

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

IA No.2271/2021
IN
CP (IB) No. 1213/MB-IV/2020
Under Section 9 of the I&B Code, 2016

In the matter of:

VALLABH FABRIKS LIMITED

[CIN: U52322PB1996PLC019237]

...Operational Creditor/Applicant

V/s

LOVABLE LINGERIE LIMITED

[CIN: L17110MH1987PLC044835]

...Corporate Debtor/Respondent

Order Dated: 16.05.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. G.K Jain, Ld. Counsel for Applicant in
IA and Petitioner

For the Respondent(s) : Ms. Simran kasat a/w Sulbha Chipade and
Drupa Dhabalia i/b Bathiya Legal.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is an Application being CP (IB) No. 1213/MB-IV/2020 filed on 11/09/2020 by VALLABH FABRIKS LIMITED, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against LOVABLE LINGERIE LIMITED, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).
2. The total amount claimed by the Operational Creditor as specified in the Part IV of the Company Petition is Rs. 1,11,96,181/- towards pending bills and interest of Rs.48,22,804 (due to delayed or no payments u/s15 &16 of MSME Act, 2006.) is due and payable by the Corporate Debtor. The debt fell due from 15.11.2017 onwards.
 - 2.1. The Operational Creditor submits that, the Corporate Debtor placed Purchase Orders from June 2017 onwards from time to time on the Operational Creditor for supply of knitted cloth.
 - 2.2. Initially, the Corporate Debtor was prompt in making payment within due date, later started delaying the payments beyond 45 days. The terms of payment per Purchase Orders are to make payment within 60 days from the date of Invoice, whereas, the payments terms mentioned on each Invoice was – *“If payment is not received within 15 days, then interest @ 24% p.a. will be charged from the Invoice date.”*

- 2.3. The last supply to the Corporate Debtor was made on 19.03.2020 for an amount of Rs. 2,54,360/- and the last payment(s) made by the Corporate Debtor was made on 11.08.2020 for an amount of Rs.14,21,006/- against the balance outstanding of Rs.77,94,383/- as on 19.03.2020.
- 2.4. However, while serving Demand Notice under Section 8 of the Insolvency & Bankruptcy Code, 2016, the Operational Creditor calculated interest as per mandatory provisions of Section 15 and 16 of MSME Act, 2006 from 31.12.2017 onwards by giving 45 days credit to the Corporate Debtor.
- 2.5. The Operational Creditor requested a number of times through email(s) to make payment of outstanding bills. In spite of repetitive reminders the Corporate Debtor failed to do so and a Demand Notice was served through email on 27.08.2020, as per Order of the Hon'ble Supreme Court for pandemic period and also served the said Demand Notice through Speed Post on 26.08.2020, duly delivered to the Corporate Debtor on its Registered Office address on 31.08.2020, and the same was replied by the Corporate Debtor and sent an unsigned reply to the Demand Notice through email on 04.09.2020 and mentioned primarily the following objections:
- a. Demand Notice has not been served at official email address of the Corporate Debtor or as mentioned in the Purchase Order (if any);
 - b. Denies and disputes the claim;
 - c. The customers have returned the garments of value Rs.96,52,725/- manufactured from cheap quality of material supplied by the Operational Creditor, hence, a counter claim of Rs. 96,52, 725/-, besides a penalty of Rs. 10,26,965/- due to delayed supplies and

further returnable goods of Rs. 33,22,881/-, making a counter claim of Rs. 81,48,453/- recoverable from the Operational Creditor;

- d. Interest debited of Rs. 48,22,804/- is not an actionable claim as held in the case of Swastik Enterprises Vs. Gammon India Limited (NCLT Mumbai);
- e. As mentioned at Para 10 of the Reply- "*It is clear that our client does not owe any liability as on date rather a sum of Rs. 81,48,453/- is likely became payable by the Operational Creditor*".

2.6. The Operational Creditor through its rejoinder replied to the abovementioned notice and has denied each and every allegation raised by the Corporate Debtor.

3. The Corporate Debtor through its reply has stated that the, the claims made by the Operational Creditor are lessor than the threshold limit as required for initiation of CIRP against the Corporate Debtor; purchase orders do not provide for payment of interest; the Operational Creditor had not informed the Corporate Debtor at the time of raising of the purchase orders by the Corporate Debtor or at the time that invoices being raised by the Operational Creditor is a unit registered under the MSME Act; interest cannot be claimed as per provisions of the MSME Act; the Operational Creditor has failed to produce all the relevant documents on the basis of which it has claimed the alleged amounts; Operational Creditor has suppressed facts regarding the existence of dispute in relation to the inferior quality of goods which was prior to the issue of Demand Notice from the Operational Creditor.

Findings

4. This bench heard both the Counsels and perused the documents and pleadings available on record.

4.1. Vide order dated 06.09.2021 this bench appointed M/s ZADN & ASSOCIATES Chartered Accountant for reconciliation of account between the parties with respect to debit notes and goods returned whether the debit notes are genuine, and the goods returned are received by the Operational Creditor. The said firm submitted its report dated 04.10.2021 giving following findings

“Our observations

Based on the verification of all debit notes, E-way bills and lorry receipt raised by the Respondent, it can be seen that there is no stamp from the petitioner acknowledging the receipt of goods.

Further, there was a difference of 689.805 kgs observed in the quantity as per debit note (4,254.715 Kgs) and quantity as per lorry receipt (3,564.91 Kgs). As per the replies received from the Respondent, “the difference of 690kgs is due to cut rejected fabrics due to poor quality but not sent to petitioner, which is captured in Debit Note.19”.

The respondent had generated E-way bills for the goods returned. Further, the GST is charged on the debit notes raised by the Respondent. However, since the Petitioner has not raised credit notes in response to the debit notes, GST on the goods returned is not reflected in GSTR 2A of the Respondent.

We have receive the copy of the email correspondence between the respondent and the Transporter (Flywing Cargo Private Limited), wherein the transporter is stating that they tried delivering the material, however, the Petitioner did not accept the materials stating that these material does not belong to the petitioners.

D. Audit Limitation

Penalty calculation by the Respondent amounts to Rs. 10,26,965/- and interest calculation by the petitioner amounts to Rs. 48,22,804/-. However, the same is not within our scope so the same has not been verified and commented upon by us.”

- 4.2. This Bench is of the view that, there exists a dispute between the parties which was communicated by the Corporate Debtor to the Operational Creditor vide reply dated 04.09.2020, to the said Demand Notice dated 26.08.2020. Further, the issues raised in the communication between the parties, requires adjudication to decide whether any sum is payable or not? This Bench does not have power to do so, and its jurisdiction to deal with such matter u/s 9 is precluded by existence of prior dispute in relation to debt claimed in the application.
- 4.3. The Hon’ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited* held that, in the event there is a pre-existing dispute between the parties, an Application under Section 9 of the Code would have to be rejected. Further, the Hon’ble NCLAT in case of **East India Udyog Ltd. Vs. SPML Infra Ltd. (2023) ibclaw.in 201 NCLAT** dismissed the petition u/s9 of the Code on the ground that there exists a pre-existing dispute with respect to the existence of amount due and payable and quality of goods and services supplied by the Operational Creditor to the Corporate Debtor
5. In view of the above, we find that the present application deserves to be dismissed under Section 9(5)(ii)(d) read with Section 8(2)(a) and Section 5(6) of the Insolvency and Bankruptcy Code, 2016 in view of pre-existing dispute between the parties with respect to the purported claims.

6. The applicant has also filed an IA No 2271/2021 on 02.10.2021 praying for penal action against the respondent in terms of section 229 read with section 447 of the Companies Act 2013 for furnishing false statement, mutilation, destruction of documents.
7. This bench notices that, the respondent has not made any false entry in its books of accounts, as the account of petitioner was debited on basis of claim of the respondent that goods were rejected. This aspect is confirmed from the findings of M/s. ZADN & ASSOCIATES. This bench feels that action under section 229 lie only “where a person is required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or an officer or other employee of a company or other body corporate which is also under investigation”. The proceedings under the code are summary proceedings and do not entail any inspection, inquiry or investigation. Further the submissions of the respondents have not been found untrue as the same were found recorded in its books of accounts by M/s. ZADN & ASSOCIATES. Further, sec 447 deals with fraud and this bench do not find that any case of fraud is made from the submissions of the respondents in the absence of mens-rea. In view of this bench is of the considered view this application is devoid of any merit, accordingly it is dismissed.

ORDER

8. The petition bearing CP (IB) No. 1213/MB-IV/2020 filed by VALLABH FABRIKS LIMITED (“the Operational Creditor”), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against LOVABLE LINGERIE LIMITED (“the Corporate Debtor”), is **Dismissed**.
9. The applicant has also filed an IA No 2271/2021 on 02.10.2021 praying for penal action against the respondent in terms of section 229 read with section

447 of the Companies Act 2013 for furnishing false statement, mutilation, destruction of documents is **Dismissed**.

10. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
16.05.2023

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)