

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,  
DIVISION BENCH, CHENNAI

Arguments heard on 13.04.2017

Order passed on 21.04.2017

C.A/1/(IB)/2017

(Under Section 9 of the Insolvency And Bankruptcy Code 2016)

In the matter of

**M/s.Alcon Laboratories (India) Private Limited**

Applicant Company (Operational Creditor)

Vs

**M/s.Vasan Health Care Private Limited**

Respondent Company (Corporate Debtor)

Applicant Represented by :

Senior Counsel Mr.Vijay Narayanan, Counsels Mr.S.Arjun Suresh &  
Ms.R.Sinduja

Respondent represented by:

Counsels M/s.S.R.Rajagopal and Rohan Rajasekaran

CORUM :

ANANTHA PADMANABHA SWAMY & CH MOHD SHARIEF TARIQ,  
MEMBERS (JUDICIAL)

**ORDER**

CH MOHD SHARIEF TARIQ, MEMBER(JUDICIAL) :- (ORAL)

1. Under adjudication is an application which came to be filed under Section 9 of the Insolvency And Bankruptcy Code, 2016 (IBC 2016) and numbered as C.A/1/(IB)/2017. The application has been filed by M/s. Alcon Laboratories (India) Private Limited (hereinafter referred to as “Operational Creditor”), having its registered office at Third floor, Crescent-4, Prestige Shantiniketan, Whitefield, Bengaluru-560048, against M/s.Vasan Health Care Private Limited (hereinafter referred to as

“Corporate Debtor”) having its registered office at No.70, Dr.Radhakrishnan Salai, Westminster Complex, Mylapore, Chennai-4.

2. It has been stated in the application that the Operational Creditor is engaged in supply of certain diagnostic equipments, eye care pharma and vision care products for which the corporate debtor approached the operational creditor in the year 2008 for supply of such products for which the operational creditor and the corporate debtor entered into various agreements/ memorandum of understanding. The operational creditor through its consignment agent M/s.Parekh Integrated Services Private Ltd (Parekh) supplied various products to the Corporate debtor on credit basis and invoices were issued periodically on behalf of the operational creditor. The products supplied by the operational creditor were received by the Corporate debtor without any demur. The corporate debtor used the products without any complaints, but had defaulted in payments towards amount of some of the products supplied, for which the corporate debtor already received invoices. Thereafter, the operational creditor has given several reminders to corporate debtor calling upon to pay the outstanding amount. But the corporate debtor failed to make payment despite having received several reminders for payment which resulted in huge amount of outstanding payable to the operational creditor by the corporate debtor. The operational creditor addressed a letter dated 7.12.2015 to the corporate debtor reminding to make payment of the outstanding sum of Rs.86,65,75,855/- (Rupees eighty six crores sixty five lakhs seventy five

thousand eight hundred and fifty five only) payable to the operational creditor as on 30.11.2015. The Corporate debtor vide reply dated 22.12.2015 admitted the outstanding dues as claimed by the operational creditor in its letter dated 7.12.2015 and assured that 80% of the outstanding would be paid in the period between 15.1.2016 and 10.2.2016. Subsequently, an agreement of milestone dated 7.4.2016 was executed between the operational creditor and the corporate debtor wherein it has been expressly admitted and acknowledged by the latter that a total outstanding amount of Rs.94,74,46,921/- is payable to the former, which the corporate debtor undertook to pay in instalments. A hypothecation agreement was also entered into between the parties which formed the part of milestone agreement (available at Annexure P10). As per clause II of milestone agreement, it was also agreed by the Corporate Debtor that failure to pay any one instalment would give rise to serious default for which the Corporate debtor would be liable to pay the entire outstanding amount for all supplies made by the operational creditor till that date immediately. However, the corporate debtor failed to pay even the first instalment as per the schedule of payment agreed between the parties in the milestone agreement. Ultimately, the Operational creditor sent a statutory notice under Section 8 of IBC 2016 on 2.1.2017 to the corporate debtor to its office in Chennai, that was received by the Corporate debtor on 6.1.2017. In the statutory notice, 10 days' time reckoning from 6.1.2017 to 15.1.2017 was provided for payment of dues. However, the



corporate debtor did neither bother to pay the outstanding amount nor reply to the statutory notice.

3. It is on record that the claim was admitted by the corporate debtor and agreed to make the payment as per schedule which is as follows :

Sl.No	Date	Amount
1	On or before 31 <sup>st</sup> Aug 2016	30% of the total due
2	On or before 30 <sup>th</sup> Sep 2016	15% of the total due
3	On or before 31 <sup>st</sup> Oct 2016	20% of the total due
4	On or before 30 <sup>th</sup> Nov 2016	15% of the total due
5	On or before 31 <sup>st</sup> Dec 2016	20% of the total due

But the corporate debtor did not adhere to the schedule of payment to be made to the operational creditor.

4. The matter came up for hearing on 10.4.2017. Both the counsels appearing for the operational creditor and the corporate debtor sought time to submit their arguments and the matter has finally been heard on 17.04.2017. The counsel representing the corporate debtor has raised objections with regard to the maintainability of the application, *inter alia*, on the following grounds :-

- I) The statutory notice issued under clause (a) of sub-rule (1) of Rule 5 of the IBC (Application to Adjudicating Authority) Rules 2016 under section 8 of IBC 2016 is not in accordance with Form-3 as provided and was not sent by Operational creditor itself;
- II) The application is not in accordance with Form-5 as provided under Sub-rule (1) of Rule 6 of the IBC (Application to adjudicating Authority) Rules, 2016

III) The item supplied by the operational creditor are still under the ownership of operational creditor as per the Hypothecation Agreement dated 7.4.2016 and dispute if any was to be resolved through consultation and ultimately by arbitration as per the addendum to agreement of milestone dated 7.4.2016, which was entered into between the parties on 18.4.2016.

IV) That a winding up petition is *sub judice* before the Hon'ble High Court of Madras.

5. We take the objections I and II together. In relation to the issue of statutory notice and the application, we have noted that both of them are in accordance with the Forms prescribed. The objection of the corporate debtor is that the statutory notice was to be sent directly by the operational creditor but this objection is not sustainable for the reason that Form-3 itself provides for the signature of the persons authorised to act on behalf of the operational creditor. Therefore, the operational creditor can authorise any person to send the statutory notice on its behalf. As to the objection raised with regard to the application not being in the Form prescribed, it is seen that all the information required are contained in the application filed under section 9 of IBC 2016. Therefore, this objection is also not sustainable. In this connection, we may make a reference to the ruling given by the Hon'ble High Court of Bombay in *Pramod Prabhakar Kulkarni Vs Balasaheb Desai Sahakari Sakhar Karkhana Ltd and Another* reported in (2001)IIILLJ741Bom., wherein similar question

came for consideration before their Lordships and it was opined that though the requirement of making a notice is mandatory and the 'Form' in which it is to be given is a matter of procedure, and hence directory. It could be expressed in other words that the 'Forms' for notice and application as prescribed under the Rules are for providing/incorporating necessary informations, which are required under the law. Thus, the substance is more important than the 'Form' and moreover there is no irregularity in the statutory notice sent and the application filed.

The next issue raised is with regard to the hypothecation agreement. In this regard, it is a normal business practice being followed that unless the entire payment/consideration is paid by the buyer, the sellers will have lien over the goods supplied, but that does not mean that the corporate debtor is not under obligation to make the payment for the supply of the goods to the supplier. The counsel for the corporate debtor also stated that the 'operational creditor' does not fall within the definition of the 'operational debt' as defined under sub-section 21 of Section 5 of IBC 2016. The argument of the counsel for corporate debtor is misleading because the word "goods" used in the definition is of wider import and includes the machinery/equipment. Further it is on record that more than half of the outstanding amount is pertaining to the consumables supplied by the operational creditor. The objection raised by the counsel for

corporate debtor is not tenable in the eye of law and therefore, stands rejected.

The next objection taken by the counsel for corporate debtor is that the addendum to milestone agreement provides for resolving the disputes through negotiations, failing which by arbitration. This does not bar the operational creditor to file the application under section 9 of IBC 2016 against the corporate debtor as the Code does not envisage such a kind of bar for initiating the corporate insolvency resolution process by the operational creditor.

The last objection that has been raised by the counsel for corporate debtor is that winding up petition is sub judice before the Hon'ble High Court of Madras, where the Court permitted Andhra Bank to appoint suitable person to conduct forensic audit of the corporate debtor. The pendency of the winding up petition cannot be a bar under the Code for initiating the corporate insolvency resolution process, because the Hon'ble High Court has not passed any order for winding up of the corporate debtor and no Official Liquidator has been appointed. Therefore, this objection is also rejected.

6. It is admitted fact that no reply has been given by the corporate debtor. A specific query has been raised across the Bench that as to why the reply to the notice has not been given by the corporate debtor, the counsel for corporate debtor at the first instance attempted to give some explanation but turned to admit that the reply to the notice has not



intentionally been given. The counsel for operational creditor also submitted that he has filed an affidavit proposing Shri V.Mahesh as an interim insolvency professional, who is a registered practitioner having registration No.IBBI/IPA/002/IP-00215/2016-17/1930, whose consent has also been sought and his name is available on the web site of the Board and no prosecution pending against him. It is also an admitted fact that the outstanding amount payable by the corporate debtor to the operational creditor is not under 'dispute'.

7. We have perused the contents of the application along with the supporting documents placed on record the reply filed by the corporate debtor and considered the submissions of both of the counsels. After having satisfied that all the requirements under law have been fulfilled, we hereby allow the application of the operational creditor and order the commencement of the corporate insolvency resolution process which ordinarily shall get completed within 180 days, reckoning from the day this order is passed. We also appoint Shri V.Mahesh as interim insolvency professional who has been proposed by the operational creditor. He is directed to take charge of the corporate debtor immediately. He is also directed to cause public announcement as prescribed under Section 15 of the Code within three days from the date the copy of this order is received, and call for submissions of claim under section 15 of IBC 2016 in the manner as prescribed.

8. We declare the moratorium which shall have effect from the date of this order till the completion of corporate insolvency resolution process,



for the purposes referred to in Section 14 of the IBC 2016. We order to prohibit all of the following, namely :

- (a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (d) The recovery of any property by an owner or less or where such property is occupied by or in the possession of the corporate debtor.

9. However, the supply of essential goods or services to the corporate debtor as specified shall not be terminated or suspended or interrupted during moratorium period. It is further made clear that the provisions of sub-section (1) of Section 14 of the Code shall not apply to such transactions as notified by the Central Government in consultation with any financial sector regulator.

Accordingly, the application of the operational creditor is allowed.

  
ANANTHA PADMANABHA SWAMY  
MEMBER (JUDICIAL)

  
CH. MOHD SHARIEF TARIQ  
MEMBER (JUDICIAL)