

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH - II
Company Petition (IB) No. 2854/ND/2019

In the matter of:

The Insolvency and Bankruptcy Code, 2016

AND

In the matter of:

Sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016

AND

In the matter of :

MAYOR SPORTS PRIVATE LIMITED

Through its Director

Mr. Nitin Mayor

Registered Address At:

Khasra No. 358, Mandi Road Extended Abadi,

Jonapur, New Delhi-110047

...Applicant/Operational Creditor

VERSUS

EMPHASIS INNOVATIONS PRIVATE LIMITED

(Earlier known as Emphasis Marketing Pvt. Ltd.)

Through its Directors

Registered Address At:

Shop No. 2, P-63, West Patel Nagar,

Near Khanna Market, Delhi-110008

...Respondent/Corporate Debtor

ORDER DELIVERED ON: 07.04.2021

CORAM:

Sh. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)

Sh. L. N. Gupta, Hon'ble Member (Technical)

PRESENT: -

Mr. Deepak Biswas and Ms. Charu Tyagi – Adv. for Applicant / Operational Creditor.



ORDER

(PER SH. ABNI RANJAN KUMAR SINHA, MEMBER, JUDICIAL)

1. The present petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 by the Applicant/ operational creditor, i.e. "*Mayor Sports Private Limited*" for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor Company namely, "*Emphasis Innovations Pvt. Ltd.*".

2. Brief facts of the case as averred, are as follows:

- i. The Applicant is a private limited company engaged in the business of manufacturing (either through itself or third parties) and distribution of sports equipment, apparel and shoes under the brand name Slazenger and marketing and selling these products through various channels.
- ii. The Respondent is engaged in the business of wholesale trading of footwear products and related services in the Territory.
- iii. The Applicant used to supply sports equipment to the Respondent/ Corporate Debtor.
- iv. The said business relationship between the Applicant/ Operational Creditor and Respondent/Corporate Debtor was based on the assurances, guarantees and representations of the Corporate Debtor and in terms of the Supply agreement dated 01.07.2015.
- v. The following invoices were raised by the Operational Creditor in favour of Emphasis Innovations Private Limited, under which Operational Debt become due:



Invoice No.	Date	Invoice Value	Payment Due as on 5.10.2019	Due Date	Interest till 05.10.2019
1088	13.10.2016	6,85,314	5,69,691	27.11.2016	3,90,324
1322	02.11.2016	2,35,568	2,35,568	17.12.2016	1,58,457
1323	02.11.2016	9,59,375	9,59,375	17.12.2016	6,45,331
3052	28.01.2017	2,60,736	2,60,736	14.03.2017	1,60,642
Total		21,40,993	20,25,370		
Interest @24% p.a. till 05.10.2019			13,54,754		
Total amount Due with Interest			33,80,124		

- vi. In 2017, various emails were exchanged between the Operational Creditor and Corporate Debtor regarding the dispute.
- vii. Demand Notice dated 08.08.2019 was sent to the Respondent demanding payment of Rs. 32,76,848/- in respect of the unpaid operational debt due from the respondent.
- viii. Reply dated 03.09.2019 to the demand notice was sent by the Corporate Debtor, which is as follows:
- a. The Respondent reiterated its earlier stand, which was taken in its legal notice and replies dated 23.03.2017, 21.06.2017 and 31.08.2017.
 - b. The Respondent had filed a criminal complaint against the Applicant in PS Fatehpur Beri, Delhi vide DD No. 39 B dated 15.07.2017.
 - c. There is a pre-existing dispute between the parties since the year 2016.

3. The amount of default claimed to be is Rs. 33,80,124/-, along with 24% p.a. interest till 05.10.2019 amounting to Rs. 13,54,754/-. The total amount due along with interest is Rs. 33,80,124/-. The above debt is claimed to be due since 27.11.2016.

4. The Corporate debtor contended the following in its reply dated 17.12.2019:

- i. There is a pre-existing dispute between the Operational Creditor and Corporate Debtor since the year 2016, which is demonstrated by letters dated 18.04.2017, 30.05.2017 and 08.08.2017 sent by the Operational Creditor to the Corporate Debtor.
- ii. The Corporate Debtor has replied to the above mentioned letters of the Operational debtor vide its reply dated 21.06.2017 and 31.08.2017. The Corporate debtor also sent a legal notice dated 23.03.2017 to the Operational Creditor for criminal breach of trust, cheating, misrepresentation, fraud and causing wrongful loss. Vide letter dated 31.08.2017, the respondent has not consented to request of referring any dispute to arbitrator and submitted that the respondent has made regular payments however, Applicant has conspired against the respondent and extracted money from the respondent by illegal means for which act applicant shall be prosecuted.
- iii. The Corporate debtor had also filed a police complaint against Operational creditor vide DD No. 39 B dated 18.07.2017 at 3:40 P.M. in Fatehpur Beri, Police Station, Delhi for committing criminal breach of trust, cheating, criminal



- conspiracy, misrepresentation, fraud and causing wrongful loss.
- iv. There is no affidavit submitted by the Applicant as mandated under section 9(3)(b) of the IBC, 2016 regarding no notice given by the Corporate Debtor relating to a dispute of the unpaid Operational Debt. Affidavit enclosed purported to be under section 9(3)(b) is general affidavit without the compliance required under the Code.
 - v. The letters/legal notices dated 18.04.2017, 30.05.2017 and 08.08.2017 send by the Operational Creditor to the Corporate debtor are not mentioned in the affidavit which proves the pre-existing dispute between the parties which has been concealed by the Operational Creditor with the purpose of playing fraud upon the court.
 - vi. The applicant has filed and relied upon forged and fabricated bills and documents for the purpose of filing of present claim.
5. The Applicant contended the following in its rejoinder dated 20.01.2020:
- i. The operational creditor has contacted the Corporate Debtor to make the payment but in order to avoid its liability, the respondents are making false and bogus averments of fabricated invoices.
 - ii. The corporate debtor itself had admitted its liability towards the operational creditor over various email communications.
 - iii. The Operational Creditor had been supplying only the good quality material to the Respondent over the years.
 - iv. Operational Creditor has never invoked arbitration and there was no pre-existing dispute amongst the parties.



- v. The police complaint was false and bogus which never adjudicated upon. No FIR has been registered till date due to its frivolousness.
- vi. Nothing is concealed from this Adjudicating Authority as all documents are placed for proper adjudication.

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

7. Ld. Counsel for the applicant submitted that during the period 2015-2018, the Applicant/Operational Creditor had supplied goods (Sports Equipment) to the respondent/Corporate Debtor in lieu of which various invoices were raised by the Operational Creditor.

8. He further submitted that the total outstanding dues of Rs. 33,80,124/- are pending which includes principal amount of Rs. 20,25,370/- plus interest of Rs. 13,54,754/-@ 24%.

9. He further submitted that a Supply Agreement dated 01.07.2015 was executed between the parties.

10. He further submitted that Operational Creditor had delivered the demand notice for the said amount and he has received the reply dated 03.09.2019 in response to the demand notice dated 08.08.2019.

11. He further submitted that demand notice was delivered on 09.08.2019 whereas the reply to the demand notice was sent on 03.09.2019 that is after the period of 10 days prescribed under Section 8 (2) of the IBC.

12. He further submitted that dispute raised by the Corporate Debtor in the reply to the demand notice is false.



13. He further submitted that the invoices were raised which are referred to in the application.

14. He further submitted that the Corporate Debtor has wrongly alleged that arbitration was invoked by the Operational Creditor. In fact, it is not invoked.

15. Since the amount has not been paid, there is default in payment of the dues by the Corporate Debtor.

16. On the other hand, Ld. Counsel for the Corporate Debtor submitted that there is a pre-existing dispute between the parties and in support of that the Corporate Debtor has placed reliance upon the correspondence made between the two (from page 28 to 33).

17. He further submitted that these documents show that a legal notice was sent by both the parties i.e. Operational Creditor as well as Corporate Debtor and in reply to that a notice was also given by Operational Creditor as well as Corporate Debtor and these correspondence were made between June 2017 to August 2017.

18. He further submitted that the amount claimed by the Operational Creditor has been disputed by the Corporate Debtor since June 2017.

19. He further submitted that the Operational Creditor had also sent a letter for invoking the arbitration clause and also proposed the name of the sole arbitrator which was turned down by the Corporate Debtor.

20. He further submitted that the Operational Creditor has wrongly represented themselves to be the authorized supplier of SLAZENGER brand of shoes and a criminal case is also instituted against the Operational Creditor (Copy of complaint is at page 23 of the reply).



21. He further submitted that since there is a dispute, the application under Section 9 of IBC is not maintainable.

22. Now, in the light of the above, we consider the submissions of the parties.

23. On perusal of the documents enclosed by the respective parties in the application as well as reply, we notice that the Corporate Debtor has enclosed the reply dated 31.08.2017, which was in response to the legal notice sent by the Operational Creditor and in this reply, he had made a reference of their legal notices dated 23.03.2017 and 21.06.2017 and refused to give the consent to appoint a sole arbitrator on the ground that the proposal was unilateral.

24. The Corporate Debtor also raised the question of Operational Creditor being the authorized supplier of SLAZENGER and it specifically mentioned in its reply that **“It is reiterated, that your client was not authorize to sell any goods under the brand name SLAZENGER as M/s SLAZENGER Limited as lawfully terminated the licencee of M/s Mayor International on 19.01.2015.”** and accordingly, they challenged the agreement dated 01.07.2015, on the ground that the Operational Creditor after falsely representing themselves to be authorized supplier of M/s SLAZENGER Limited had entered into this agreement to supply the goods.

25. We notice that the Corporate Debtor has also enclosed the reply to the letter dated 30.05.2017 sent by the Operational Creditor (at page 30 of the reply) and the same/ similar grounds were taken in that reply too.

26. We further notice that several correspondences were made between the parties on this issue and in the course of hearing, Ld. Counsel for the applicant referred to the mails exchanged between the parties (which is from page 76 to 104 of the application). On perusal of these emails, we notice that all these



mails were exchanged till October 2017. By these correspondences, the Corporate Debtor has claimed that dispute regarding the payment was raised by them.

27. Hence, we are of the considered view that these correspondences would not help the applicant to substantiate the point that there is no dispute. Rather they substantiate the claim of the Corporate debtor that it was the Operational Creditor, who proposed the name of the sole arbitrator which was turned down by the Corporate Debtor. Further, the legal notice as well as reply to the legal notice issued in the month of June 2017 shows that the dispute regarding the payment has been going on since 2017.

28. At this juncture, we would like to refer the submission of Id. Counsel for the Petitioner, who contended that reply of demand notice was not received within ten days from the date of delivery of demand notice. Here, we would like to refer to the decision of the Hon'ble NCLAT in the Company Appeal (AT) (Insolvency) 548/2020 on the similar issues and the same is quoted below: -

“18. We are of the view that the learned Adjudicating Authority instead of taking a technical objection that the Appellant/Corporate Debtor has not replied to the Demand Notice issued by the Respondent/Operational Creditor within statutory period of 10 days as contemplated under Section 8(2) of IBC, should have analysed the documents placed before it, before taking such objection.

19. As per Article 141 of the Constitution of India, we are bound by the decision of the Hon'ble Supreme Court in the matter of “Mobilox Innovations Private Limited vs. Kirusa Software Private Limited” reported in (2018) 1 SCC 353 at paragraph 33 held as under:

“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on nonpayment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of



such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.”

20. The Hon’ble Supreme Court clearly held that the dispute must exist before the receipt of the Demand Notice or Invoices as the case may be. Further, in the matter of *“Innoventive Industries Ltd. Vs. ICICI Bank and Anr.”* – (2018)1 SCC 407, in paragraph 29 held which reads as under:

..

“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 of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (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.”

..

21. Further, this Bench in the matter of "Vinod Mittal Vs. Rays Power Exports & Anr." in Company Appeal(AT) (Insolvency) No. 851 of 2019 dated 18.11.2019 held in paragraph-11 as under:

..

11. Having gone through the matter and on considering record, there remains hardly any doubt that the earlier correspondence shows that between the parties there were disputes regarding installation of the project as well as functioning of the same. Although the project had been commissioned for which Completion Certificate had been issued, still if disputes had arisen between the parties regarding the installation and functioning of the project, the Operational Creditor merely pointed out Certificate of Appreciation dated 19th April, 2015 issued and claims that once Completion Certificate had been issued, Corporate Debtor could not raise issues with regard to the quality of the work done. In fact, the record shows that there had been even a review meeting between Operational Creditor and Corporate Debtor and excerpts of which minutes have been placed on record by the Corporate Debtor at Page - 187 which showed that full installation was yet to be completed (see Page - 188). There was also discussion regarding Sag Structure Correction Action Plan. In fact, there is Annexure - 24 showing the Experts enquiry on 5th May, 2015 as to when the plant would be declared fully commissioned so that they could start electrical review of the project. Looking to such material on record, it is quite clear that there was pre-existing dispute regarding installation as well as operation of the project. When this is so, the Section 9 Application could not have been admitted. In fact, when e-mail dated 20th October, 2016 (Page - 431) was already before the Adjudicating Authority and it had also noticed the same, the Adjudicating Authority should

have found preexisting dispute and the Section 9 Application should have been rejected. Only by observing that the Respondent – Corporate Debtor have not come forward to dispute the Application would not be sufficient to initiate CIRP, if the record already showed existence of dispute.”

And in the matter of “*Mr. Gajendra Parihar Vs. M/s Devi Industrial Engineers & Anr.*” in Company Appeal (AT) (Insolvency) No. 1370 of 2019 this Bench dated 18.03.2020 was of the view that existence of dispute prior to the issuance of Demand Notice, the Application under Section 9 IBC is not maintainable and once there is existence of such dispute, the Operational Creditor gets out of the clutches of the Code.

CONCLUSION:

22. Having gone through the records and the law laid down by the Hon'ble Supreme Court and the precedents of this Tribunal, we are of the considered view that the correspondences i.e., e-mail/letters show that there is existence of disputes prior to issuance of Demand Notice.

23. Exchange of e-mails/correspondences, as referred above, clearly establishes that there is a pre-existing dispute between the parties regarding completion of the work and the Appellant/Corporate Debtor continuously made complaints regarding non-completion of work and deficiency in services, thereby loss caused to the Appellant/Corporate Debtor.

24. Therefore, it is quite clear that there is pre-existing of dispute regarding completion of the work and the learned Adjudicating Authority ought not to have admitted the Application under Section 9 of IBC filed by the Respondent/Operational Creditor. Even in the Reply filed by the Appellant/Corporate Debtor before the learned Adjudicating Authority pursuant to Section 9 Application, it is quite clear that there was sufficient material produced before the learned Adjudicating Authority and the learned Adjudicating Authority ought to have considered the materials placed before it.

25. We are of the considered view that the learned Adjudicating Authority should have considered the substantial material placed before it in its correct

perspective and law laid down by the Hon'ble Supreme Court in this regard, before passing the Impugned Order dated 04.06.2020 thus committed error.

26. It is re-iterated that the Code is a beneficial legislation intended to put the Corporate Debtor on its feet and it is not a mere money recovery legislation for the Creditors.

27. For the above reasons, we set aside the Impugned Order dated 04.06.2020 passed in (IB) No. 1906(ND)/2019 by the learned Adjudicating Authority.”

29. Now, in the light of the aforesaid decision, when we consider the case in hand, we are of the considered view that in this matter also, there was a number of emails exchanged till October 2017, which reveal the facts regarding raising of disputes not only by the corporate debtor but also by Operational Creditor, who had proposed to refer the matter for Arbitration and also proposed the name of Mr. Mool Chand (Retd.) Justice as a sole arbitrator prior to the issuance of the demand notice. This fact has not been disclosed by the applicant in its affidavit filed under Section 9(3)(b) IBC2016, in which he simply said that he has received the reply to the demand notice.

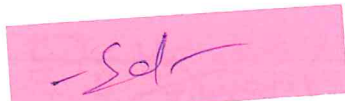
30. On the basis of aforesaid discussions, we are of the considered view that the documents filed by the Petitioner along with its application and documents filed by the corporate debtor along with its reply establishes that there is a pre-existing dispute between the parties prior to the issuance of demand notice and that is the reason for which the applicant proposed the name of the arbitrator and expressed its intention to refer the matter to the arbitration. Merely the reply to the demand notice was not sent within ten days from the date of delivery of the demand notice, in view of the aforesaid decision of the Hon'ble NCLAT, we are of the considered view that the same is not liable to be rejected, if there are sufficient documents to show that prior to the issuance of the demand notice corporate debtor had raised dispute.



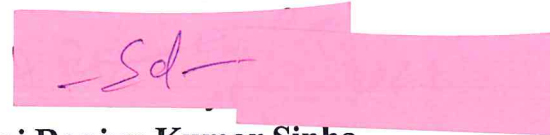
31. So under such circumstances as narrated above, we have no option but to hold that the Corporate Debtor had raised the dispute regarding the existing of debt prior to the delivery of demand notice. We are also of the view that the Operational Creditor has falsely sworn in an affidavit under Section 9 (3) (b) that no notice was given by the Corporate Debtor relating to the payment of the unpaid operational debt. In view of Section 9 (5) (ii) (d), if the notice of dispute has been raised by the Corporate Debtor or there is record of dispute in the information utility, the Adjudicating Authority has no option but to reject the application of the Operational Creditor.

32. **Accordingly, it is ORDERED**

that the present Application is not maintainable and the same is dismissed.



**L. N. Gupta
(Member Technical)**



**Abni Ranjan Kumar Sinha
(Member Judicial)**