Plot No.564/A/22, Road No.92,
Jubilee Hills, Hyderabad,
Telangana – 500 096.

....Respondent Company/Corporate Debtor

Date of Order: 19.04.2024

Coram:

Shri. Rajeev Bhardwaj, Hon'ble Member (Judicial)

Shri .Sanjay Puri, Hon'ble Member (Technical)

Counsel/Parties present:

| | | |
|--------------------|---|---|
| For the Applicant | : | Mr.Y.Suryanarayana and Ms.Mano Ranjani, Counsels |
| For the Respondent | : | Mr.S.Ravi, Senior Counsel along with Ms. Achala Siri and Ms. Siva Praneetha, Counsels |

Per : Sri Rajeev Bhardwaj, Hon'ble Member(Judicial)

ORDER

1. This Application has been filed under Section 9 of the IBC by M/s.Dotcom Pharma Private Limited (**hereinafter referred as Applicant/Operational Creditor-OC**) to initiate Corporate Insolvency Resolution Process (CIRP) against M/s.Mylan Pharmaceuticals Private Limited (**hereinafter referred as Respondent/Corporate Debtor-CD**).
2. **Case of the Applicant:**
 - a) The Applicant is a Micro Small and Medium Enterprises (MSME) Private Limited Company dealing in the business of Drugs and Druggists Sundries Merchant Wholesalers, while the Respondent is a Private Limited Company and is in the business of Research, Manufacture and Distributors of Drugs and Medicines.
 - b) The Corporate Debtor is exclusive distributor in India of Sovaldi tablets being manufactured by M/s.Gilead Sciences Inc, USA .
 - c) M/s.Deep Healthcare Enterprises, a super speciality pharmaceutical distribution firm, is an Authorised Stockists/Distributor of the Corporate Debtor (**hereinafter referred as CD's Authorised Distributor**).
 - d) The Operational Creditor purchased 1000 packs of Sovaldi tablets vide Invoice No.DHE-18/19/001547 dated 02.08.2018 (**Annexure A08 of the Application**) for a sum of Rs.1,82,00,000/-.
 - e) The Operational Creditor could sell only 210 packs of Sovaldi tablets until May, 2019 and therefore asked the supplier to take back unsold 760 packs of Sovaldi tablets. This is also the policy of the Corporate Debtor to take back the unsold packs of Sovaldi tablets.

- f) Accordingly, the Operational Creditor raised Debit Notes and returned 760 packs of Sovaldi tablets on 02.11.20219 and 10.02.2020 **(Annexure A10 of the Application)**
- g) The amount of Rs.33,50,164/- was also remitted on different dates by the Authorised Distributor as evidenced from the Bank Statement. **(Annexure A11 of the Application).**
- h) When the Respondent did not return back remaining payment of Rs.1,00,44,336/-, the Applicant/Operational Creditor sent Legal Notice dated 16.12.2020 **(Annexure A13 of the Application)** asking for the payment and in response thereof, the CD has sent reply dated 31.12.2020 .**(Annexure A14 of the Application)**
- i) However, payment was not made despite the Legal Notice and therefore, the Applicant approached the Micro & Small Enterprises Facilitation Council, Meerut by filing an Application, which was registered as Case No.145 of 2021. **(Annexure A15 of the Application).** Before the MSME Council, the CD did not put an appearance and it was only its authorised distributor who filed the reply **(Annexure A16 of the Application)** stating that it acted as an agent of the CD. The said application was withdrawn on 31.03.2022 because of inordinate delay and the details of withdrawal of Application are at **Annexure A17 of the Application.** The Applicant has also approached for Pre-Institution Mediation by moving an Application, but this attempt has failed. **(A17 of the Application).**
- j) Ultimately, the Applicant sent demand notice dated 12.05.2022 **(Annexure A19 of the Application).**
- k) In order to support the claim, the Applicant has also referred to the Policy of the CD for taking back the unsold goods as per e-mail

correspondence and Whatsup messages exchanged between the Applicant and the Respondent/Authorised Distributor.

3. **Case of the Respondent:**

The Respondent has contended and contested the averments of the Applicant and submitted as below:

- i) The Respondent has raised preliminary objections of non-existence of Contract between the Applicant and the Respondent, as the Respondent is not privy to any agreement between the Applicant and M/s.Deep Healthcare Enterprises. Therefore, there existed no relationship of Principal and Agent between the Respondent and M/s.Deep Healthcare Enterprises. Further, preliminary objections are about pre-existing dispute between the parties, the Applicant is not an Operational Creditor under the IBC and that the Application is scandalous and not based on the process of the IBC.
- ii) On merits, it is submitted that by virtue of an Agreement dated 12.02.2015 with M/s.Gilead Sciences Inc, USA, the Respondent imports and distributes Sovaldi tablets in India. The last such import was made for M/s.Deep Healthcare Enterprises in August, 2018. It is also clarified that in September, 2014, the Respondent entered into an Agreement for transfer of technology with M/s.Gilead Sciences Inc, USA and accordingly the Respondent was granted non-exclusive rights for the manufacture and distribution of generic Sofosbuvir in India, which was launched in the name of 'Myhep.
- iii) In April, 2018, M/s.Deep Healthcare Enterprises approached the Respondent with a request for supply of 1000 packs of the Sovaldi tablets and accordingly requisition was sent to M/s.Gilead Sciences

Inc, USA. A consignment was sent to M/s.Deep Healthcare Enterprises in August, 2018, which was accepted without any demur or objection. M/s.Deep Healthcare Enterprises also made payment of Rs.1,71,50,396/- for the supply of 1000 bottles of Sovaldi product. It was later on revealed that the Applicant has purchased 1000 packs of Sovaldi Product from M/s.Deep Healthcare Enterprises on a non-returnable basis.

- iv) On account of the unsold packs of Solvaldi tablets, correspondence took place between the Applicant and M/s.Deep Healthcare Enterprises. The Applicant also sent e-mail on 26.06.2019 to the Respondent in this regard and in response, the Applicant was asked to reach out to M/s.Deep Healthcare Enterprises. Thereafter, the Respondent received notice dated 16.12.2020 for the refund of Rs.1,58,84,118/- towards 760 bottles of unsold Sovaldi products and a reply was sent vide letter dated 30.12.2020. The Applicant also filed an Application under MSME Act, which was later on withdrawn by the Applicant. The Applicant further invoked the provisions of Commercial Courts Act, 2015 for Pre-Institution Mediation Settlement which also failed as the Respondent never sold the Sovaldi Products to the Applicant.
- v) The Demand Notice dated 28.04.2022 was also frivolous and untenable and this was also accordingly replied to vide letter dated 12.05.2022.

4. We have heard Learned Counsels for both the parties and have also gone through the entire records.

5. M/s.Gilead Sciences Inc, USA supplied 1000 packs of Sovaldi tablets to M/s.Deep Healthcare Enterprises for a sum of Rs.1,71,50,396/- and the tax invoice is at **Annexure 2** of the Counter. It is the Respondent, who is the authorised distributor of M/s.Gilead Sciences Inc, USA in India. On 02.08.2018, M/s.Deep Healthcare Enterprises sold 1000 packs of Sovaldi tablets to the Applicant vide **Annexure 1** for a sum of Rs.1,82,00,000/-. However, the Applicant could not sell the entire lot of Sovaldi tablets and 760 packs of Sovaldi tablets remained unsold. The Applicant raised demand notice for the unsold goods on M/s.Deep Healthcare Enterprises and the details of which have given below:

| S.No | Date | Quantity | Acknowledgment given in the form of debit note/ Invoice No. | Amount in Rs. |
|------|--------------|------------------|---|--------------------|
| 1 | 02.11.2019 | 746 packs | DN00002 dated 02.11.2019 | 1,35,77,200/- |
| 2 | 10.02.2020 | 14 packs | DN00007 dated 10.02.2020 | 2,54,800/- |
| | TOTAL | 760 Packs | | 1,38,32,000 |

6. Subsequently, M/s.Deep Healthcare Enterprises returned back Rs.33,50,164/- on different dates to the Applicant. When the remaining amount of Rs.1,00,44,336/- was not returned, the Applicant resorted to various means to recover this amount.
7. Thus, the Respondent imported Sovaldi tablets for M/s.Deep Healthcare Enterprises as per **Annexure 2** of the Counter. M/s.Deep Healthcare Enterprises sold these tablets to the Applicant dated 02.08.2018. (**Annexure A8 of the Application**).
8. The Applicant filed MSME Samadhan Application No.145 of 2021 before the Micro & Small Enterprises Facilitation Council, Meerut,

wherein M/s.Deep Healthcare Enterprises filed reply (**Annexure A16 of the Application**). However, this Application was withdrawn on 30.08.2022 (**Annexure A17 of the Application**). Simultaneously, the Applicant also invoked the provisions of Commercial Courts Act, 2015 and the District Legal Services Authority, New Delhi issued notice to the Respondent, M/s.Deep Healthcare Enterprises and M/s.Gilead Sciences Inc, USA. However, the mediation failed and accordingly the matter was closed on 07.02.2021. Finally, the Applicant filed the present Application claiming that the Corporate Debtor is liable to pay the remaining amount because the said Company is the Principal. Thus, there are 4(four) stakeholders in the entire episode, i.e., the Applicant, Corporate Debtor, M/s.Deep Healthcare Enterprises and M/s.Gilead Sciences Inc, USA.

9. It is argued by the Learned Counsel for the Applicant that the Respondent is the Principal and M/s.Deep Healthcare Enterprises is its Agent for the supply of Sovaldi tablets to the Applicant. Accordingly, it is urged that the Respondent falls within the definition of Corporate Debtor and therefore liable to pay the debt.
10. On the other hand, it is submitted by the Learned Counsel for the Respondent that the Respondent is not privy to the contract between M/s.Deep Healthcare Enterprises and the Applicant and Sovaldi tablets were sold to the latter on Principal to Principal basis.
11. A contract of agency can be express or implied. Chapter X the Indian Contract Act, 1872 deals with the laws relating to Agency. It involves three key parties, i.e., the principal, the agent, and third parties with

whom the agent interacts on behalf of the principal. In agency, one person appoints another to do any act for himself or to represent him in dealing with the third persons. The relationship between an agent and a principal is called an “Agency. An agent therefore brings together his principal and a third person The acts of an agent are acts of a principal for all legal purposes.

12. There is no written agreement between M/s.Gilead Sciences Inc, USA and the Respondent for the supply of Sovaldi tablets to M/s.Deep Healthcare Enterprises, but it can be inferred from the GST invoice **(Annexure 2 of the Counter)**. These tablets were directly supplied to M/s.Deep Healthcare Enterprises at the instance of the Respondent for a sum of Rs.1,71.50,396/-. These were further sold by M/s.Deep Healthcare Enterprises on 02.08.2018 to the Applicant. **(Annexure 1 of the Application)**. Condition No.1 of the Annexure 1 is relevant which says **“Goods once sold will not be taken back or exchanged”**. This condition is part of the contract between M/s.Deep Healthcare Enterprises and the Applicant. The Respondent was nowhere in picture when these tablets were supplied to the Applicant.
13. There is no evidence to prove that the Respondent was party to the contract entered into between M/s.Deep Healthcare Enterprises and the Applicant. The Applicant has referred to certain WhatsApp messages exchanged between one of its employees and the Respondent, but these messages are not admissible in evidence because it is not primary evidence. The condition mentioned in section 65B(4) of the Evidence Act is essential to the admissibility of electronic records as evidence.

Reference can be made to the decision of the Hon'ble Supreme Court in *Arjun Panditrao Khotkar versus Kailash Kushanrao Gorantyal and Ors. (2020)7SCC1*.

14. Debit Notes were also served on M/s.Deep Healthcare Enterprises and some of the amount was also returned by the said agency. The Respondent has also not admitted anywhere either in the proceedings under MSME Act or the Commercial Courts Act that the Respondent has any role in the contract between the Applicant and M/s.Deep Healthcare Enterprises. The stand of M/s.Deep Healthcare Enterprises by filing reply (**Annexure A16 of the Application**) before the Micro & Small Enterprises Facilitation Council, Meerut stating that it is an Agent of the Respondent will not change the character and nature of the contract, unless and until there are sufficient evidences to prove it.
15. Thus, we conclude that the Sovaldi tablets were sold by M/s.Deep Healthcare Enterprises to the Applicant on Principal to Principal basis and the Applicant is not privy to the said contract. It has nowhere been proved that when the tablets were supplied by M/s.Gilead Sciences Inc, USA to M/s.Deep Healthcare Enterprises through the Respondent, it was the intention of the parties to supply these tablets to the Applicant. If there had been any intention, the Respondent would have directly sold the tablets to the Applicant, because in such circumstances, the margin of profit would have been more.
16. Besides the fact that the Applicant has failed to prove that M/s.Deep Healthcare Enterprises is the Agent of the Respondent, it is proved that there was a pre-existing dispute between both the parties, prior to the

filing of the present application. This is clear from filing of the Application under the MSME Act and the Commercial Courts Act. When the Application No.145 of 2021 was withdrawn by the Applicant on 31.03.2022 (**Annexure A17 of the Application**), the Applicant has specifically stated that the Application No.145 of 2021 was with regard to the dispute between both the parties. The Pre-Institution Mediation Settlement was also held because of the dispute. The Respondent in response to the Demand Notice also raised the dispute by filing the reply dated 12.05.2022. (**Annexure A20 of the Application**).

17. Coming to the dispute raised by the CD, it is to be noted that whenever there was existence of a real dispute, the IBC provisions cannot be invoked [*Transmission Corporation of Andhra Pradesh Ltd. versus Equipment Conductors and Cables Ltd. (2019) 12 SCC 697*]. There must not only be a dispute before the issuance of Demand Notice, but it should also be genuine one. The celebrated case on the subject is the judgment of the Hon'ble Supreme Court in *Mobilox Innovations Private Limited versus Kirusa Software Private Limited (2018)1 SCC 35* where after going through various judgments, it was laid down in para 51:

51. 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.

(own emphasis)

18. Further the Hon'ble Supreme Court in *M/s.Kay Bouvet Engineering Ltd. versus Overseas Infrastructure Alliance (India) Pvt. Ltd. (2021)10 SCC 483* again reiterated and explained the principles laid down in *Mobilox case (supra)* in the following words:

It is thus clear that once the "Operational Creditor" has filed an application which is otherwise complete, the adjudicating authority has to reject the application under Section 9(5)(ii)(d) of IBC, if a notice has been received by "Operational Creditor" or if there is a record of dispute in the information utility. What is required is that the notice by the "Corporate Debtor" must bring to the notice of "Operational Creditor" the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. All that the adjudicating authority is required 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 a mere bluster. It has been held that however, at this stage, the Court is not required to be satisfied as to whether the defence is likely to succeed or not. The Court also cannot go into the merits of the dispute except to the extent indicated hereinabove. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has no other option but to reject the application.

19. The Hon'ble NCLAT in *Aalborg CSP A/S versus Solar Atria Cleantech Private Limited [2020] ibclaw.in 96 NCLAT* after relying upon the decisions in *Mobilox Innovations Private Limited* supra has held:

It is clear from the Judgement of the Hon'ble Supreme Court that it is duty of the Adjudicating Authority to see whether there is 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. We are not required to be satisfied that the defence would succeed or examine the merits of the dispute. If the dispute truly exists and is not spurious, hypothetical or illusory, the Application under Section 9 would require to be rejected. Thus, it is necessary to see if the dispute truly exists in fact. On this basis, it would be appropriate to now see if the Respondent is able to show that dispute truly exists.

(Own emphasis)

20. Within the parameters of the decision in *M/s.Mobilox case (supra)*, the present dispute in fact is a pre-existing dispute and is not spurious, hypothetical or illusory. The dispute was also highlighted by the Corporate Debtor in response to the Demand Notice under Section 8(1) of I&B Code.
21. The Applicant has also filed the present Application as a substitute for the recovery forum. Here, we would refer to the decisions of the Hon'ble Supreme Court of India in *K.Kishan versus M/s.Vijay Nirman Company Private Limited (2018), ibclaw.in01SC* and *Transmission Corporation of Andhra Pradesh Limited versus M/s. Equipment Conductors and Cables Limited (2018), ibclaw.in 33SC*. Thus, the IBC is not

intended to be a substitute for a recovery forum. However, the Applicant is on a forum shopping and when he could not get success in the proceedings under the MSME Act and Commercial Courts Act, he approached this Forum. This Forum cannot be misused as an alternative for alleged debt enforcement.

22. Last but not the least, the Applicant has approached this Authority on the plea that M/s.Deep Healthcare Enterprises is the Agent of the Respondent. However, the Applicant has not impleaded M/s.Deep Healthcare Enterprises. On the other hand for the Pre-Institution Mediation Settlement, besides the Respondent and M/s.Deep Healthcare Enterprises, M/s.Gilead Sciences Inc, USA was also impleaded as party. On the strength of the reply (**Annexure A16 of the Application**) before the MSME Facilitation Council, Meerut, the Applicant is claiming that the Respondent is the Principal of M/s.Deep Healthcare Enterprises. Until and unless both the Agent and Principal are impleaded as parties, it cannot be determined whether any relationship exists between the Respondent and M/s.Deep Healthcare Enterprises because the proceedings under the IBC are different in nature in contrast to proceedings under the MSME Act or Commercial Courts Act.
23. For the reasons as discussed above, we opine that the Applicant has miserably failed to prove the ingredients of Section 8 and 9 and accordingly **CP(IB) No.292/9/HDB/2022 is dismissed with costs of Rs.50,000/-.**

SD/-
SANJAY PURI
MEMBER (TECHNICAL)

SD/-
RAJEEV BHARDWAJ
MEMBER (JUDICIAL)