



**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH [SPECIAL], COURT NO. II
KOLKATA**

Company Petition (IB) No. 298/KB/2022

*An Application 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:

Visun Services LLP

... Operational Creditor/ Applicant.

Versus

YibealTradex Private Limited

... Corporate Debtor/ Respondent.

Date of Pronouncement: May 22, 2024

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI. BALRAJ JOSHI, HON'BLE MEMBER (TECHNICAL)

Appearances:

For the Applicant:

Mr. Rishav Banerjee, Adv.

Ms. Prerna Shaha, Adv.

Ms. Rishika Goyal, Adv.

For the Respondent:

Mr. Soumya Roy, Adv.

Mr. Dipak Ranjan Mukherjee, Adv.

O R D E R

Per: Balraj Joshi, Member (Technical)

1. The Court congregated through a hybrid mode.
2. Heard the Learned Counsels for both parties at length.
3. This petition has been preferred by Visun Services LLP, hereinafter referred to as "Applicant"/ "Operational Creditor" against YibealTradex Private Limited, hereinafter referred to as "Respondent"/ "Corporate Debtor" under Section 9 of the



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Insolvency and Bankruptcy Code, 2016, for brevity “I&B Code”/ “Code” seeking to commence the Corporate Insolvency Resolution Process, for brevity “CIR Procees” in respect of the Corporate Debtor herein. The Corporate Debtor had conceptualised the idea of physical and virtual stores for sale and purchaee of the products and for that purpose has developed an integrated software application and technology plantform that will provide a complete marketplace for products to an individual or a busnes entity and is being operated under the brand name of HyperXchange in the Franchisee Agreement at page no. 23 of the Petition.

4. The total amount claimed to be in default is Rs. 3,67,03,813/- calculated till July 15, 2022. The date from which such debt fell due was claimed as on May 03, 2022.

5. **Factual Conspectus:**

5.1. The applicant entered into a franchisee agreement with the respondent on May 03, 2021, whereby the applicant was engaged as a non-exclusive franchisee for the sale, resale, marketing and distribution of the products of the respondent on e-commerce marketplaces such as Flipkart, Amazon, Ingram and HX Kart within India.

5.2. That, as per the agreement dated 03.05.2021, the applicant is entitled to a monthly commission at the rate of 21% per annum on the purchase price of the goods. Further, it was agreed upon that the respondent would buy back the goods from the applicant at the rate of 21% markup on the cost price on which the goods were to be sold on Flipkart, in case the goods were not sold within 60 days.

5.3. The applicant transferred a sum of Rs. 90 Lakh for purchasing goods to be listed and sold on Flipkart in May 2021.

5.4. The Director of the respondent company spoke to the applicant and requested for a short-term funding to meet its targets for the Big Billion Days Sale and Diwali



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Sale in the months of October-November 2021. The applicant provided an additional amount of Rs. 2 Crore as a short-term arrangement till December 31, 2021.

5.5. The respondent had suggested a plan on March 15 and 30, 2022, to pay back the money owed to the applicant to the tune of Rs. 1.7 Crore.

5.6. The Statutory notice of demand under Section 8 of the I&B Code was issued by the applicant demanding the outstanding dues on July 19, 2022, and the reply to the demand notice denying and disputing the amount claimed was received by the applicant on August 03, 2022.

6. Applicant's contentions:

6.1. The Learned Counsel, Mr. Rishav Banerjee, appearing on behalf of the applicant would submit that the Corporate Debtor has failed to make payment of the 21% of commission on the sold goods and buy back the unsold goods along with a 21% mark up, cumulating to the tune of Rs. 3,67,03,813/- calculated till July 15, 2022.

6.2. He took us to the Franchise Agreement dated 03.05.2021, annexed at pages 23-38 as Annexure "F" to the application. Clause 7.3.4 of the said Franchise Agreement, envisages that *on termination of this Agreement, HyperXchange will buy back unsold Products from Visun at a 21% markup on Visun's cost price for such Products*. It is pertinent to mention that HyperXchange is the other name for the Corporate debtor.

6.3. Further, it is contended that out of 5800 odd units purchased, 1000 units were returned by Flipkart and 3000 units were sent back for refurbishment directly without being sold. Approximately, 70% of the goods purchased by the applicant from the respondent were found to be damaged and not fit for sale. In terms of the understanding between the parties, the goods returned from Flipkart were required to



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be refurbished and re-listed within 7 days. However, the 1000-odd units returned from Flipkart from October 06, 2021, to January 2022, were only sent for refurbishment at the end of January 2022.

6.4. It is averred that the stock returned was lying unattended for four months without any action being taken by the respondent company and a stock of 3000 units was not opened and checked and directly sent for refurbishment out of which 70% received were found as damaged, which is a breach of the terms of the agreement dated 03.05.2021.

6.5. Further, it is asserted that the respondent has acknowledged an amount of Rs. 1.7 Crore is due and payable to the applicant by proposing a repayment plan of that amount through an email dated 15.03.2022 and 30.03.2022, annexed at Pages 61-62 to the application.

Respondent's submissions per contra:

7.1. The Learned Counsel for the respondent submits that the Corporate Debtor is a fully compliant and financially healthy company.

7.2. Further, the Learned Counsel for the respondent took us to Clause 15 of the Franchise Agreement dated 03.05.2021, which provides that all the disputes arising from the said agreement were to be resolved through Arbitration.

7.3. Further, he has drawn our attention to Clause 7.3 of the Franchise Agreement dated 03.05.2021, which caters to that on **termination** of this Agreement, HyperXchange will buy back unsold Products from Visun at a 21% markup on Visun's cost price for such Product (Clause 7.3.4). However, termination clause of the said Franchise Agreement dated 03.05.2021, has never been invoked by the applicant. Thus, the applicant is barred from claiming the alleged default amount.



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7.4. Further, it is contended that there was an unseen procedural delay in onboarding Visunas a Franchisee of Yibealin the e-commerce portal before the festive session of 2021. Such delay was attributable to factors such as the non-availability of the warehouse, storage facility etc. and thus, vide letter dated 01.09.2021, annexed at page 18 to the Reply Affidavit, the respondent allowed to use a warehouse at Tollyguange.

7.5. That, during the festive rush, and to generate greater traction of the business and scale of sales for the respondent as well as the applicant, Flipkart provided a gadget directly sourced to the applicant which had not worked properly. The respondent has raised the issues with Flipkart and asking for reimbursement of losses caused to them.

7.6. Further, it is claimed that sans considering the business practicalities as aforesaid or trying to reconcile the accounts and inventory position, the applicant resorted to seeking legal demands for recovery of their business investments which were not in line with the franchise agreement. The applicant never heeded the requirement of seeking clarity on the financials and stock positions or any staggered payment plan offered by the respondent.

7.7. Further, it is claimed that the business transactions could not bear the desired results and expected returns due to market conditions. Customer demands and interplay of the omnichannel platform and none of the instances cited by the applicant is attributable to dishonesty or deliberate failure on the part of the corporate debtor.

7.8. It is further submitted that no debt can be ascertained during the subsistence of the franchise agreement. The Agreement is alive and subsisting till inventory remains unsold and no mutual agreement has been reached as to whether the entire inventory is to be sold or purchased back by the Yibeal at the pre-determined price.



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7. Rejoining Submissions of the Applicant

7.1. That, all the allegations and/or disputes raised by the Respondent are an afterthought and not a single correspondence addressed by the Respondent prior to the receipt of Statutory Notice of Demand dated 19.07.2022.

7.2. That, without prejudice to the rights and contentions of the Operational Creditor, even if it is considered that the Franchise Agreement is still continuing, therein an admitted debt to the tune of Rs. 1.7 Crore by the Corporate Debtor in their email dated March 30, 2022.

8. Analysis and Findings:

8.1. We note that the instant application has been preferred by Operational Creditor on account of Corporate Debtor's failure to make the payment of the 21% of committed commissions on the sold goods and buy back the unsold goods along with a 21% markup, cumulating to the tune of Rs. 3,67,03,813/-.

8.2. In admitting a Petition under Section 9, The Operational Creditor is required to establish that there was an Operational debt, in the payment of which the Corporate Debtor has defaulted then the petition must be admitted provided there is no dispute raised by the Corporate Debtor which should be raised before the Demand notice under Section 8 is sent and received by the Corporate Debtor.

8.3. We fall back upon the famous judgement in case of *Innoventive Industries Ltd. Vs. ICICI Bank*, reported in (2018) 1 SCC 407: MANU/SC/1063/2017, where the Hon'ble Apex court has inter-alia explained as follows :

“29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period



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of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.”

(Emphasisi Added)

8.4. From the submissions made by the parties , we note that the demand notice was served upon the respondents on 19th July 2022, which has been duly replied by the Corporate Debtor on August 4, 2022, outlining some disputes on the reconciliation of the inventory and payments made thus far. We also note that an affidavit under Section 9(b) has also been filed by the Petitioner on 4 Feb 2023, wherein it has been affirmed that there were no Pre-existing disputes and also that it has been raised as an afterthought by the Corporate Debtor. On 4th September 2023, the Corporate Debtor has filed a supplementary affidavit to the reply filed by it, wherein it has been averred that inadvertently by way of an oversight , an email dated April 3 2022 written by the Operational Creditor was not annexed to the reply of the Corporate Debtor . The said email by the Operational Creditor was in response to the email dated 30th March 2023 by the Corporate Debtor . Both these e-mails are extracted below :

Email by the Corporate Debtor dated 30.03.2022



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On Wed, Mar 30, 2022 at 8:43 PM Dipanjan <dipanjan@hyperxchange.com> wrote:

Hi Harshit,

We have tried to resolve our differences and issues on our ledger status in the last few weeks during your visits to Kolkata. It gives me comfort and assurance to work in partnership with you given your confidence in trying to find a solution in an amicable manner .

As on date an amount of Rs.1.7 cr remains payable to you. You will appreciate that hyperXchange like any other , have been influenced by adverse market sentiments and COVID realities affecting operational expenditures and returns on investments .

We are fully resolved to make staggered payouts to all our stakeholders including yourselves and therefore proposes the following :

- #1. Rs. 30L by end of first week of April 2022
- #2. Rs. 50L by the end of third week of April 2022
- #4. Rs. 35L by the end of the first week of May 2022
- #5. Rs. 55L by the end of the fourth week of May 2022

As you are deeply invested to the risks and dynamics of secondary market electronics business , it goes without saying that our business commitments are contingent to developing dynamics and market sentiments .

We are proud to have you as a business stakeholder of hyperXchange family and hope to tide over the extant issues sooner than you can expect.

Regards,
Dipanjan

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Email by the Operational Creditor dated April 3, 2022

From: Harshit Patel <harshit@visunsolutions.com>
Sent: Sunday, April 3, 2022, 8:37 PM
To: Dipanjan <dipanjan@hyperxchange.com>
Cc: Asish Chakraborty <asish@hyperxchange.com>; Ranjit Sengupta <ranjit.sengupta@hyperxchange.com>; kishor patel <kpatelreality@gmail.com>; JIPNESH JAIN <jipnesh@gmail.com>
Subject: Re: Visun Payments

Dear Dipanjan,

We are in receipt of your email dated 31st March, 2022 with respect to the repayment of an amount of Rs.1,70,00,000/- (Rupees One Crore Seventy Lakhs Only) as per the payment schedule as suggested by you, the timeline requested is not acceptable as we have already been patient and supported your company for the last 3 months.

Franchise Agreement dated 3rd May, 2021, states our arrangement: We have agreed to purchase goods from Yibeal Tradex Pvt Ltd (HyperXchange - HX) and sell the same from our account (Visun Services LLP - VS) on Flipkart as a Digital Franchise of HX.

Facts of our arrangement: Our terms have stated clearly that VS will purchase the goods from HX only after HX has done the QC for the entire lot of goods and the same will be sold by VS on Flipkart. HX has also taken the responsibility for managing all the listing and management of goods along with bearing all the expenses related to the same for selling on Flipkart through VS account. HX has committed to VS that there will be a minimum return on investment of 21%p.a for the goods purchased and sold by VS. Over and above that HX has committed to VS that if the goods are not sold within 60 days, HX will buy back the goods from VS at the sales price on which the goods should be sold on Flipkart.

Transaction: VS agreed to initiate the business transaction by purchasing goods worth INR 90 Lakhs in May 2021. The funds were accordingly transferred to HX. However, HX could not fulfill its commitment and did not supply the goods for the next 5 months.

On the other hand, as per the discussion between Dipanjan Purkayashtha with VS, he requested a short term funding to help the company suffice its targets for Big Billion Day Sale and Diwali Sale between the months on October and November 2021. It was clearly stated to Dipanjan that the infusion of additional INR 2 crores will be made solely on the basis of a short term arrangement with a hard stop date on 25th December, 2021. The same was agreed and confirmed, only then we moved forward with the transaction.

Uptill date the goods worth INR 2.9 crores in total have not been listed even once on the VS account of Flipkart.

Follow up: We had time and again sought reason for the same and further in default for the return of monies as paid by us.

Further time and again HX requested time from us for the payment of the amounts on the grounds that since the goods to be sold to us were defected on account of various reasons and further you couldn't comply your part of the Agreement;

On 30th December 2021, HX agreed and assured VS in unequivocal terms to repay the amount and further the director Mr. Asish Chakraborty had sought time of 1 (One) week to repay the entire sum of money by purchasing back the goods



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From VS.
That considerable time has gone and further till date no satisfactory revert has come forth and further the amounts to be paid to us till date remain in limbo.

Remedy: For the last 3 months, time is being sought by HX, without just cause and further the same is affecting us both mentally and financially, as all other commitments are falling apart.
On the basis of the assurances and representations as shown by HX, hard earned money was invested by VS and thus as of today nothing has come forth without just assurances of payment.
For the last 6 days, I am personally here in Kolkata to extend support and help to this situation. None of the commitments made and assurances given to return the aforesaid money has been honoured. I can sympathise with the you but cannot grant any more time beyond this. You are well aware of my situation as well.
As per your email, the time requested till May 2022, leaves us with no other alternative to take appropriate legal steps (as we are also threatened for the same by our own commitments to the people with whom we have business association).

We hereby humbly request you to return the aforesaid amount of INR 1.7 crores along with the minimum assured returns on the entire sum of INR 2.9 cr, within a period of 7 (Seven) days hereof as no further time is possible to be given under the given circumstances.
We hereby shall also be inclined to invoke the clauses of the Franchise Agreement for the aforesaid purposes and further which will affect all future business relationships.
We request you to amicably resolve the issue and perform your part of the commitments.

Thank you

8.5. Without going into the nitty gritty of the conditions and specific performance of the contract, it is clear from the emails that the Corporate Debtor has accepted the debt to the tune of 1.7 Cr for which it had also offered a repayment plan. Thus the debt above the threshold is established. Further in the email dated April 3 2022, the time granted by the Corporate Debtor was 7 days for paying the debt, which has obviously not been done, prompting the Operational Creditor to institute the current proceedings. The assertion by the Corporate Debtor that since the Franchise agreement has not been terminated is no reason for not paying back the committed commission (21%) to the Operational Creditor as per Annexure A of the said



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Franchisee agreement. The very condition that the goods which are not sold which have been showcased on the Flipkart platform for 60 days, would be bought back by the Corporate Debtor with 21 % mark up clearly establishes the nature of the agreement and subsequent transactions, which interalia meant that the amount of money advanced by the Operational Creditor was to be adjusted by the Corporate Debtor based on the services provided by the Operational Creditor by selling the same being an authorised franchisee of the Corporate Debtor. Thus the debt is an operational debt.

8.6. The Corporate Debtor has also tried to raise an issue of Pre-existing dispute by way of the e-mails reproduced above. In this context, we draw support from the judgment of Apex Court in the matter of **Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353 : (2018) 1 SCC (Civ) 311 : 2017 SCC OnLine SC 1154 at page 403**

“51. 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)(i)(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.”



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8.7. However it is seen from various emails attached with the pleadings which do not show the existence of dispute that could be assigned due to a lack of fulfilment of the obligations by the Operational Creditor and as such it is clear that Corporate Debtor has tried to raise a bogey of dispute, when none exists. On the contrary, it is the Operational Creditor who has complained of defective goods being supplied by the Corporate Debtor, some of which were returned to them directly by Flipkart.

8.8. Thus we conclude that there is an Operational debt existing which has a value above the threshold specified in Section 4 of the Code and which has not been paid in terms of the agreement. The Section 8 notice has been duly served and replied to by the Corporate Debtor. Affidavit under Section 9(b) has also been annexed. There is no pre-existing dispute as discerned from various emails attached in the pleadings.

8.9. In light of the aforementioned facts, circumstances and precedents cited above, this Adjudicating Authority is satisfied that the Corporate Debtor has defaulted in the repayment of its debt due to the Operational Creditor and as such the instant petition ought to be admitted.

8.10. It is, accordingly, hereby ordered as follows:-

- i. The application bearing **CP (IB) No. 298/KB/2022** filed by **Visun Service LLP**, (*Operational Creditor*), under section 9 of the Code read with rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **YIBEAL TRADEX PRIVATE LIMITED** the Corporate Debtor, is *admitted*.
- ii. There shall be a moratorium under section 14 of the IBC.
- iii. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority

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approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- iv. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- v. **Mr. Pankaj Kumar Tibrewal** having registration number **IBBI/IPA-001/IP-P01577/2018-2019/12410** email: **tibrewalpankaj@yahoo.com** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016.
- vi. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- vii. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.



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- viii. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- ix. The Financial Creditor/Operational Creditor shall initially deposit a sum of ₹_2,00,000/- (Rupees Two lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC). Further, the Fees of the IRP will be subject to the approval of the COC in accordance with Notification No. IBBI/2022-23/GN/REG091 dated 13.09.2022, issued by the Insolvency and Bankruptcy Board of India, as published in the in the Official Gazette.
- x. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.

8.11. Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

9. The Registry of this Adjudicating Authority shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), to whom the company(ies) are registered with, by all available means. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.



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10. CP (IB) No. 298/KB/2022 to come up on 12th July 2024 for filing the progress report.
11. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on May 22, 2024.

Bose, R. K. [LRA]