(14)

IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IBA/634/2020

(filed 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. Fipola Retail India Pvt. Ltd.***

M/s. AlphaEdge Consumer Private Limited,
1424, Fern Block, Embassy Residency,
Behind Gleneagles Global Health City,
Cheran Nagar, Perumbakkam,
Chennai 600 100.

... *Operational Creditor*

-Vs-

M/s. Fipola Retail (India) Private Limited,
No.2B, Door No.AC5, 2nd Floor, 2nd Avenue,
Anna Nagar, Chennai – 600 040.

... *Corporate Debtor*

Order pronounced on 2nd September 2021

CORAM :

R.SUCHARITHA, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Operational Creditor : R. Prem Raja Kumari, Advocate

For Corporate Debtor : Rohan Rajasekaran, Advocate
Preethi S. Arasu, Advocate.

ORDER

Per: **R. SUCHARITHA, MEMBER (JUDICIAL)**

1. Under consideration an Application is filed by M/s. AlphaEdge Consumer Private Limited (hereinafter referred to as **'Operational Creditor'**) under Section '9' of the Insolvency and Bankruptcy

Code, 2016 (hereinafter referred to as **'IBC, 2016'**) against M/s. Fipola Retail (India) Private Limited (hereinafter referred to as **'Corporate Debtor'**) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. Part I of the Application discloses the details of the Operational Creditor from which it is evident that the Operational Creditor is a Private Limited Company. Part II of the Application discloses the details of the Corporate Debtor from which it is evident that the Corporate Debtor is also a Private Limited Company incorporated under the provisions of the Companies Act, 2013 and the registered office of the Corporate Debtor as per the Application is stated to be situated at No.2B, Door No.AC 5, 2nd Floor, 2nd Avenue, Anna Nagar, Chennai 600 040. From Part – III of the Application, it is seen that the Applicant has not proposed the name of the IRP and left it to the discretion of this Tribunal.

3. Part IV of the Application discloses about the details of the 'operational debt' and it is seen that the Operational Creditor has claimed a sum of Rs.1,80,42,916/- together with compounding interest @ 18% per annum. Part V of the Application discloses the list of documents filed by the Operational Creditor so as to prove the 'operational debt', which are as follows;

a) Order of NCLT, Chennai in IBA No.737/2019 filed under Section 7 of IBC Code, attached as Annexure II.

b) Section 73 of Indian Contract Act, 1872 (Breach of contract) & Clauses 4.1, 5.1, 8.1, 8.2, 8.3, 14.1, 15 and Schedule I of the Franchise Agreement dated 31.05.2018.

c) Statement of Account attached as Annexure III.

d) Franchise Agreement, Invoices & Typed set of documents filed.

4. Before venturing into the merits of the case, it is significant to note here that the Applicant herein has originally filed an Application under Section 7 of IBC, 2016 before this Adjudicating Authority, which was numbered as IBA/737/2019 in and by which this Adjudicating Authority vide its order dated 13.02.2020 had *dismissed* the said Application and the operative portion of the order is extracted hereunder:-

> "32. It is also further seen that the responsibility of running the Store, even though clauses in relation to the same was heavily relied upon by the Counsel for the Petitioner is placed upon the Franchisor, it is required to be seen that the said clauses when Franchise Agreement read as a whole is provided more as a protective measure with a view to protect its trade name and mark and also normally in order to have a uniformity and consistency in relation to the Stores operated at several places including the one in the present one and in the circumstances the said clauses cannot be read in isolation viz., 9.1.
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> 33. The standard as prescribed in relation to the quality, quantity or otherwise taking into consideration the expectancy of the user public when the trade name **"Fipola"** is associated any adverse usage by the Franchisee will be only detrimental to the trade name of the Franchisor as well as in relation to the Franchise and as already pointed out is a protective measure in relation to its 'trade name' permitted to be utilized by the Financial Creditor.

34. It is also required to be further noted that in this regard Schedule-1 as pointed in the Franchise Agreement cannot be also be read in isolation and it has to be read in conjunction with the clauses contained in the Franchise Agreement as a whole.

35. It is also required to be noted under the rules framed viz., 'AAA' Rules, 2016 that the present Petition before this Tribunal under Section 5 (8) is required to be supported with a written Financial Contract clearly specifying the tenure of the financial debt, interest or compensation, if any, payable thereon and as already pointed in the Franchise Agreement by any stretch of imagination cannot be considered a financial contract as defined under 'AAA' Rules, 2016.

36. It is also required to be noted that all 'claims' as defined under the provisions of IBC, 2016 namely under Section 3 (6) cannot lead to the filing of a Petition under the provisions of IBC, 2016 in relation to the Corporate Debtor as a 'financial debt' or as an 'operational debt' unless the conditions as provided under Section 5 (8) or 5 (20) as the case may be is satisfied by the Petitioner approaching this Tribunal.

37. Taking into consideration all the above, the claim cannot be treated as a 'financial debt' and the Petitioner cannot be treated as a 'Financial Creditor' as defined under Section 5 (8) and 5 (7) of IBC, 2016 respectively.

38. In the circumstances, we are constrained to **dismiss this petition, however, without cost."**

5. Immediately thereafter, it is seen that the Applicant has issued a Demand Notice to the Corporate Debtor on 25.02.2020 under Section 8 of IBC, 2016 demanding payment to be made by the Corporate Debtor which was subject matter of the IBA/737/2019. The said Demand Notice was served on the Corporate Debtor on 29.02.2020.

6. Learned Counsel for the Operational Creditor submitted that the Corporate Debtor entered into a Franchise Agreement with the Operational Creditor on 31.05.2018 wherein the Operational Creditor became a franchisee of the Corporate Debtor to pay a franchise fee of Rs.5,90,000/- and made further investments based on the request of the Corporate Debtor to the tune of Rs.82,24,022/- on the committed promises made by the Corporate Debtor on providing guaranteed monthly return on investment.

7. Learned Counsel for the Operational Creditor has submitted that as per the clause 4.1 of the Franchise Agreement, the Operational Creditor has made an investment of Rs.16,00,000/- as a Security Deposit towards the lease of Fipola Store premises at No.151/2, 151/3, Arcot Road, Valasaravakkam, Chennai to the Corporate Debtor on 15.06.2018 which was in turn paid to the landlord from the store operations by the Corporate Debtor.

8. It was submitted by Learned Counsel for the Operational Creditor that as per the clause 8.1 of the Franchise Agreement the Operational Creditor is entitled to get a monthly minimum guaranteed return to be paid by the Corporate Debtor for a period of 36 months and it was submitted that in spite of some invoices being raised by the Operational Creditor for a sum of Rs.2,05,839/, the same was never paid by the Corporate Debtor. Further, it was

submitted that since the date of execution of the Franchise Agreement, the Operational Creditor has received only a sum of Rs.1,74,440/- from the Corporate Debtor.

9. It was further submitted by Learned Counsel for the Operational Creditor that the Franchise Agreement entered into between the parties is for a period of 12 years with a minimum guaranteed monthly return of investment for a lock in period of three years to be provided by the Corporate Debtor to the Operational Creditor on the payment made by the Operational Creditor.

10. It was further submitted that since no payment was forthcoming from the Corporate Debtor, the Operational Creditor has initially filed an Application under Section 7 of the IBC, 2016 in the capacity as a Financial Creditor and the same was dismissed by this Tribunal vide its order dated 13.02.2020.

11. It was also submitted by Learned Counsel for the Operational Creditor that while the said matter was pending before this Tribunal, the Corporate Debtor on 11.12.2019 by invoking the Arbitration Clause in the Franchise Agreement has issued a notice under Section 21 of the Arbitration and Conciliation Act 1996 by nominating one Ms. Hema Srinivasan as the sole Arbitrator.

12. It was submitted by the Learned Counsel for the Operational Creditor that since the matter was pending before this Tribunal, the Petitioner did not agree to the appointment of the said person as the Arbitrator and hence the Corporate Debtor filed O.P.No.22/2020 under Section 11(6) of the Arbitration and Conciliation Act, 1996 praying for the appointment of the Arbitrator. It was also submitted that the O.P. No.22/2020 came to be dismissed for default by the Hon'ble High Court of Madras on 11.02.2020.

13. Subsequent to the dismissal of the IBA/737/2019 by this Tribunal dated 13.02.2020, the Operational Creditor had issued a Demand Notice to the Corporate Debtor on 25.02.2020, to which the Corporate Debtor had issued a notice of dispute on 05.03.2020 stating about the Application filed by the Applicant in IBA/737/2019 and also the pending of OP No.22/2020 before the Hon'ble High Court of Madras.

14. It was submitted by Learned Counsel for the Operational Creditor that the Operational Creditor vide its reply to the notice of the dispute has stated that the breach in the Franchise Agreement was communicated on 18.03.2019 and as the claim towards the minimum guaranteed monthly return of investments as well as

under other heads had not been cleared by the Corporate Debtor. Further, it was submitted that there was no bar on the part of the Operational Creditor to prefer an Application for initiation of the CIRP against the Corporate Debtor under Section 9 of IBC, 2016 and thus the same would not also be barred by the principles of *res judicata* and also it was submitted that the OP No.22/2020 was dismissed for default on 11.02.2020 and as on the date of issuance of the Demand Notice there was no Arbitration proceeding initiated. Under such circumstances, the Learned Counsel for the Operational Creditor prayed for initiation of CIRP against the Corporate Debtor.

15. The Corporate Debtor has filed the counter. The Learned Counsel for the Corporate Debtor submitted *prima facie* contended that the averments made by the Operational Creditor in the present Application and the reply given by the Corporate Debtor to the Demand Notice would prove that the claim made by the Applicant in the present Application is in the nature of 'damages', since the Applicant himself has alleged that the debt has become due in accordance with Section 73 of the Contract Act, 1872 and under the said circumstances, it was submitted that the present Application under Section 9 of the IBC 2016 is not maintainable.

16. Further, it was also submitted by the Learned Counsel for the Corporate Debtor that the alleged claim under the present

Application arises out of the Franchise Agreement and admittedly the Operational Creditor has not supplied any goods nor provided any service to the Corporate Debtor and hence there is no 'operational debt' within the definition under Section 5 (21) of the IBC, 2016.

17. The Learned Counsel for the Corporate Debtor has listed out the details of the dates and events which had happened since the filing date of entering into the franchise agreement and till the present date which is extracted hereunder:-

DATE	EVENT
31.05.2018	Franchise Agreement executed
18.03.2019	Legal notice issued by the Applicant
05.04.2019	Amendment to earlier legal notice
16.04.2019	Application filed by Applicant u/s 7 of the Code in IBA/737/2019
28.11.2019	Notice invoking Arbitration issued by the Respondent for referring disputes to a Sole Arbitrator
11.12.2019	Notice dated 28.11.2019 invoking arbitration served on the Applicant E-mail
26.12.2019	Reply to notice dated 28.11.2019 issued by the Applicant
07.01.2020	Petition filed by the Respondent u/s 11 (6) of the Arbitration & Conciliation Act, 1996 for appointment of an Arbitrator in OP/22/2020
11.02.2020	Petition in OP/22/2020 dismissed for non-appearance of Petitioner
13.02.2020	IBA/737/2019 dismissed by this Hon'ble Tribunal
25.02.2020	Form-3 notice issued by the Applicant to the Respondent
29.02.2020	Form – 3 received by the Respondent
05.03.2020	Notice of dispute issued by the Respondent to the Form-3 notice
July, 2020	Restoration Application filed by the Petitioner in OP/22/2020

28.09.2020	Order passed by the Hon'ble High Court of Madras restoring the Petition in OP/22/2020.
09.12.2020	Final order passed by the Hon'ble High Court of Madras in OP/22/2020 appointing Senior Counsel Mrs. Chitra Sampath as the Sole Arbitrator
23.02.2021 06.03.2021 08.03.2021	Notices issued by the Ld. Arbitrator to the parties
11.03.2021	Present Application IBA/634/2020 was listed for admission
20.03.2021	Statement of Claim filed by the Respondent to the Arbitrator
02.04.2021	Statement of defense filed by the Applicant

18. Further it was contended by the Learned Counsel for the Corporate Debtor that in terms of Section 21 of the Arbitration and Conciliation Act, 1996, the arbitral proceedings has commenced as early as on 11.12.2019 when the Applicant has received the notice dated 28.11.2019 issued by the Respondent referring the dispute to arbitration. Thus, it was submitted that the said proceedings had culminated into the appointment of the Sole Arbitrator by the Hon'ble High Court of Madras. It was also submitted that the Respondent has filed his statement of claim before the sole Arbitrator and the Operational Creditor has also filed the statement of defence which is pending for consideration.

19. It was further submitted that the Respondent has a legitimate claim before the Arbitrator for a sum of Rs.4.5 Crore among others and hence the present proceeding as initiated by the

Operational Creditor is devoid of merits. Further, it was submitted that there is a dispute between the parties in relation to the sum which is payable and also the pending arbitration proceedings would show that the dispute between the parties is required to be adjudicated before the appropriate forum. Under such circumstances, Learned Counsel for the Corporate Debtor prayed for the dismissal of the present Application.

20. Learned Counsel for the Operational Creditor has filed the rejoinder and the Operational Creditor has sought to deny all the averments made in the counter by the Corporate Debtor and also stated in the rejoinder that as on the date of issuance of the Demand Notice under Section 8 of IBC, 2016, the O.P.No.22/2020 filed before the Hon'ble High Court of Madras was dismissed and not pending and hence it could not be considered as a 'dispute' that is existing between the parties.

21. Heard the submissions made by the Learned Counsel for both the parties. It is required to be noted that the present Application has been filed by the Operational Creditor under Section 9 of the IBC, 2016 and that the Operational Creditor has already filed an Application under Section 7 of the IBC, 2016 which came to be dismissed by this Tribunal vide order dated 13.02.2020 on the ground that the amount claimed is not a financial debt. Further,

this Adjudicating Authority in para 36 of the said order dated 13.02.2020 has stated that *'all claims as defined under the provisions of IBC, 2016 namely under Section 3 (6) cannot lead to the filing of a Petition under the provisions of IBC, 2016 in relation to the Corporate Debtor as a 'financial debt' or as an 'operational debt' unless the conditions as provided under Section 5 (8) or 5 (20) as the case may be is satisfied by the Petitioner approaching this Tribunal'.* However, for the same debt, the Operational Creditor has filed the present Application seeking thereof that the default occurred in respect of certain breaches which are happened on the Franchise Agreement and that the Applicant is entitled to be an Operational Creditor in respect of the Corporate Debtor.

22. Be that as it may, in order to better address the issues, the following definitions under IBC, 2016 is required to be taking into consideration;

> **Sec. 3(6)** "claim" means –
>
> (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;
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> (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;
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> **Sec. 3 (11)** "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Sec. 3 (12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not 1[paid] by the debtor or the corporate debtor, as the case may be;

Sec. 5 (20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Sec. 5 (21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

23. From the above definitions, it is required to be noted that for a 'debt' to qualify as an 'Operational Debt', it has to undergo the following percolation process;

(a) The amount in default should fall within the definition of 'claim' as defined under Section 3(6) of IBC, 2016.

(b) Such a 'claim' should be capable of being treated as a 'debt' as defined under Section 3(11) of IBC, 2016.

(c) And such 'debt' should fall within the confines of "Operational Debt" as defined under Section 5(21) of IBC, 2016.

(d) And the said "Operational Debt" must be owed by the Corporate Debtor to the Creditor, who can then be considered as an Operational Creditor under Section 5(20) of IBC, 2016.

24. In the present case, the Applicant has not supplied any goods nor rendered any services to the Corporate Debtor, however the Operational Creditor is having a 'claim' over the damages and

the breaches committed on the part of the Corporate Debtor in relation to the Franchise Agreement. All 'claims' cannot qualify to be an 'operational debt'. The Applicant may have a 'claim' against the Corporate Debtor, however the said claim, as per the definition of Section 5(21) of IBC, 2016 should be in respect of provision of goods or service, which is not so in the present case.

25. Further, this Tribunal strongly feels that the filing of the present Application by the Operational Creditor under Section 9 of IBC, 2016 immediately after the dismissal of the Application filed under Section 7 of IBC, 2016, is required to be deprecated.

26. It is also required to be noted that the notice invoking Arbitration clause under the Franchise Agreement was issued by the Corporate Debtor as early as 28.11.2019. At this juncture, it is necessary to refer to Section 21 of the Arbitration and Conciliation Act, 1996 which reads as follows:-

> "**21. Commencement of arbitral proceedings.**—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

27. Perusal of the aforesaid Section shows that the Arbitral proceedings in respect of the particular dispute would commence on the date on which the request for that dispute to be referred to

arbitration is received by the Respondent under Section 21 of the Arbitration and Conciliation Act, 1996 i.e., on 28.11.2019. If the said definition is taken into consideration, then it is required to be noted that the dispute between the parties arose much early as on 28.11.2019 itself.

28. Further it is also required to be noted that the intention of the Operational Creditor to participate in the Arbitration proceeding and also by filing a Statement of defence before the Sole Arbitrator would make it clear that there is a dispute between the parties and the said dispute is required to be adjudicated. In relation to the same also it is to be noted that the O.P.No.22/2020 has been ordered by the Hon'ble High Court of Madras and the sole Arbitrator has also being appointed and further both the Operational Creditor and the Corporate Debtor have filed their respective claims before the Sole Arbitrator and hence the issue as to whether the Operational Creditor is entitled to claim the sum from the Corporate Debtor is *sub judice* before the Learned sole Arbitrator.

29. All these facts would go on to show that there exists dispute between the parties and that the Operational Creditor is indulging in the act of forum shopping by filing the statement of defence before the Learned Sole Arbitrator and also pursuing the present Application before this Tribunal. Further, it is seen that the

Operational Creditor is trying to waste the valuable time of this Tribunal, which practise is required to be deprecated. Under these circumstances, we are of the view that in order to dissuade the practice of filing multiple proceedings before this Tribunal and also before other fora for the same cause of action, and thereby wasting the valuable time of this Tribunal, the present Application entails an imposition of costs. Thus, the present Application filed by the Operational Creditor under Section 9 of the IBC, 2016 stands **dismissed with the cost of ₹50,000/-.** The cost is to be paid to the account of **PM CARES** *(Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund)*. Let the same be done within a period of two (2) weeks from today and file an affidavit of compliance in the Registry of this Tribunal.

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

Raymond