

**In the National Company Law Tribunal**  
**New Delhi Bench**

Case No. (IB) – 370 (ND) / 2017

**In the Matter of**

M/s Vimal Organics Ltd.

...Applicant

Vs.

M/s Anya Polytech and Fertilizers Pvt. Ltd.

...Respondent

**Order Delivered on - 10.10.2017**

**CORAM:**

**SMT. INA MALHOTRA, HON'BLE MEMBER (J)**

**SH. S. K. MOHAPATRA, HON'BLE MEMBER (T)**

**Present:** Mr. Ahsan Ahmad, Advocate for the Petitioner  
Mr. Nesar Ahmad and Mr. Hitesh Joshi, PCS

Mr. P. Nagesh, Mr. Om Prakash and Mr. Pradeep Kr. Tripathi,  
Advocates for the Respondent

**ORDER**

**Per Ms. Ina Malhotra Member (J)**

The Respondent / Corporate Debtor is engaged in the business of manufacture and supply of fertilizers. It had entered into an agreement with the Petitioner on 03.05.2014 for erection and commissioning of a Zinc Sulphate Mono Hydrant Plant of 50 MTPD capacity. In addition to the setting up of the plant, the agreement provided for project management, site supervision and other engineering expertise including training of staff for

operating the plant. The total price for commissioning was agreed at Rs.10,01,00,000/-, cif Shahjahanpur, Service Tax etc. was to be paid in addition. The entire project was entrusted to the Petitioner from the stage of conceptualising the design till the desired output of the finished product could be made marketable. The time frame for completion was also an important factor, as the production had to meet the market demand. However, all civil construction was to be done by the Corporate Debtor themselves.

2. It is the Petitioner's case that against the invoices raised on the Respondent which included the tax liability undertaken to be paid by them, they have received an amount against of Rs. 10,16,47,601/- leaving a balance of Rs.81,48,130.56/- as the outstanding debt. Despite various reminders, it is averred that the Respondent has failed to liquidate this liability and therefore, the present petition has been filed by the Petitioner as an Operational Creditor seeking initiation of Corporate Insolvency Resolution Process of the Respondent / Corporate Debtor under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) on grounds of their recoverable debt. The said petition, which has been filed by a duly authorised person, is in the required format. Notice under Section 8 of the Code had been sent to the Corporate Debtor. Compliance of the mandatory provisions of Section 9(3)(b) and 9(3)(c) have also been placed on record.

3. The Respondents, on entering appearance, have resisted the prayer of the Operational Creditor. The liability is disputed on various grounds. The Ld. Counsel for the Corporate Debtor submits that the disputes in respect of various factors have been in existence for long, a fact which has been suppressed by the Operational Creditor.

4. Mr. P. Nagesh, Ld. Counsel appearing on behalf of the Corporate Debtor has taken us through various correspondence on record to fortify his arguments that even prior to the service of notice under Section 8 of the Code,



various disputes had been raised with respect to the inadequacies in the implementation of the plan. While the Operational Creditor seeks payment of Rs.81 lakhs on account of the Service Tax, Vat and other taxes paid, the Corporate Debtor submits that, in fact, due to the non-adherence to the terms and conditions of the contract, they are entitled to claim liquidated damages and have to recover much more from the Operational Creditor.

5. A perusal of the Counter Affidavit in reply has reflected that certain defects and non-implementation in performance had been raised from time to time. Amongst other correspondence, reliance is placed on the replies to the legal notices and a compilation of mails, annexed as Annexure R3 to the counter affidavit sent by the Corporate Debtor. In the various communications points in disputes have been specifically enumerated. Several meetings were held where due rectification was pointed out and undertaken to be carried out by certain dates. It had been brought to the notice of the Operational Creditor that they had failed to supply the scanner, vibrator, grinder as per the process diagram and the drawings submitted by them. The product manufactured was not satisfactory on account of impurities and other foreign material imparted in the output. There were leakages in the reactor etc. It was pointed out that the pumps and valves had got damaged due to sub-standard material used and locally manufactured parts which were of inferior quality and were without any warranty and guarantee and hence unserviceable.

6. The other main points of dissension raised by the Corporate Debtor was that as undertaken by the Operational Creditor, they were required to impart training to the Corporate Debtor's work force who were qualified engineers, recruited for the manufacture of the product Zinc Sulphate, for which the plant was set up. Dissatisfaction was also conveyed in respect of the entire project being grossly delayed, not being able to achieve the required output of 50 MTPD, non-delivery of the packaging machinery, though paid for, and above all, the failing to perform the Guaranteed Test Run (GTR) successfully.

They had called upon the Operational Creditor to execute the same but has still not been conducted till date. It is also the grievance of the Corporate Debtor that in terms of the said agreement, the Bank Guarantee which had been provided for due performance, on having lapsed after the first year, was never renewed. Liability is also sought to be disputed on account of the delay in implementation of the project by about 114 weeks. Since they were under pressure from their Bankers to meet the obligation of supplying to KRIBHCO for the kharif season 2016, they had to seek outside help. This delay caused extensive losses. Vide their email dated 31<sup>st</sup> May, 2016, the Corporate Debtor had notified their intention of recovering damages from the Operational Creditor on all the aforesaid counts.

7. Ld. PCS appearing for the Operational Creditor has stated that the delay, if any, in implementation of the project was on account of the delay in carrying out the civil works which was the sole responsibility of the Corporate Debtor. He has also emphasised that the outstanding debt is on account non-payment of Service and other taxes, which is primarily the responsibility of the end user, not only under law, but also under the agreement. There is, however, no cogent explanation offered in respect of non-supply of the packaging machinery or the non-execution of the GTR or lack of furnishing the performance guarantee.

8. The correspondence on record Annex R3 filed with the counter affidavit substantiates that these points had been raised from time to time and though a sum of Rs.10 lakhs was last paid on 31.12.2016, on an on-account basis, the dissatisfaction over the performance of the agreed terms and conditions is the basis for withholding any further disbursement.

9. Ld. Counsel for the Corporate Debtor submits that these are disputes which require an in depth analysis and adjudication, and they have therefore, invoked the arbitration clause provided for in the agreement for a counter recovery of their liquidated damages and on other grounds.

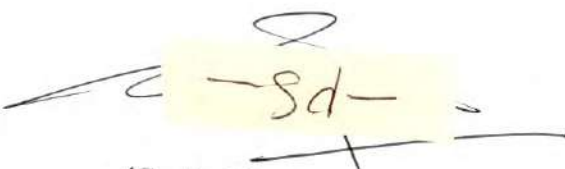


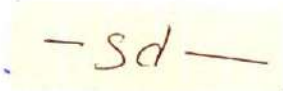
10. After hearing the counsels at length, this Bench is of the opinion that though the Operational Creditor has stated that there is no dispute with respect to the demand of the alleged outstanding balance, there exists a prior dispute primarily on account of dissatisfaction about proper implementation of the plant and the produce apart from non-execution of the tests under the GTR. It is however beyond the scope and jurisdiction of this Tribunal to appreciate the evidentiary value of the dispute. What is required to be assessed is that the dispute in the present proceedings is not patently false or a moonshine defence, raised only to resist initiation of any Insolvency Resolution Process against them.

11. In the case at hand, various objections were taken prior to initiation of the procedure under the Code, some of which may have been redressed and some still not to the satisfaction of the Corporate Debtor. A company that sets up a plant involving a huge expense as in the present case does so with the hope of achieving a faultless product. The existing disputes with respect to the alleged deficiencies in respect of services rendered in the implementation of the project can only be adjudicated in another form, which we are informed is vide initiation of arbitration proceedings.

12. This Bench is of the opinion that it is not to examine the merits of the dispute. Since we find that the defence is not spurious or set up to resist the Resolution Process, and existed prior to the issuance of the notice to the Corporate Debtor, the petition is liable to be Rejected.

13. Petition is therefore disposed off as being Rejected. However, no order as to costs.

  
(S. K. Mohapatra)  
Member (T)

  
(Ina Malhotra)  
Member (J)