

**THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

**IA 548/2021
and
CP(IB) No. 197/Chd/Hry/2020**

**Under Section 9 of
Insolvency and Bankruptcy
Code, 2016.**

**In the matter of IA No. 548/2021
and CP(IB) No. 197/Chd/Hry/2020:**

Liberty Footwear Co.

4/42, Punjabi Bagh,
New Delhi-110026

...Petitioner-Operational Creditor

Vs.

Liberty Shoes Limited

having its registered office at
Liberty Puram, 13th Milestone,
G.T. Karnal Road, Kutail,
P.O. Bastara, Karnal-132114 (Haryana)

...Respondent-Corporate Debtor

Judgement delivered on: 15.06.2023

**Coram: Hon'ble Mr. Harnam Singh Thakur, Member (Judicial)
Hon'ble Mr. Subrata Kumar Dash, Member (Technical)**

For the Petitioner-
Operational Creditor and
applicant in IA No. 548/2021

: Mr. G.K. Jain, PCA

For the Respondent-
Corporate Debtor and
respondent in IA No. 548/2021

: 1). Mr. V.K. Sachdeva, Advocate
2). Mr. Pulkit Sachdeva, Advocate

Per: Harnam Singh Thakur, Member (Judicial)

JUDGMENT in CP(IB) No. 197/Chd/Hry/2020

The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC' / 'Code'), by **Liberty Footwear Co.** through its Chartered Accountant Mr. GK Jain (for brevity 'Operational Creditor' / 'Petitioner'), with a prayer to initiate Corporate Insolvency Resolution Process (CIRP) in case of **Liberty Shoes Limited** (for brevity 'Corporate Debtor' / 'Respondent').

2. The Corporate Debtor, namely, Liberty Shoes Limited, is a Company incorporated on 03.09.1986 under the provisions of the Companies Act, 1956 with CIN No. L19201HR1986PLC033185 with its registered office at Karnal, Haryana. Hence, the territorial jurisdiction lies with this Adjudicating Authority. Copy of master data of the corporate debtor is attached with the main petition and marked as Annexure A-14.

3. The facts of the case, briefly, as stated in the petition are that "Liberty" is a registered Trade Mark of Liberty Footwear Co., a partnership concern. This partnership is continuing since 1958, and the last reconstitution took place on 08.09.2003 after the demise of Sh. P.D. Gupta and for responsibility shifted to Sh. Adarsh Gupta. On 03.04.2013, the firm entered into Trade Mark Licence Agreement with Liberty Shoes Limited for a period of 15 Years with terms that the Corporate Debtor pay a license fee @ 2% of turnover for the first five years, 2.5 turnover for the next five years and 3% turnover for next five years. The fee had to be paid on a quarterly basis within the first 15 days of each quarter of the year. The corporate debtor never provided estimates and prepared quarterly invoices arbitrarily. The corporate debtor

besides the deduction of TDS, deducted GST and other payments. Further, the corporate debtor deposited the amount of GST, filed GST returns/Income Tax Returns of the firm (Operational Creditor). During Financial Year 2019-20, the operational creditor issued four invoices amounting to Rs. 13.86 crore and receive few payments in the account. However, Rs. 9,15,69,316/- (Rupees Nine Crore Fifteen Lakh Sixty Nine Thousand Three Hundred Sixteen only) remained outstanding along with interest @ 12% P.A., if payment is not made by the due date as per Clause-4(g) of the Trade Mark License Agreement.

4. It is submitted by the petitioner in Form 5, Part IV that amount claimed to be in default is Rs. 9,51,15,334/- (Rupees Nine Crore Fifty One Lakh Fifteen Thousand Three Hundred Thirty Four Only) (Rs. 9,15,69,316 towards in account pending amount of Royalty towards usage of Trade Mark plus Interest of Rs. 35,46,018) plus interest 12% p.a. from 24.02.2020 till date of actual payment. The default occurred on 15.04.2019 as mentioned by the operational creditor, however, no basis for the same has been provided. Copy of claim of debt, detail of transactions and calculation of interest (Annexure-A-1); Bank Statement (Annexure-A-3 & A-4); Trade Mark License Agreement dated 03.04.2013 and Addendum (Annexure-A-6); Invoices (Annexure-A-7); Letters dated 01.01.2020, 02.01.2020, 17.01.2020 (Annexure-A-8, A-9 & A-10); Partnership deed dated 08.09.2003 (Annexure-A-11); Internal Regulation dated 20.01.2003 (Annexure-A-12) and Registration Certificate of Partnership in Form-C (Annexure-A-13) are attached with the main petition.

5. A demand notice in Form 3 is stated to be issued by the operational creditor on 19.02.2020 (Annexure A-2). The demand notice has been delivered to the corporate debtor vide registered post as the tracking report/postal receipts are attached at Annexure A-18 and through email dated 24.02.2020 (Annexure-A-17) and the corporate debtor had not replied to the demand notice till date.

6. The notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted. The affidavit of service was filed vide Diary No. 00440/1 dated 26.08.2020 and additional affidavit was filed vide Dairy No. 01566/2 dated 04.12.2020. The corporate debtor has filed a reply vide diary No.01566/1 dated 26.10.2020, wherein it is stated that the transactions between the parties are governed by terms and conditions contained in the agreement dated 31.03.2003 between the parties. The invoices were raised by Liberty Footwear Company. One of the partners of an operational creditor have a dispute and differences with other partners have chosen to file the present petition on behalf of the partnership firm. There is an internal dispute amongst partners and partners of the firm as partners had withdrawn the powers of Mr. Adarsh Gupta by letters dated 28.12.2018 and affirmed the same vide letter dated 08.11.2019. The partners of the firm requested to make payment vide letter dated 20.03.2020. Further, Mr. Adarsh Gupta vide letter dated 13.09.2019 asked for a differential amount which was denied by the company vide letter dated 16.09.2019. All the invoices raised by the petitioner firm have duly been accounted for and paid by the corporate debtor. Mr. Adarsh Gupta has falsely claimed to be the Managing Partner of Liberty Footwear Company. The power of attorney

executed as conferred power upon Mr. G.K. Jain to issue a demand notice, file a present petition and certify any documents on behalf of Adarsh Gupta, firm. The petition had failed to place on record specific authorization from other partners of the operational creditor in favour of Mr. Adarsh Gupta, who has further authorized Mr. G.K. Jain to file the present petition. Therefore, the Power of Attorney dated 23.01.2020 is an illegal document. The petitioner has no locus to file the present petition. The invoices/account statements/amounts raised are forged/fabricated documents and figures self-created by Mr. Adarsh Gupta. The date of default mentioned as 15.04.2019 is baseless and the entire amount already stood paid. There is suppression of material facts as the reply dated 07.03.2020 to demand notice was sent through Registered Post, which was received on 09.03.2020 by the operational creditor and has not been disclosed. There is no breach of contract between the parties. There is no operational debt and no default of any payment.

7. The rejoinder was filed vide Diary No.00440/2 dated 18.11.2020, wherein it is stated that the demand notice was not replied within 10 days of its delivery. The invoices accounted for by the corporate debtor are not raised by Liberty Footwear Company and were prepared by its own accountant Mr. Sanjiv Sharma. Previously, the corporate debtor has not paid the entire amount due to the operational creditor and Rs. 364.12 Lakh had been underpaid by the corporate debtor to the operational creditor towards franchise fees/license fees under terms of the Trade Mark License Agreement which is evident from Annexure-R-13. The petition is filed by an operational creditor for the benefit of the firm and not for the personal gains

of any one partner of the firm. The differences between partners have nothing to do with the liberty of the corporate debtor. All the documents filed are true as per records available with the operational creditor. The invoices were issued under the signature of Mr. Adarsh Gupta, Partner of the firm and were delivered to the corporate debtor through email as well as courier. The bank account of the operational creditor is under the joint signatures of Mr. Adarsh Gupta, Vivek Bansal and Harish Gupta. The ledger account of the operational creditor in the books of the corporate debtor evidenced that all payments are made by the corporate debtor including payment of GST, TDS, Deducted from employees and advanced income tax. Default occurred on account of non-payment of its debt by the due date as per TradeMark License Agreement.

8. The short written submissions have been filed by the petitioner vide Diary Nos.01167/2 dated 15.06.2022 and 01566/6 dated 22.03.2023. The short written submissions have been filed by the respondent corporate debtor vide diary Nos.01566/4 dated 15.12.2020 and 01566/5 dated 24.08.2022.

9. We have heard the learned counsels for the petitioner as well as the corporate debtor and have perused the records.

10. The first issue for consideration is whether the demand notice dated 19.02.2020 was properly served. The demand notice has been delivered to the corporate debtor vide registered post as the tracking report/postal receipts are attached at Annexure A-18 and through email dated 24.02.2020 (Annexure-A-17). Although, it is alleged by petitioner that the corporate debtor had not replied to the demand notice till date. But this contention of

petitioner is falsified with the copy of reply dated 07.03.2020 to demand notice filed by respondent-corporate debtor sent through Registered Post, which was received on 09.03.2020 by the operational creditor as the tracking report and postal receipts are attached at Annexure R-20 of the reply. Therefore, the demand notice was duly served upon the corporate debtor and replied thereof.

11. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. It is deposed by the operational creditor by way of affidavit that the corporate debtor had not reported any dispute till 06.03.2020 in response to the service of demand notice (Page 23-25C of the petition). The petitioner has submitted a bank certificate under Section 9(3)(c) certifying that *“no payment has been received by bank during the period 19.02.2020 to 06.03.2020 through cheques/DD/NEFT/RTGS from Liberty Shoes Limited in account of Mr. Adarsh Gupta and Liberty Footwear Co. maintained with us”*.

It is submitted by the corporate debtor that the transactions between the parties are governed by terms/conditions contained in the agreement dated 31.03.2003 between the parties, Mr. G.K. Jain is not authorised to file the present petition and the invoices placed on record are forged and fabricated. The operational creditor has admitted that the transactions were based upon the terms and conditions mentioned in the Agreement dated 03.04.2013. However, it is seen from the records that the power of attorney executed as conferred power upon Mr. G.K. Jain to issue a demand notice, file a present petition and certify any documents on behalf of Adarsh Gupta and the firm. Further, the authorisation of Mr. Adarsh Gupta was withdrawn by the partners

of the firm vide letter dated 28.12.2018 and affirmed the same vide letter dated 08.11.2019. The petition is not supported by the authorisation from the other partners of the operational creditor in favour of Mr. Adarsh Gupta to further authorized Mr. G.K. Jain to file the present petition.

Moreso, there is suppression of material facts on part of the operational creditor as the copy of reply dated 07.03.2020 to demand notice filed by respondent-corporate debtor sent through Registered Post, which was received on 09.03.2020 by the operational creditor as the tracking report and postal receipts are attached at Annexure R-20 of the reply and receiving of reply to demand notice has not been disclosed by the operational creditor.

It is evident from the averments in reply that there is pre-existing dispute between the parties as there was an internal dispute amongst partners of the firm. The partners had withdrawn the powers of Mr. Adarsh Gupta by letter dated 28.12.2018 and affirmed the same vide letter dated 08.11.2019. Therefore, the dispute existed much prior to the issuance of the demand notice dated 19.02.2020. The reliance can be placed upon the judgment of Hon'ble Supreme Court, **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353** wherein it was held that:

“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.

43.We have seen that a “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6).

45. *Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability”.*

(Emphasis Supplied)

The above instances indicate that there were no debt and default on part of the operational creditor and Shri. G.K. Jain, Chartered Accountant is not proved to be duly authorised or competent person to file the present petition.

The reliance can be placed upon the judgment of Hon’ble National Company Law Appellate Tribunal, New Delhi in the case of **Palogix Infrastructure Private Limited Vs. ICICI Bank Limited** wherein it is stated that-

“31. As per Section 7 of the 'I & B Code' an application for initiation of 'Corporate Insolvency Resolution Process' requires to be filed by 'Financial Creditor' itself. The form and manner in which an application under section 7 of the 'I & B Code' is to be filed by a 'Financial Creditor' is provided in 'Form-1' of the Adjudicating Authority Rules. Upon perusal of the Adjudicating Authority Rules and Form-1, it may be duly noted that the 'I & B Code' and the Adjudicating Authority Rules recognize that a 'Financial Creditor' being a juristic person can only act through an "Authorised Representative". Entry 5 & 6 (Part I) of Form No. 1 mandates the 'Financial Creditor' to submit "name and address of the person authorised to submit application on its behalf. The authorization letter is to be enclosed. The signature block of the aforementioned Form 1 also provides for the authorised person's detail is to be inserted and also includes inter alia the position of the authorised person in relation to the 'Financial Creditor'. Thus, it is clear that only an

"authorised person" as distinct from "Power of Attorney Holder" can make an application under section 7 and required to state his position in relation to "Financial Creditor".

32. The 'I & B Code' is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.

33. Therefore, we hold that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'".

(Emphasis Supplied)

Although, it is pleaded by the operational creditor that there is a default on the part of the corporate debtor with respect to the payment outstanding, however, there is no supporting document placed on record to show the amount due and outstanding. It may be noted that there is lack of authorisation on part of the operational creditor to file the present petition.

It is pertinent to note that other IA No. 548/2021 has been filed by operational creditor for appointment of a Chartered Accountant in Chandigarh to determine the total debt due to the operational creditor by the corporate debtor on sale for period 01.04.2019 to 31.03.2020 on basis of audited financials and to determine debt paid by the corporate debtor towards operational creditor as per TradeMark License Agreement dated 03.04.2013 interest due payable by corporate debtor, therefore the petitioner/applicant is not sure about the amount claimed.

Thus, default is not established.

12. The other issue for consideration is whether this application is filed within limitation. A demand notice issued dated Form 3 is stated to be issued by the operational creditor on 19.02.2020 and the same has been delivered to the corporate debtor. However, the period of limitation would begin from the date of default i.e. 15.04.2019 as mentioned by the operational creditor,

however, no basis for the same has been provided. This application was filed vide Diary No. 1919 on 11.03.2020. Therefore, this Adjudicating Authority finds that there is no cogent evidence about the date of default, thus, it cannot be said that the present petition is filed within limitation.

13. Thus, it is the case of rendition of accounts which can be adjudicated upon only by a civil court and not within the ambit and domain of this authority. As a sequel to the above discussion and the facts as well as circumstances since there is lack of supporting documents regarding the amount claimed by the petitioner, thus, the petition is not complete under Section 9(5) of the Insolvency and Bankruptcy Code, 2016 and there is a pre-existing dispute between the parties, the petition is liable to be rejected, in terms of Section 9 of IBC, 2016 and stands dismissed, however, with no order as to costs.

IA 548/2021

14. The present application is filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC' / 'Code'), by **Liberty Footwear Co.** through its Chartered Accountant Mr. GK Jain (for brevity 'Operational Creditor' / 'Petitioner'), against **Liberty Shoes Limited** (for brevity 'Corporate Debtor' / 'Respondent') with a prayer for appointment of a Chartered Accountant in Chandigarh to determine the total debt due to the operational creditor by the corporate debtor on sale for period 01.04.2019 to 31.03.2020 on basis of audited financials and to determine debt paid by the corporate debtor towards operational creditor as per TradeMark License Agreement dated 03.04.2013 interest due payable by corporate debtor.

15. Perusal of IA No. 548/2021 shows that applicant is not sure about the debt amount claimed in the main petition CP(IB) No. 197/Chd/Hry/2020 under Section 9 of Insolvency and Bankruptcy Code,2016. As already held in main CP that it is case of rendition of accounts which can be adjudicated upon only by a civil court. Therefore, the present application renders infructuous and stands dismissed accordingly.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

Sd/-
(Harnam Singh Thakur)
Member (Judicial)

June 15, 2023
PKA/TB