

**NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH**

**CP No.8/2016
Now treated as Petition under section 9 of Insolvency and
Bankruptcy Code, 2016
RT No.9/Chd/Pb/2017**

Date of Order: 18.04.2017

In the matter of :

M/s Wanbury Ltd.Petitioner / Applicant

Versus


M/s Panacea Biotech Ltd.Respondent

Present:: Mr. C.S.Chauhan, Advocate for Shri A.P.Sandhu, Advocate
for Petitioner.
Mr.Atul V.Sood, Advocate for the Respondent.

Coram: **Hon'ble Justice R.P.Nagrath, Member (Judicial)**

ORDER

Company petition was filed in the Hon'ble High Court of Punjab and Haryana for winding up of the Respondent Company for its inability to pay the 'debt' in terms of section 433 (e) of the Companies Act, 1956 (to be referred hereinafter as the Act), after having served the Respondent Company with a notice of demand in terms of section 434 of the Act. Annexure P-7 is the notice dated 17.12.2014, calling upon the Corporate Debtor-Respondent to pay the outstanding amount of ₹49,45,331.86 being the principal sum, and ₹10,52,106.78 towards interest @ 24% p.a. upto 30.11.2014. It is also admitted by the petitioner that certain payments were made thereafter and the respondent was called upon to pay the remaining outstanding amount As per the notice



dated 25.05.2015 (Annexure P-9) the outstanding amount of principal for the goods delivered was ₹34,85,548.86, apart from the interest @ 24% p.a. The Respondent, vide its reply dated 14.07.2015 (Annexure P-11) had undertaken to pay the balance amount of ₹34,85,549 in 12 instalments as detailed in the reply. Therefore, from the aforesaid notice to the respondent, it was an admitted fact that the respondent was to pay an amount of ₹34,85,548.86 as claimed by petitioner in the notice (Annexure P-9).

2. The instant petition was received by transfer to the Tribunal in terms of Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 (for brevity the 'Rules') as notified on 07.12.2016. These Rules came into force with effect from 15.12.2016.

Sub-rule 1 of rule 5 of the Rules reads as under: -

"(1) All petitions relating to winding up under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent as required under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under sections 7, 8 and 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code.

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under sections 7, 8 and 9 of the code, as the case may be, including details of the proposed insolvency professional to the Tribunal within sixty days from date of this notification, failing which the petition shall abate."

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As per the amendment made in this Rule vide notification dated 28.02.2017, the period of furnishing all the required information has been extended to six months.

3. Accordingly, the petition received by transfer from the High Court is to be treated as an application filed under section 8 and 9 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred hereinafter as the 'Code'). The petitioner is admittedly an 'operational creditor' and entitled to make an application in terms of section 9 of the code. Under Rule 6 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity to be referred hereinafter as 'AAA Rules') an 'operational creditor' is to make an application for initiating corporate insolvency resolution process against the 'corporate debtor' in form 5, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Sub-rule(2) of Rule 6 further says that the applicant under sub-rule (1) shall despatch forthwith, a copy of the application filed with the Adjudicating Authority by registered post or speed post to the registered office of the 'corporate debtor'.

4. The petitioner / applicant has filed affidavit of Mr.Ravi Kant Alhat, its authorised signatory in form No.5, giving all the particulars required in the said form. It is stated that the outstanding principal amount in default as on 16.03.2017 is ₹20,85,273.03 with interest outstanding at ₹21,36,518.70. The statement of accounts is attached as Annexure A-2

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is in CD form and working for computation of amount and the difference of default amount in the tabulated form is attached as Annexure A-3.

5. The matter was listed for the first time on filing of the aforesaid application in form No.5 of AAA Rules on 03.04.2017. Having heard the learned counsel for petitioner, the applicant/petitioner was required to remove the following defects: -

i) To file resolution of the applicant company/operational creditor that Mr.Ravi Kant Alhat son of Keshav Alhat has been authorised by the company to accept the service of the process on its behalf.

ii) To file affidavit of authorised representative to the effect that there is no repayment of the unpaid operational debt and that no notice of any dispute has been received by the applicant company/operational creditor. The affidavit would further state that no notice of the dispute has been given by the Corporate Debtor relating to a dispute of the unpaid operational debt.

6. The applicant petitioner removed the aforesaid defects by filing an affidavit dated 05.04.2017 and the matter was listed soon after the vacation period of the Tribunal from 08.4.2017 to 16.04.2017.

7. The learned counsel for petitioner recorded his statement on 17.04.2017 that the petitioner-operational creditor has received Cheque No.706456 dated 03.04.2017 drawn on Axis Bank Ltd. for an amount of ₹18,82,074/-, but the same has not been encashed so far as 'corporate debtor' wanted the cheque to be accepted towards full and final settlement of the outstanding dues. Learned counsel for petitioner further stated that the balance amount towards the principal was still ₹2,03,199/-, apart from the claim of interest to the tune of ₹21,36,518.70. It was also clarified in the said statement by the learned counsel that the petitioner had earlier

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received cheque of aforesaid amount of ₹.2,03,199/-, but the same was not got encashed by the petitioner. Learned counsel for respondent also recorded his statement on 17.04.2017 that the respondent would be bringing the cheque for the balance amount by today i.e. 18.04.2017 and that is how the matter was adjourned for hearing for today.

8. The learned counsel for respondent has handed over the original cheque No.706896 dated 17.04.2017 for Rs.2,03,199/- in favour of the petitioner, drawn on Axis Bank Ltd. and the petitioner's counsel made the statement on having received the aforesaid cheque that the same was being accepted without prejudice to the rights of the petitioner to press for claim of interest over the outstanding amount. Copy of the cheque be made part of the record.

9. In view of the above the only limited question for determining would be whether the claim of interest falls within the term 'debt' which the respondent is liable to pay, failing which the petitioner is entitled to an order of admission in terms of section 9 of the Code and for recommending the appointment of the Insolvency Resolution Professional. It may be pointed out that the petitioner has not named the IRP to be appointed in case of admission, but has made a request for referring the matter to the Insolvency and Bankruptcy Board of India, for such an appointment in terms of section 16(3) of the Code

10. I have heard learned counsels of parties and given my thoughtful consideration to the controversy involved in the case. It is not disputed by the learned counsel for petitioner that the respondent has issued cheques in respect of entire principal sum due.

(Signature)

11. The learned counsel mainly relied upon the judgement of Hon'ble Supreme Court in **Vijay Industries Vs. NATL Technologies Limited (2009) 3 Supreme Court Cases 527** in support of his contention. The question before the Hon'ble Supreme Court was whether interest payable on the sum due would be a debt so as to attract the provisions of sections 433 and 434 of the Companies Act, 1956. The Hon'ble Supreme Court held as under: -

"34. Section 433 of the Companies Act does not state that the debt must be precisely a definite sum. It has not been disputed before us that failure to pay the agreed interest or the statutory interest would come within the purview of the word "debt". It is one thing to say that the amount of debt is not definite or ascertainable because of the bona fide dispute raised thereabout or there exists a dispute as regards quantity or quality of supply or such other defences which are available to the purchaser; but it is another thing to say that although the dues as regards the principal amount resulting from the quantity or quality of supply of the goods stands admitted but a question is raised as to whether any agreement had been entered into for payment of interest or whether the rate of interest would be applicable or not. In the latter case, in our opinion, the application for winding up cannot be dismissed."

12. The facts of the case before the Hon'ble Supreme Court were that the invoices of the credit bills attached with each of the supply contained a clause relating to payment of interest in the following terms - "amount must be paid within 7 days or you are liable to pay 2% interest per month." It was not in dispute that on the foot of each credit bill, the officer of the respondent company has put his signatures as a token of acceptance.

13 It was further found that the respondent company had adjusted the amount paid first towards the interest at a stipulated rate and

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the balance against the principal amount. The Hon'ble Supreme Court, on the facts of the case, further held as under: -

"43. The findings of the High Court, with respect, are not correct for more than one reason; firstly, because the Division Bench did not hold that the invoices were not proved by cogent evidence; secondly, question of leading evidence would arise only after the company petition is admitted and, thirdly, issuance of invoices and signature of the respondent thereon is not disputed "

44. The judgment of the Division Bench also contains a legal flaw insofar as it failed to take into consideration that the appellant had in fact issued three notices being dated 6-1-2003, 8-9-2003 and legal notice dated 23-12-2003 specifically mentioning that the payments had been adjusted towards interest first and balance, if any, shall be adjusted towards the principal. Thus, a prima facie case was made out."

14. The Hon'ble Supreme Court set aside the judgment of High Court. Further, instead of remitting the case back to the High Court, disposed of the matter in exercise of its jurisdiction under Article 142 of the Constitution of India, directing the respondent company to pay simple interest on the admitted sum @ 12% p.a. on the balance amount instead of 24% p.a. within 8 weeks from the date the amount became due till it was paid, failing which the consequences provided under the Law were to ensue

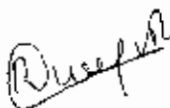
15. I am, however, of the view that the issue here is to be determined, in view of the provisions of the 'Code' which has come into force w.e.f. 01.12.2016. Learned counsel for parties have not disputed that the term "debt" or operational creditor were not defined in the 1956 Act. This term is now defined in section 3(11) of the 'Code' as meaning 'a liability or obligation in respect of a claim which is due from any person and



includes a financial debt and operational debt'. We are presently concerned with the definition of term "operational debt" as defined in section 5(21) of the 'Code'. Section 5 (20) defines "operational creditor" as meaning 'a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred'. Section 5 (21) of the 'Code' says that "operational debt" means 'a claim in respect of the provisions of goods and services including employment or a debt in respect of the repayment of the dues arising under any law for the time being in force and payable to the Central Government or State Government or any local authority.

16. There is a marked difference between the definition of the term 'financial debt' and the 'operational debt'. Under section 5 (8) the term 'financial debt' means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and that is an inclusive definition. In the definition of the term 'operational debt' under section 5 (21) the word 'interest' has not been mentioned.

17. Anyhow, to resolve the issue, it would be relevant to refer to the documents on record and the agreement, if any, between the parties. In the present case, admittedly, the amount being paid by the applicant / petitioner from time to time was being regularly adjusted towards the principal only and the interest has accumulated for the amount claimed by the petitioner. Even the invoices filed along with the winding up petition, do not contain any clause of payment of interest. It is only now with the present application that 'operational creditor' has attached 'Tax Invoices' [Annexure A-4 (colly)] containing the clause of payment of 24% p.a.

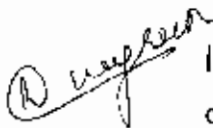


towards the interest in case the payment is not made within 3 days. These Tax Invoices were not part of the petition before the Hon'ble High Court. It is not the version of the petitioner that the Credit Invoices or Tax Invoices bear the signatures of the representative of the respondent Company. The term of 'interest' is thus only a unilateral act of the petitioner / applicant.

18. It would be pertinent to refer to the reply of respondent dated 23.03.2015 (Annexure P-8), attached with the Company Petition filed in the High Court. In this reply, the respondent has explained the reasons for the delayed payment. It was stated that the steps were being taken for restoration of World Health Organization (WHO) pre-qualification of the respondent Company's pentavalent vaccine ("Easyfive-TT") as in the absence of the same, the supplies of pentavalent vaccine ("Easyfive-TT") to UNICEF and other agencies could not be made, thereby adversely affecting the respondent Company. It was also stated that in view of the above, the petitioner / applicant company had assured full cooperation to the respondent and for that reason, no provision for payment of 'interest' in case of delay in payment was agreed in any of the purchase order in question. The petitioner has not placed on record the purchase orders issued by the respondent with the applicant company, in order to controvert the above stand of the respondent.

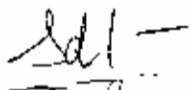
19. The learned counsel for petitioner, however, vehemently contented that the interest can be determined by the Tribunal at the reasonable rate, as the petitioner is entitled to interest in accordance with section 61 of the Sales of Goods Act and section 3 of the Interest Act.

I am of the considered view that it is never the intention of legislature under



the 'Code' that the Tribunal should determine the rate of interest and grant time to the company to pay the amount as per the directions. It is clearly intended that an application filed under section 9 of the Act is either to be admitted or rejected within a period of 14 days of the receipt of the application. There is no scope of passing an interim order like the one suggested by the learned counsel for the applicant / petitioner.

20. In view of the aforesaid discussion, I hold that the entire amount of 'debt' as per the intention of the legislature under the 'Code' having been paid by way of cheques, the instant petition is rejected. However, in case the cheques issued by the respondent are dishonoured, the petitioner would be at liberty to file a fresh petition, if so advised or take other appropriate steps in accordance with the Law. Certified copy of the order be sent to both the parties by speed post.



(Justice R.P.Nagrah)
Member (Judicial)

April 18, 2017
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