

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. IV)
Company Petition No. IB- 307/ND/2019

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

M/S Merchens Karton-und Paper Fabric GMBH

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

M/S Franco Leone Limited

...RESPONDENT/ CORPORATE DEBTOR

ORDER PRONOUNCED ON: 09.05.2022.

CORAM:

MR. DHARMINDER SINGH
HON'BLE MEMBER (JUDICIAL)

MS. SUMITA PURKAYASTHA
HON'BLE MEMBER (TECHNICAL)

ORDER

PER-DHARMINDER SINGH, MEMBER (JUDICIAL)

1. The instant application filed under Section 9 of IBC 2016 has been filed by M/s. Merckens Karton-Und Pappen Fabric Gmbh the applicant/operational creditor seeking (for brevity Operational Creditor) to initiate CIRP against the Respondent company/Corporate Debtor (for

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brevity Corporate Debtor) M/s Franco Leone Ltd., for the alleged default on the part of the Corporate Debtor having an outstanding balance of Rs.12,21,663.65/-on account of supplying insoles boards and shank boards suitable for insolesto the corporate debtor. The details of transactions leading to the filing of this petition as averred by the applicant are as follows:-

- a. The Operational creditor is involved in the business of producing boards, insoles boards and shank boards suitable for insoles, used from men and women shoes.
- b. It is submitted that the Operational Creditor shipped material to the Corporate Debtor and issued Invoice No.423777dated 02.02.2017 to Corporate Debtor for the amount of Rs. 12,21,663.65/-, but the Corporate Debtor defaulted in making payment of operational debt.
- c. It is submitted that the payment of default was occurred first time on 02.02.2017, when first Invoice No. 423777 was issued to the Corporate Debtor by the Operational Creditor.
- d. Furthermore, the Operational Creditor sent an e-mail dated 15.01.2018 for reminder of making the payment of outstanding debt to corporate debtor, but corporate debtor failed to reply the said email.
- e. The applicant sent demand notice under Section 8 of the code on 28.11.2018 calling upon the corporate debtor to pay the total

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amount of Rs.12,21,663.65 /-. The applicant submits that the notice had been duly served on the corporate debtor. The Copy of demand notice along with postal receipts and the tracking reports has been annexed. Accordingly, prayed for acceptance of the present petition.

2. On behalf of the respondent, the detailed reply has been file stating that Operational Creditor is doing business in India through Agent/Middle Man Mr. Vivek Goel, who is managing partner of M/s Instyle Overseas LLP, Karol Bagh, New Delhi, accordingly, respondent had purchased insole sheets manufactured by the applicants, at several occasions from Mr. Vivek Goel i.e. Instyle Overseas LLP and few invoices were raised by Mr. Vivek Goel to the respondent. The respondent/Corporate Debtor being the Footwear manufacturer, had negotiated for purchase of insole sheets through Vivek Goel in the month of December 2016. Accordingly, the price quality and quantity of the alleged transactions were discussed and finalized between the respondent and Vivek Goel. Thereafter, Mr. Vivek Goel sent a mail to the applicant on 16.12.2016 which was accepted by the applicant and this aspect has been concealed by the applicant.
3. Further, it is submitted that the applicant dispatched the alleged material to the respondent upon the email of Mr. Vivel Goel, but not upon the purchase order dated 04.01.2017. As a formality, Mr. Vivek Goel instructed respondent to send the purchase order to the

applicant as well as himself, therefore, the same was sent infact to Mr. Vivek Goel , who was dealing with respondent/Corporate Debtor. In view of the said purchase order, respondent received the insole sheets on 10.04.2017 which is apparent from the custom clearance documents. After receipts of the alleged material, the respondent used the same partly for producing the footwears and sent it to market for selling those to individuals, but many customers made several complaints to the respondent about the footwears manufacture with the Insole Sheets sold by them being of low quality and sub-standard. Accordingly, the respondent raised a dispute with Middle Man Mr. Vivek Goel by notice of dispute dated 15.03.2018, which was duly dispatched on 21.03.2018 through speed post, which was never returned back.

4. It is also submitted that the respondent also claimed a sum of Rs. 4,04,155/- besides calling instructions for returning the unused insole sheets. The respondent has raised the said dispute within a period of one year from the receipt of insole sheets supplied by the applicant/Operational Creditor. The Operational Creditor concealed the said material facts. The applicant instead of settling the dispute of the respondent, Mr. Vivek Goel preferred to provoke the applicant to raise legal notice on 28.11.2018. It is strange that Mr. Abhishek Anand, was instructed to raise the notice, where the GPA in favour of MR. Pawan Kapoor was executed thereafter on 24.01.2019. Therefore,

Mr. Vivek Goel, might have engaged Mr. Abhishek Anand, wherein the applicant herein has engaged Mr. Dushyant Tiwari and Mr. Priyam Aggarwal as a counsel to file present application. Further, it is submitted that respondent had duly replied to the notice dated 28.11.2018. Thus, there was a clear dispute between the parties, hence, the present petition is not maintainable. The respondent also relied upon citations ***Phillips India Limited Vs. Goodwill Hospital & Research Center Ltd. and MCL Global Steel (P) Ltd. & Ors. Vs. Soril Infra Resources Ltd.*** Accordingly, the prayer has been made to dismiss the present petition with heavy costs.

5. Rejoinder has been filed denying all the allegations made in the written statement and stated that the Corporate Debtor has not made the payment of Rs. 12,21,663.65/- and the notice dated 15.03.2018 was manipulated in nature because of the reason that the company was earlier known as “Franco Leone Shoes Private Limited”, whereas the name has been changed on 15.03.2018 as “Franco Leone Limited”, but the said letter was sent on 21st March 2018, which shows that the same was after thought. Further, the allotment of new PAN Card/charge or correction etc. were made on 20th March 2018. Therefore, there was manipulation on the part of the respondent/Corporate Debtor. Apart that, it is also submitted that Mr. Abhishek Anand was duly authorized through email on 26th November 2018 to send the demand notice to the Corporate Debtor.

Therefore, he was duly authorized to do so. In this regard, the reliance has been placed on citation ***Macquaire Bank Limited (Singapore) and Shilpi Cable Technologies Ltd, 2017 SCC Online SC 1493.*** Accordingly, it is prayed that the application of the present applicant be accepted and the respondent/Corporate Debtor be submitted to CIR proceedings

6. Heard, record has been thoroughly perused. On behalf of applicant, it is the invoice No. 423777 dated 02.02.2017 has been placed on record, which was issued to the Corporate Debtor for an amount of EUR 15058.10 i.e. Rs. 12,21,663.65/-. Though, there is a contention on the part of the respondent that there was existing dispute between the party, but it is apparent from the record that though Mr. Vivek Goel was Middle Man between the applicant and respondent, but the said purchase order was sent on behalf of Corporate Debtor directly to the applicant herein i.e. dated 04.01.2017, although, some other purchase order were sent to Mr. Vivek Goel. On the basis of the same, the said invoices were raised by the applicant. Once there was direct communication between Operational Creditor and Corporate Debtor, then it give rise to privity of contract between them. Hence, it could not be said that Mr. Vivek Goel was only responsible and the Applicant cannot file the present petition under Section 9 of the Code against the Respondent/Corporate Debtor.

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7. So far as, the defect of the article is concerned, the same was **dispatched** after one year of the receipt of the consignment and the letter was sent to Mr. Vivek Goel and not to the applicant herein. Even, the consignment was not returned, which shows that the same has been utilized by the respondent/Corporate Debtor. Had there would have any defect in the articles supplied by the Operational Creditor, the same must have been communicated at that very moment and not after the lapse of one year. Once there was direct conversation between the Applicant and the Respondent, then sending of notice of dispute qua defect in articles to Mr. Vivek Goel is just manipulative and after thought action on the part of the Corporate Debtor and nothing else.
8. Moreover, the respondent/Corporate Debtor had sent the letter on its letter pad, which bear the subsequent name of company, as the name of “Franco Leone Shoes Private Limited” was changed to “Franco Leone Limited” on 20th March 2018. The letter was anti dated to show that it was sent on 15th March 2018, whereas the same was actually sent on 21.03.2018. Hence, the said letter has been ante dated with intent to show that the same has been sent on 15th March 2018. The same was addressed to Mr. Vivek Goel and not to the company. Even, the letter dated 01st March 2018, was sent to Instyle Overseas LLP, wherein it was stated that “Franco Leone Shoes Private Limited” be read as “Franco Leone Limited” in future and all the

correspondence be made in its new name. There is no such receipt placed on record to show that the said letter has been duly sent to Instyle Overseas LLP belonging to Mr. Vivek Goel or to the Applicant herein.

9. Apart from that, it is also worthwhile to mention in the context that all the correspondence between the respondent and Mr. Vivek Goel as well as the applicant were being made through email, but these letters have been sent through registered post itself creates a serious doubt about the conduct of the respondent.
10. Even, the said letter dated 15th March 2018 was also sent on 21st March 2018. Hence, the said letter is nothing, but a manipulated document just to create a false evidence that the consignment was send by the applicant was defective, accordingly, the said intimation was given to the Mr. Vivek Goel. Moreover, when the Respondent send the letter to the Middle Man Mr. Vivek Goel, why the same was not sent to the applicant herein whereas, already correspondence was being exchange between the respondent and the applicant through email. No such corroborative documents have been placed on record to support the fact that the articles were infact defective. Hence, the Respondent fabricated the said documents later on just to make out a defence that it has intimated to Mr. Vivek Goel that the articles were defective in nature. From the above said facts and circumstances, it is established that there was no genuine pre-existence dispute between

the Operational Creditor and the Corporate Debtor. Therefore, the citation referred on behalf of the Respondent *Phillips India Limited and MCL Global Steel Private Limited (supra)* are not helpful. Rather in this regard, the reference can be made to citation Hon'ble Supreme Court in **Mobilox Innovations Pvt Ltd Vs. Kirusa Software Pvt Ltd in civil appeal number 9405 of 2017** is squarely applicable to the present facts, wherein it is laid down as under:

“40... 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.”

11. So far as, the question of sending demand notice by Mr. Abhishek Anand is concerned, it is apparent that there is a email sent on 26.11.2018 by Karin Palmetshofer to Mr. Vivek Goel and copy to Christoph Merkens, whereby Mr. Abhishek Anand, Advocate was authorized to issue demand notice to Franco Leone Limited. Merely, that the General Power of Attorney has been executed in favour of the

Mr. Pawan Kumar on 24.01.2019 does not mean that the Mr. Abhishek Anand was never authorized. In this regard, the reliance can also be placed on citation ***Macquaire Bank Limited (Singapore) (Supra)***, wherein it is clearly held:

“Advocate can act on behalf the party and not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of the proceedings in court.”

12. In view of the law laid down by Hon'ble Supreme Court of India, it is held that Mr. Abhishek Anand was duly authorized to send a demand notice to the respondent/Corporate Debtor on behalf of the applicant herein; accordingly, the demand notice was valid and legal one. Therefore, the contention raised on behalf of respondent that demand notice was defective in nature stands discarded.
13. Resultantly, the present application under Section 9 of the code stands accepted.
14. The applicant has proposed the name of Mr. Vijender Sharma, Resolution Professional of the corporate debtor. The registration number of the IRP being IBBI/IPA-003/IP-N-00003/2016-17/10022 and email [id vijender@vsa.net.in](mailto:ijender@vsa.net.in). Mr. Vijender Sharna has given its written consent in required Form-2, which is attached with the application. Therefore, this bench appoints Mr. Vijender Sharma, as the Insolvency Resolution Professional of the corporate debtor.
15. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Vijender Sharma to meet

out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

16. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.

17. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.


SUMITA PURKAYSATHA
MEMBER (T)


DHARMINDER SINGH
MEMBER (J)