



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-IV**

Company Petition No. (IB)-287(ND)/2021

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. Major Brands (India) Private Limited
..... Operational Creditor
Vs.
M/s. Gaurik Fashions Private Limited
..... Corporate Debtor

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (J)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (T)

Order Delivered on: 21.07.2022

ORDER

PER: SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

The instant petition is filed by M/s. Major Brands India Private Limited (hereinafter referred as 'Applicant'/ 'Operational Creditor') having registered office at B-907, 09th Floor, Mittal Commercial, CTS No. 1629, Village Marol, Andheri Kurla Road, Andheri East Mumbai - 400059 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process

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in respect of M/s. Gaurik Fashions Private Limited (hereinafter referred as 'Respondent Company' or 'Corporate Debtor').

2. The Respondent Company M/s. Gaurik Fashions Private Limited having CIN: U52609DL2017PTC315030 incorporated under the provisions of the provisions of the Companies Act, 2013 having its registered office situated at H-34, BK Dutt Colony Lodhi Road, NDMC Delhi, South Delhi, New Delhi - 110003. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.
3. The brief facts of the case leading to the filing of this application as averred by the applicant are as follows:
 - a. The applicant submits that it is an established leading Franchisee for premier international fresh brands in India. The applicant and the respondent corporate debtor had entered into 2(two) terms sheets both dated 02.09.2017 wherein the respondent corporate debtor will act as a "Sub Franchise" for stores located in Elante Mall, Chandigarh and Pavilion Mall, Ludhiana respectively.
 - b. The applicant submits that covenants of the term sheets dated 02.09.2017 are as follow:-
 - i. Clause 4A- The applicant will supply stocks/ merchandise to the respondent corporate debtor on outright basis with 100% stock correction. The entire arrangement was subject to Sale or return basis ('SOR'),

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- wherein the stocks were supplied by the Applicant to the respondent corporate debtor by raising invoices and the payment was received on weekly basis after sale of stocks for the weekly basis after sale of stocks for the week from the respective stores and after deducting the margins/ commissions and taxes.
- ii. Clause 5A – The store occupancy charges to be solely borne by the respondent corporate debtor only, as charge normally includes Rent, CAM, property tax etc.
 - iii. Clause 10 & 11 – All the expenses towards civil, Furniture and Fixtures and even maintenance of the entire store are to be solely borne by the Respondent only.
 - iv. Clause 7A- The respondent corporate debtor had agreed to make payments to the applicant post deducting the agreed margin as applicable on weekly basis i., every Tuesday and as per the said payment clause any other charges/ taxes including TDS as applicable were to be solely borne by the Respondent corporate debtor.
- c. The applicant submits that the respondent corporate debtor had defaulted in making the payment and the last payment which was received by the applicant was on January 08,2019 for both the stores i.e., Elante Mall, Chandigarh and Pavilion Mall, Ludhiana .
- d. The applicant submits that pursuant to the mutual agreement between the parties, after the closure of the Pavillion store, the stock lying in the Pavilion store was shifted to Elante Mall and the respondent corporate debtor is liable to pay the outstanding amount to the applicant which is pertaining towards the secondary sale conducted by the respondent corporate debtor.
- e. The applicant submits that the respondent corporate debtor have miserably failed to make payment for a consolidated principal amount towards stocks, rentals & secondary sales pertaining towards both the stores for INR 2,06,29,997/- as on December 31, 2019. The applicant further submits that the above mentioned amount is bifurcated as follow:-
- a) Rs. 1,89,48,887/- towards the Elante Mall located at Chandigarh, which is further bifurcated into 3(three) parts:-

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- i. Rs. 41,85,221/- towards the secondary sale.
 - ii. Rs.17,13,326/- towards the outstanding rentals (including CAM, AHU, Electricity) of Elante store which was paid by the applicant and supposed to be reimbursed by the respondent corporate debtor.
 - iii. Rs.1,30,50,339/- towards the billing value of stocks lying with the respondent as on December 31, 2019.
- b) Rs.16,81,111/- towards the Pavillion Mall located at Ludhiana is pertaining towards the secondary sale.
- f. Further, the applicant submits that the respondent corporate debtor is liable to pay interest amounting Rs.79,88,730/- calculated @ 18% p.a. from the date of last payment (i.e., interest payable from June 30, 2018 to 28th February, 2021).
- g. The applicant submits that despite numerous emails sent to the respondent corporate debtor requesting to share the copy of the ledger account maintained by the respondent corporate debtor for reconciliation. The applicant states that when no concrete steps were taken by the respondent corporate debtor to reconcile the accounts and make the outstanding payment to the applicant, consequently, the applicant had served legal notice towards both the stores dated 13.09.2019 asking the respondent corporate debtor to forthwith clear the legitimate outstanding amount which is pertaining towards the store located in Elante Mall and towards the secondary sales at Pavillion Mall store located at Ludhiana.
- h. The applicant submits that reply dated 01.12.2019 was received from the advocate of the respondent corporate debtor, wherein the respondent corporate debtor has rejected the legitimate claim of the applicant for both the stores and further threatened that if the applicant peruse towards their claim, than the respondent corporate debtor shall raise counter claim in return.
- i. Further, the applicant submits that a demand notice dated 30.01.2020 under section 8 of the Code was issued to the respondent corporate debtor, claiming the outstanding principal amount of INR 2,42,94,906/- along with further interest on the

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principal amount at the rate of 18% p.a. from December 31, 2019 till date of payment/realization.

- j. The applicant submits that the respondent corporate debtor had replied to the applicant demand notice dated 30.01.2020 vide its reply dated February 17, 2020 stating that the claim of the applicant is not as per the agreed terms between both the parties while not denying that there are amounts due and payable by the respondent corporate debtor to the applicant.
- k. The applicant have provided with the following documents on record to prove the claims:
- i. Copy of both the term sheets executed between the parties.
 - ii. Copy of the e-mails dated August 01, 2019, January 02,2020, March 06 January onwards up to October 30, 2020 sent by the applicant to the respondent.
 - iii. Copy of all the 67 invoices raised by the applicant upon the respondent corporate debtor.
 - iv. Copy of the secondary sales made by the respondent corporate debtor.
 - v. Copy of the ledger account maintained by the applicant in the ordinary course of business.
 - vi. Copy of the legal notice dated September 13, 2019 issued by the applicant to the respondent corporate debtor.
 - vii. Copy of the Demand Notice dated January 30,2020 sent to the respondent corporate debtor.

4. The corporate debtor has filed its reply cum objections and the averments of the corporate debtor in the reply are stated in brief as below:-

- a. The respondent corporate debtor submits that the applicant is relying upon the purported invoices issued by the applicant to the respondent corporate debtor, as per which the respondent corporate debtor is liable to pay a consolidated amount of Rs.2,06,29,997/- along with interest pertaining to both the leased store. The respondent corporate debtor further state that after closure of all three stores (DLF Saket, Elante, Pavilion) including the above mentioned two stores, the parties exchanged their respective working(s) with regard to amounts payable/ receivable.

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- b. The respondent corporate debtor submits that vide e-mail dated August 23, 2019, a detailed account statement was sent by the respondent corporate debtor to the applicant pointing out that the applicant owes a sum of Rs. 1,39,26,600/- only not the sum of Rs.2,06,29,997/- as claimed by the applicant. The respondent corporate debtor had placed the relevant e-mail correspondence exchanged between the applicant and respondent corporate debtor regarding reconciling and settling the accounts.
- c. The respondent corporate debtor submits that the respondent corporate debtor had sent replies dated December 01, 2019 to legal notices dated September 13, 2019 issued by the Operational Creditor, highlighting various facts which unambiguously proves that there was a pre- existing dispute between the parties right from the closure of first store (DLF SAKET, which is not part of the present matter) –
- i. Despite investing agreed amounts for making the store operational, the Corporate Debtor incurred losses;
 - ii. Lack of sale support on part of the Operational Creditor as it failed to provide sufficient quantity of new and fast moving stock;
 - iii. Other stores of Operational Creditor were offering huge discounts; however, such offers were not extended to the Corporate Debtor;
 - iv. Detailed accounts were shared by the Corporate Debtor based on which it is revealed that it is the Operational Creditor who owes money to the Corporate Debtor;
 - v. The Franchise Agreement of the Operational Creditor with Master Franchisor got terminated effective from July 01, 2019, the store located at Pavilion Mall, Ludhiana (operated by the Corporate Debtor) were functional only for a period of 21 month against the term of 5 years as agreed between the parties;

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- d. The respondent Corporate Debtor submits that the corporate debtor vide its reply dated February 17, 2020 to the demand notice dated 30.01.2020 issued by the applicant reiterated existence of the pre-existing dispute between the parties with regard to the amount of debt, delay in supply of goods, non-compliance of term sheet on account of all three stores (including DLF mall which is not part of the present Application as the same was being operated by sister unit of the Corporate Debtor with similar agreed terms with the Operational Creditor) and advised the Operational Creditor through its counsel to reconcile the account.
- e. The corporate debtor further submits that pre-existing dispute exist between the parties, which cannot be adjudicated by this Hon'ble Authority in a summary manner whereas the present matter requires complete trial as the real facts can be taken out through cross examining and further questioning. Further, the respondent corporate debtor submits that this Hon'ble Adjudicating Authority has jurisdiction as provided under the IB Code and does not have jurisdiction to adjudicate the contractual disputes as sought by the applicant.
- f. The respondent corporate debtor submits that 18% interest amount claimed by the applicant is arbitrary as the rate of interest has nowhere been specified in the invoice nor in the Term Sheet. Therefore, the purported amount of interest claimed cannot be treated as an operational debt and the amount of debt as claimed under the present Application under reply is wrong and erroneous.
- g. The respondent corporate debtor further submits that the demand notice dated 30 January, 2020 is invalid and not in terms of IB Code as at the time of sending the said purported Demand Notice, no authorization was enclosed which authorised any director on behalf of the Operational Creditor to have further appointed or authorised the said counsel to send the said Demand Notice.
- h. The respondent corporate debtor submits that the requirement under Section 9(3)(c) of the IB Code has not been met and neither

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the applicant has enclosed any e-mail/ letter asking the financial institution in seeking the said certificate as required under section 9(3)(c) of the IB Code.

- i. The respondent corporate debtor have provided with the following documents on record to prove its contentions:
 - i. Copy of the e-mail dated August 23, 2019 vide which detailed workings were shared along with working sheet
 - ii. Copy of e-mail correspondence exchanged between the parties which clearly provide the conduct of the Operational Creditor.
 - iii. Copy of the respondent corporate debtor reply dated December 01, 2019 to legal notice dated September 13, 2019 issued by the operational creditor.
 - iv. Copy of the respondent corporate debtor reply dated February 17, 2020 to the demand notice dated January 30,2020 issued by the Operational Creditor.

5. The applicant filed the rejoinder to the reply submitted by the respondent corporate debtor. The submissions of the applicant in the rejoinder are stated herein in brief:-

- a. The applicant submits that no pre-existing dispute exist between the parties in the present matter as the dispute does not truly exist in fact and is illusory. The applicant state that the respondent corporate debtor in order to establish the pre-existing dispute has only relied upon feeble arguments and assertion of facts mentioned in its own replies dated 01.12.2019 to the legal notices dated 13.09.2019 and not supported/substantiated by evidence. The applicant further states that mere mention of a dispute without any supporting evidence does not constitute there is pre-existing dispute between the parties and the communications relied by the respondent corporate debtor have no bearing on the question of a pre-existing dispute.

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- b. The applicant submits that the respondent corporate debtor has repeatedly made references to various communications which pertain to DLF Saket Mall which is not a subject to the present transaction and the same is with the sole purpose of misleading this Hon'ble Tribunal. Further, the applicant submits that DLF Saket Mall entire issue pertains toward a separate entity altogether i.e. Gaurik Retails Pvt. Ltd. for which the applicant has sought to prefer appropriate legal proceedings before the appropriate forum.
- c. The applicant submits that the applicant has always abided by the terms of the Term Sheet dated 02.09.2017 however, there were series of defaults committed by the respondent corporate debtor towards clearing the legitimate outstanding dues and the respondent corporate debtor completely stopped making payments from January 2019 onwards which the respondent corporate debtor has conveniently left unexplained.
- d. The applicant submit that the respondent corporate debtor in its reply dated 17.02.2020 to the Demand Notice dated 30.01.2020 issued by the applicant under Section 8 of the Insolvency and Bankruptcy Code, neither states nor gives any records of the existence of and/or pendency of any suit or arbitration proceedings filed before the receipt of the Demand Notice.
- e. The applicant submits that the respondent corporate debtor has failed to abide by the terms of the Term Sheet executed between the parties with respect to supply of goods and services. Therefore, the applicant submits that the said debt falls within the ambit of operational debt and the respondent corporate debtor is liable to pay the outstanding amount towards the secondary sales, rentals, billing value of stock lying with the applicant and capital assets.

6. We have heard Ld. Counsel for both the parties and perused the averments made in the application, reply and rejoinder filed by the parties.

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The relevant documents annexed with the respective submissions have been examined.

7. With regard to the quantum of operational debt, we are of the view that the operational debt of Rs.17,13,326/- towards the outstanding rentals (including CAM, AHU, Electricity) of Elante store claimed by the applicant cannot be considered as supply of goods or rendering of any services and thus, cannot fall within the definition of Operational Debt as envisaged under the Code, 2016. Further, whether or not the alleged amount of Rs. 17,13,326/- towards the outstanding rentals (including CAM, AHU, Electricity) of Elante store, to be reimbursed by the respondent corporate debtor would be an issue of trial between the parties.
8. With regard to the alleged dispute in respect of the interest amount, we are of the view that since the principle amount due and payable towards the secondary sale is well above the minimum threshold of Rs. 1 Crore as stipulated in Section 4 of the Code, 2016, we are not inclined to indulge in the exercising of quantifying the operational debt.
9. With regard to the contention of the respondent corporate debtor of pre-existing dispute. We find that in order to substantiate the plea of pre-existing dispute between the parties, the respondent corporate debtor has stated contentions in its reply along with relevant documents including e-mail correspondences exchanged between the parties, ledger account for the year 2017-2019, copy of corporate debtor reply dated December 01, 2019 to the legal notice dated September 13, 2019 issued by the applicant intimating the applicant about the existence of dispute between the parties with regard to fulfillment of obligations as specified in the term sheets dated 02.09.2017 , short supply of stocks, existence of outstanding debt. We further observe that all the above referred letters/ correspondence relied upon by the respondent corporate debtor are issued much prior to the issuance of the demand notice dated 30.01.2020 by the applicant.

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10. The Hon'ble Supreme Court in catena of Judgements has laid down the principle that pre-existing dispute which may be ground to thwart an application under Section 9 has to be real dispute a conflict or controversy, a conflict of claims or rights should be apparent from the reply as contemplated by Section 8(2). The Corporate Debtor is not to raise bogie of disputes but there has to be real substantial dispute. The existence of dispute when the Demand Notice was issued is mandatory condition for exercising jurisdiction to reject the Application by the Adjudicating Authority as is referred to in sub-section (5) of Section 9. The statute uses the expression 'existence of a dispute'. The word 'dispute' has been defined in Black's Law Dictionary as in the following manner:-

“Dispute.

A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a relation to which jurors are called and witnesses examined. See Cause of action; Controversy; Justiciable controversy; Labour dispute.

11. In the case of **“Mobilox Innovative Private Limited vs. Kirusa Software Private Limited”** in civil appeal number 9405 of 2017 ([2017] ibclaw.in 01 SC) the Hon'ble Supreme Court vide order dated 21.09.2017 has held that:

“Therefore, all 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. In the present

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case the respondent has raised dispute with sufficient particulars. Besides the case records reveal that there was existence of dispute much prior to the issuance of notice under section 8 of the code. The claims of the dispute suggest the need of elaborate investigation. The moment there is existence of such a pre-existence dispute, the corporate debtor gets out of the clutches of the code.”

12. We will have to examine as to whether the claim of the respondent corporate debtor with regard to the “existence of dispute” can be considered to be the one which is spurious, illusory or not supported by any evidence. At this juncture, we find it relevant to refer the email correspondence exchanged between the parties in the month of August, 2019 with regard to reconciling and settling their account. On perusal of the email dated August 23, 2019 vide which detailed workings were shared along with working sheet and previous email correspondence between the parties in regard to the mismatch in the workings as to the amounts payable/ receivable, it is clearly evident that there is a disagreement between the parties with regard to the amount of debt, consequent to which the applicant had issued legal notice dated September 13, 2019 to the respondent corporate debtor for demand of the outstanding dues, which undoubtedly proves that there is a pre- existing dispute as to the existence of the amount of debt between the parties.

13. We further find that the respondent corporate debtor had replied to the demand notice dated 30.01.2020 issued by the corporate debtor vide reply dated 17.02.2020, wherein the respondent corporate debtor had issued reply dated 17.02.2020 raising the pre- existing disputes between the parties with regard to the non-fulfillment of promises by the operational creditor, breach of the covenants of terms sheets, regarding the quantum of debt due. At this juncture, it is relevant to refer the e-mail correspondence between the operational creditor and the corporate debtor regarding the performance of the parties in compliance of the term sheets:-

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Email dated July 12, 2019 addressed by the Corporate Debtor to the Operational Creditor

Subject: Re: Ludhiana store issues

Hi Jaymin,

Thanks for considering our request of closing the store, ideally this should have happened way back looking at the scenario that Major brand hasn't been supplying stock for the last 8 months. It's clearly evident that MB is not bothered about the partner. We have been suffering losses due to non supply of stock but rather than supporting the partner MB is bothered about their money only.

Just to update you till now nothing from Saket store has been released to us despite we trusting MB and sending the stock back to you. We were committed that civil payment (part of it, which is given by DLF to MB) would be returned to us.

Looking at the current scenario I don't think we can trust MB since we fulfilled all our commitment but MB didn't fulfil even once since day 1.

Please let us know about our deposits and other payment of Saket, in the meanwhile we can shift this stock to Chandigarh store but not to MB.

*Hope this clarify everything we intend to say.
Thanks, Rajesh Dudi*

14. With regard to the contention of the applicant that respondent corporate debtor has made references to various communications which pertain to DLF Saket Mall which is not a subject to the present transaction, we find that the applicant had sent two legal notices dated September 13, 2019 having subject "Demand Notice for Outstanding Dues and Termination of Term Sheet dated September 02, 2017 pertaining towards the Elante Mall store located at Chandigarh" and "Demand Notice for Outstanding Dues and Termination of Term Sheet dated September 02, 2017 pertaining towards the Pavillion Mall store located at Ludhiana" preceding the sharing of workings related to all the three stores (Elante, Pavillion, DLF- Saket) and e-

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mail correspondence (August,2019) exchanged between the parties for the purpose of account reconciliation of all the three stores. We have also gone through the email correspondence between the parties regarding the Pavillion, Ludhiana Store issues. We find no cogent evidence that the documents relied by the corporate debtor to prove 'pre-existing dispute' pertain to DLF Saket Mall.

15. We would like to make a pertinent mention that in law if there was a 'Dispute in existence' and even before the issue of demand notice under Section 8(1) of the Code, 2016, the application for initiation of insolvency process by an operational creditor can be rejected by the Adjudicating Authority.
16. The Hon'ble Supreme Court in the decision ***Transmission Corporation of Andhra Pradesh Limited V/s. Equipment Conductors and Cables Limited reported in (2019) 12 SCC 697***, categorically laid down that 'IBC was not intended to be a substitute to a recovery forum and that whenever there was existence of a real 'Dispute', IBC provisions could not be invoked'. The object of the Code, at least insofar as Operational Creditors are concerned, was to initiate Insolvency Process against the Corporate Debtor only in clear cases where a real 'Dispute' between the parties as to the 'debt owed' did not exist.
17. In the instant case, we are of the considered view that there is sufficient evidence on record to exhibit a 'Pre-Existing Dispute' between the parties prior to the issuance of the Demand Notice under Section 8, IBC, 2016. Further, the defence is not spurious, mere bluster, plainly frivolous or vexatious. Therefore, we are of the consequent view that the ratio of the Judgement of the Hon'ble Supreme Court in the case of M/s. Mobilox Innovations Pvt. Ltd. V/s. Kirusa Software Pvt. Ltd. squarely applies to the facts of the attendant circumstances of the case.
18. On going through the submissions made by the parties and keeping in mind the provisions of law laid down in the Code and the Judgments cited supra,

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it is amply clear that there exists a pre-existing dispute with respect to the store located in Elante Mall, Chandigarh and Pavillion Mall, Ludhiana as far as initiation of proceedings by Operational Creditor against the Corporate Debtor is concerned.

19. Accordingly, the instant petition (**IB-287/(ND)/2021**) stands dismissed with no order to costs.

Let copy of the order be served to the parties.

Consign the file to the record room.

(DR. BINOD KUMAR SINHA)

MEMBER (T)

(DHARMINDER SINGH)

MEMBER (J)