



IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-III

Item No.04
IB-310(ND)/2018

IN THE MATTER OF:

M/s. Vama Apparels (India) Pvt. Ltd.

..... **APPLICANT**

Vs.

M/s. SSIPL Reatail Pvt. Ltd.

..... **RESPONDENT**

SECTION

U/s 9 IBC code 2016

Order pronounced on 16.06.2023

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open court vide separate sheets.

IB-310(ND)/2018 is **dismissed**.

SD/-

(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

SD/-

(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)



BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH

COURT- III

IB-310/ND/2018

U/S. 9 of the IBC, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rule, 2016

IN THE MATTER OF

M/s VAMA APPARELS (I) PRIVATE LIMITED

Registered office at:

Kanchanjunga, 72 - Peddar Road

Mumbai - 400026

...Operational Creditor

Versus

SSIPL RETAIL PRIVATE LIMITED

Registered Office at:

B1/F4, Mohan Co-operative Industrial Area

Main Mathura Road,

New Delhi - 110003

...Corporate Debtor

Delivered on: - 16.06.2023

Coram:

Shri Bachu Venkat Balaram Das

Hon'ble Member (Judicial)

Shri Atul Chaturvedi

Hon'ble Member (Technical)



Appearances:

Operational Creditor : Mr. Krishna Mohan Menon, Advocate

Corporate Debtor : Dr. U.K Chaudhary, Sr. Advocate

ORDER

Per: Bachu Venkat Balaram Das, Member (Judicial)

1. The instant application bearing IB-310/ND/2018 has been filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as 'IBC, 2016') R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Operational Creditors, M/s Vama Apparels Private Limited is seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor viz., M/s SSIPL Retail Private Limited, to declare moratorium and to appoint Interim Resolution Professional (hereinafter referred as 'IRP'). The Corporate debtor is registered with ROC, NCT of Delhi & Haryana and is therefore, within the jurisdiction of this Adjudicating Authority.

2. The Operational Creditor/Petitioner has averred as follows: -

- a. It is submitted that, the Operational Creditor is a retail store based in Mumbai engaged in the business of retail shopping in Mumbai, The Corporate Debtor is engaged in the business of trading, marketing and dealing in footwear/garments/lifestyle products, accessories through its retail outlets and other channels.



- b. It is further submitted that, Corporate debtor with the view to expand its business had approached the operational creditor to sell goods of the Corporate debtor.
- c. It is averred that, Agreement executed between the parties specifically stated that the Operational Creditor would collect the entire sale proceeds from the end buyers of the products of Corporate Debtor and will transfer the same to the account of the Corporate Debtor after deducting margins of the Operational Creditor and Corporate Debtor in return would pay the Operational Creditor a fixed lump sum amount of Rs. 11,00,000/- per month and subsequently the minimum amount would increase to 14,00,000/- It was further decided that the minimum lump sum amount will be given regardless of the actual quantum of sales turnover achieved out of the sales of products supplied by the Corporate Debtor to the Operational Creditor.
- d. It is averred that thereafter, the Corporate Debtor started paying the committed monthly amount to the Operational Creditor as agreed between the parties. However, in July 2017 representatives of Corporate Debtor approached the Operational Creditor with an intention to decrease the Minimum Guarantee payable to the Operational Creditor and increasing the sales revenue payable instead, Corporate Debtor also offered to bring in more brands to



compensate for decrease in minimum guarantee. The same offer was declined by the Operational creditor.

- e. It is further submitted that, the Operational creditor continued with its demand of minimum guarantee payable by the Corporate debtor whereas the Corporate debtor continued with the claim that the contract has been renewed in the light of the fact that the new brands are also being brought to the store of the Corporate debtor.
- f. It is further averred that, the Operational creditor highlighted the fact that the agreement and the addendum currently exist with a lock period of 3 year as per agreement.

3. Thus, the Corporate Debtor has, inter alia, raised the contention based on 'pre-existing' dispute. To support its contention, the Corporate Debtor has also placed on record certain correspondence through e-mails dated 07.09.2017, 20.07.2017 and 18.09.2017.

4. We have heard the arguments advanced by Ld. Counsels appearing for Operational Creditor as well as for the Corporate Debtor and also perused the record.

5. The Operational Creditor's claim is based on the facts that, an agreement was executed between the parties specifically stated that the Operational Creditor would provide the service of collecting the entire sale proceeds from the end buyers of the products of Corporate Debtor and transfer the same to the account of the



Corporate Debtor after deducting margins of the Operational Creditor and in return Corporate Debtor in return would pay the Operational Creditor a fixed lump sum amount. The Corporate Debtor has failed to comply with terms and conditions of the Agreement and also not paid the monthly committed guarantee due to the Operational Creditor. The total amount of debt in default is Rs. 2,72,42,805/-.

6. It is further submitted that, Operational Creditor sent demand notice u/s 8 (1) of the Code to the Corporate Debtor on 07.02.2018. The total amount of debt in respect of which default is claimed in this notice is Rs. 2,59,70,641/-. Corporate debtor has also responded to the demand notice and raised the issue of a 'pre-existing' dispute. The Corporate debtor has not repaid the amount in default till date of filing the instant application even after persistent reminders and notices.

7. While perusing the records, we found that the Corporate Debtor has placed certain e-mails dated 07.09.2017, 20.07.2017 and 18.09.2017 on record pointing out the dispute of Minimum Guarantee amount not being conditional/binding between the parties. It can be seen from these emails that there was some controversy on the part-refund of security deposit between the parties. Further, in email dated 18.09.2017, Corporate Debtor raised the demand of Rs. 16.5 Lacks upon the Operational Creditor. It is clear from the correspondence between the parties that there is an undeniable discrepancy with respect to the dispute on the invoices and breach of contract. All these e-mails were sent prior to the issuance of demand notice u/s 8 (1) of the Code dated 07.02.2018 by the Operational Creditor. Considering the facts and circumstances as reflected from the record, we



are of the considered opinion, that the dispute which existed between the Operational Creditor and the Corporate Debtor prior to issue of the demand notice u/s 8 (1) about the Minimum Guarantee and Security Deposits requires a detailed inquiry and investigation by a proper forum and this Adjudicating Authority having a summary jurisdiction is not that forum.

8. It is crucial at this stage to refer Section 8(2)(a) of the Code, same is reproduced below for reference: -

8(2) The Corporate Debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor (a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoices in relation to such dispute;’. This section is restrictive in nature for filing an application under Section 9 of the Code i.e. if a valid existence of dispute or record of pendency of suit or arbitration proceedings which existed before the issuance of demand notice, is shared with the Operational Creditor, within 10 days, it is presumed that there exists a pre-existing dispute between the parties with respect to the goods or services rendered by the Creditor.

9. The Hon’ble Supreme Court, in the matter of **‘Mobilox Innovative Private Limited v. Kirusa Software Private Limited’**, held as follows:

“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.”

10. The word ‘dispute’ as defined under Code includes suit or arbitration proceedings relating to the existence of the amount of debt; the quality of goods or services; or the breach of a representation or warranty. It is true that the definition must fit under the parameters as defined under the code but at the same time it must stand on a test as laid down in the recent judgment of the Hon’ble Supreme



Court in ***M/s S.S. Engineers Vs Hindustan Petroleum Corporation Ltd. & Ors., Civil Appeal No. 4583 of 2022*** whereby the following has been held:

“31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor. 32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.”

11. Therefore, the Corporate Debtor is required to establish that a dispute over the quality of the ‘goods or services’ existed prior to the filing of the demand notice under Section 8 so as to ensure that CIRP is not initiated against it. While in order for the Operational Creditor to be successful in its Application under Section 9 of



the Code, it must prove that the Corporate Debtor has not complied with Section 8(2)(a) of the Code.

12. In view of the aforesaid factual and legal position, we are of the view that there is 'Pre-existence of dispute' which was raised by the corporate debtor time and again much prior to the service of demand notice under section 8 (1) of IBC and the same was also duly notified by the Corporate Debtor in terms of provisions of Section – 8 (2) of the Code. Therefore, we deem it appropriate to reject this application filed under section 9 of the IBC, 2016 by the Operational Creditor/Applicant herein.

13. Accordingly, the instant Application bearing IB-310/ND/2018 is hereby **dismissed**. No orders as to cost. A copy of this order is to be marked to the parties and also to IBBI for record.

SD/-

(Atul Chaturvedi)
Member (Technical)

SD/-

(Bachu Venkat Balaram Das)
Member (Judicial)