

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

CP (IB) No. 38/Chd/Hry/2022

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

In the matter of:

Ajay Fashions Private Limited

having its registered office at
D-76, Shastri Nagar, Jodhpur,
Rajasthan-342001, India,

...Petitioner-Operational Creditor

Vs.

Airplaza Retail Holdings Private Limited

having its registered office at
Plot No.184, Fifth Floor, Platinum Tower, Udyog Vihar,
Phase-I, Gurgaon, Haryana-122016
CIN No: U52399HR2008PTC086045

...Respondent-Corporate Debtor

Judgement delivered on: 07.07.2023

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

For the Petitioner-Operational Creditor : Mr. Manish Jain, Advocate
Ms. Divya Sharma, Advocate

For the Respondent-Corporate Debtor : Mr. Ashim Aggarwal, Advocate

Per: Harnam Singh Thakur, Member (Judicial)

JUDGMENT

The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC' / 'Code'), by **Ajay Fashions**

Private Limited through its Director Mr. Ajay Mehta (**for brevity 'Operational Creditor' / 'Petitioner'**), with a prayer to initiate Corporate Insolvency Resolution Process (**CIRP**) in case of **Airplaza Retail Holdings Private Limited (for brevity 'Corporate Debtor' / 'Respondent')**.

2. The Corporate Debtor, namely, Airplaza Retail Holdings Private Limited, is a Company incorporated on 01.02.2008 under the provisions of the Companies Act, 1956 with CIN No. U52399HR2008PTC086045 with its registered office at Plot No.184, Fifth Floor, Platinum Tower, Udyog Vihar, Phase-I, Gurgaon, Haryana-122016. 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-14.

3. The facts of the case, briefly, as stated in the petition are that the operational creditor leased out premises to Corporate Debtor vide Lease Agreement dated 29.06.2006 which was extended till 14.05.2021 and various invoices were raised. The Corporate Debtor made regular payments till April, 2020. The Operational Creditor sent various reminders vide emails dated 08.04.2020, 09.04.2020, 15.04.2020, 06.07.2020, 07.08.2020, 28.08.2020, 21.09.2020, 23.09.2020, 29.09.2020, 12.10.2020, 03.11.2020, 05.11.2020, 20.11.2020, 30.11.2020, 06.01.2021, 07.01.2021, 01.02.2021, 05.02.2021, 18.02.2021, 19.02.2021, 04.03.2021, 05.03.2021, 08.03.2021, 18.03.2021, 26.03.2021, 27.03.2021 and 09.04.2021. The applicant further served Legal Notice dated 29.04.2021 on Corporate Debtor for vacating leased premises and clear outstanding dues. The Corporate Debtor raised

plea of force majeure for getting waived unpaid operational debt. In September 2021 the Corporate Debtor proposed Settlement Agreement. However, no payments were made. On 11.11.2021, Corporate Debtor deposited an amount of Rs. 14,72,184/- making clear that debt is existing.

4. It is submitted by the petitioner in Form 5, Part IV that the amount claimed to be in default is Rs.1,27,39,039.70/- (Rupees One Crore Twenty-Seven Lakhs Thirty-Nine Thousand Thirty-Nine Rupees And Seventy Paise Only). Regarding the date of default, the operational creditor has mentioned that the default occurred on each and every date when the invoice was raised by the applicant on the corporate debtor and payments in consonance to the same are not being made by the corporate debtor. Copy Board Resolution (Annexure-A1), Lease Agreement dated 27.06.2006 (Annexure-A3), Invoices (Annexure-A4), reminders/emails exchanged between the parties (Annexure- A5), Legal Notice dated 29.04.2021 (Annexure-A6), Ledger (Annexure-A9) and Statements of Bank Account (Annexure-A10) are attached with the main petition.

5. A demand notice in Form 3 and Form 4 is stated to be issued by the operational creditor on 01.11.2021 and the same has been delivered to the corporate debtor vide registered post as the postal receipts are attached at Annexure-A2 of the petition. The corporate debtor replied to the demand notice through email dated 13.11.2021 (Annexure-A8) wherein it is stated that the amount claimed is not due and code is used as a recovery mechanism. The amount mentioned is inflated and there is pre-existing

dispute between the parties. The claim is related to unpaid lease rental and AFPL has already approached the Micro and Small Enterprise Facilitation Council (hereinafter referred as 'MSEFC'), Jaipur. The immovable property does not fall under the definition of operational debt.

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 corporate debtor has filed reply vide diary No.01568/3 dated 03.10.2022, wherein it is stated that the Lease Agreement was executed between Shri. Sohanraj Mehta and the petitioner and Vishal Retail Ltd. along with the Deed of Allotment dated 06.05.2013. There is a pre-existing dispute between the parties for the breach committed by the petitioner of the Lease Agreement which is evident from Letters dated 24.05.2021 and 13.11.2021. The claim is in relation to the alleged unpaid lease rentals. The claim amounts are not due and the provision of IBC is being used as a recovery mechanism. The petitioner has suppressed that it has already approached Micro and Small Enterprise Facilitation Council, HQ-II, Jaipur for Rs. 54,07,308/-. The MSEFC by way of notice dated 14.07.2021 called upon both parties to resolve the dispute by way of conciliation. The petitioner has introduced six invoices- R003, R004, R005, R006, R007 & R008 dated 04.10.2021 for Rs. 66,08,933/- towards liquidated damages which have inflated. No reason has been provided by the petitioner that invoices are raised for liquidated damages and not towards the rent. The Lease Agreement expired on 14.05.2018 and not on 15.05.2021. However, even after that, the petitioner

has accepted the rent. The damages from 15.05.2021 till October 2021 is shown to bring the present claim over Rs. 1 crore threshold limit. For the liquidated damages, a suit can be filed and cannot be considered as operational debt. The threshold limit has not been met. During the Covid-19 pandemic, the leased premises have been rendered unusable which constituted an event of force majeure. On 14.07.2021, the respondent addressed an email for settlement enclosing the Settlement Deed. On 19.07.2021, the petitioner responded by sending a revised draft of the Settlement Deed which shows that there is a dispute between the parties. No relationship of an operational creditor and a corporate debtor is created between a tenant and a sub-tenant. The lease of immovable property cannot be considered as a supply of goods or the rendering of any service and the same does not fall under the definition of operational debt. Vide letter dated 23.05.2020, the petitioner in response to the communication dated 06.05.2020 and 09.05.2020 contended that the letters issued by the respondent were dehors the lease agreement and rejected the rent proposal, the petitioner offered a relaxation of three months and proposed that rent for three months can be paid in 12 equal installments.

7. The rejoinder was filed vide Diary No.01568/4 dated 06.12.2022, wherein it is stated that as per the Lease Agreement dated 29.06.2006 upon the termination of the Agreement, the lessee shall be bound to pay legal charges equivalent to 200% of the last paid lease rent till the date of hand over of possession of the property. The outstanding lease rent constitutes

operational debt and the corporate debtor has availed services by taking the lease the demised premises. Therefore, the applicant is covered under the ambit of the operational creditor. The corporate debtor has availed input tax credit for GST deposited by petitioners. However, failed to clear the outstanding payment as per the invoices. There is no pre-existing dispute and reply dated 13.11.2021 to demand notice shall not be taken on record since the same is after the expiry of 10 days mandated period. The pendency of MSME proceedings does not render instant application under Section 9 infructuous. The proceeding before the MSME Tribunal is neither covered under the definition of suit nor under arbitration proceedings. The admission of unpaid operational debt can be fortified from 26AS for Financial Year 2021-22 which clearly reflects that the corporate debtor has deducted TDS on the amount of unpaid debt and deposited Rs. 5,39,720/- as part of TDS. Non-execution of the settlement between the parties would in no manner be treated as a pre-existing dispute.

8. The short written submissions have been filed by the petitioner vide Diary No.01568/5 dated 27.03.2023 and by the respondent/corporate debtor vide Diary No.01568/6 dated 17.04.2023.

9. We have heard the learned counsel for the petitioner and corporate debtor and have perused the records.

10. The first issue for consideration is whether the demand notice in Form 3 and Form 4 was properly served. The demand notice in Form 3 and Form 4 is stated to be issued by the operational creditor on 01.11.2021 and

the same has been delivered to the corporate debtor vide registered post as the postal receipts are attached at Annexure-A2 of the petition. The corporate debtor replied to the demand notice through email dated 13.11.2021 (Annexure-A8). Therefore, the demand notice was duly served upon the corporate debtor.

11. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. It is deposed by way of the compliance affidavit filed by learned counsel for the operational creditor vide Diary No. 01568/1 dated 22.03.2022 wherein it is stated that there is no pre-existing dispute between the parties.

The petitioner vide email dated 08.04.2020 offered a relaxation of three months and proposed that rent for three months can be paid in 12 equal installments.

It is submitted by the corporate debtor that the claim of the petitioner is barred under Section 10A of the Insolvency and Bankruptcy Code, 2016 as it pertains to the covid default period from 25.03.2020 till 25.03.2021 and the invoices were raised during 05.04.2020 to 04.10.2021. The default occurring after 25.03.2021 for the amount of Rs. 66,08,933/- is below the threshold limit of Rs. 1 Crore. The corporate debtor further submitted that *'the Hon'ble NCLAT relying upon judgment of Hon'ble Supreme Court in Ramesh Kymal v. Siemens Gamesa Renewable Power Put Ltd | 2021 SCC OnLine SC 72], in its recent order dated 02.11.2022 passed in the matter of Shapoorji Pallonji and Company Put. Ltd. versus Black Canyon SEZ*

Pvt. Ltd. has inter alia. held that for the default, which was committed during the period covered under Section 10-A no application could ever be filed as there was prohibition for initiation of CIRP during the period set out under Section 10-A of IBC'.

The Section 10-A of the Insolvency and Bankruptcy Code, 2016 is stated as under:-

*“10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf: Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.
Explanation. – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020”.*

Therefore, the claim in the present petition pertains to the period 05.04.2020 to 04.10.2021 for which an application for initiation of the Corporate Insolvency Resolution Process cannot be filed.

The petitioner has also approached Micro and Small Enterprise Facilitation Council, HQ-II, Jaipur for Rs. 54,07,308/-. The MSEFC by way of notice dated 14.07.2021 called upon both parties to resolve the dispute by way of conciliation. The dispute existed between the parties much before the issuance of the demand notice dated 01.11.2021. 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 definition of a ‘dispute’ as provided in the Insolvency and Bankruptcy

Code,2016 is as follows-

*“5. Definitions. – In this Part, unless the context otherwise requires, –
(6) “dispute” includes a suit or arbitration proceedings relating to–
(a) the existence of the amount of debt;
(b) the quality of goods or service; or
(c) the breach of a representation or warranty;”*

Therefore, it can be safely concluded that there is a pre-existing dispute between the parties.

It is pertinent to note that in the invoices, the petitioner has also included the component of liquidated damages, which cannot be construed as Operational debt except after adjudication by a Competent Authority/Court. The reliance can be placed upon the judgment of National Company Law Tribunal, Mumbai Bench titled **Gujarat Urja Vikas Nigam Limited vs. Nitash Co-generation Private Limited CP No. 1356/IBC/NCLT/MB/MAH/2017:-**,

“30. A conclusion can be drawn from a plain reading of the above said judgements that the liquidated damages arises on breach of contract for which a suit can be filed wherein the damages are required to be ascertained because the said damages must not be allowed arbitrarily. Hence, liquidated damages can be crystallised only after adjudication from a court of law. Its reasonableness is also decided by a court of law on the other hand, the insolvency proceedings are not the appropriate forum to decide the reasonability of the liquidated damages or to file claim for damages. Hence, the damages claimed in the present case cannot be adjudicated as the same is the subject matter of a civil suit. Liquidated damages are not an actionable claim, until and unless adjudicated. This is the first reason for not considering the liquidated damages as 'operational debt'”.

(Emphasis Supplied)

If the component of liquidated damages is excluded, then the debt does not fall within the threshold limit of Rs. 1 crore.

Thus, it is a settled proposition that National Company Law Tribunal is not a recovery forum. If at all, there is any dispute between the parties regarding the said claim then the parties are at liberty to approach the appropriate Forum.

12. The other issue for consideration is whether this application is filed within limitation. A demand notice issued dated 01.11.2021 in Form 3 and 4 attached as (Annexure A-2) was duly served on the corporate debtor. However, the period of limitation would begin from the date of default. Regarding the date of default the operational creditor has mentioned that the default occurred on each and every date when the invoice was raised by the applicant on the corporate debtor and payments in consonance to the same are not being made by the corporate debtor. However, the last payment of Rs. 14,72,184/- was received on 11.11.2021 which can be construed as the date of default. This application was filed vide Diary No. 01568 on 04.02.2022 and was re-filed on 17.02.2022. Therefore, this Adjudicating Authority finds that this application is filed within limitation.

13. As a sequel to the above discussion and the facts as well as circumstances since there is a pre-existing dispute between the parties regarding the amount claimed by the petitioner. Moreso, the actual amount claimed without liquidated damages falls below the threshold limit. The petition is liable to be rejected, in terms of Section 9 of IBC, 2016. The petition consequently stands dismissed, however, with no order as to costs.

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

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

July 07, 2023
VN/TB