

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

**CP (IB) No. 236/Chd/Hry/2021**

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

**In the matter of:**

**Unicredit S.P.A  
European Commercial Bank  
incorporated under the laws of Milan, Italy**  
having its registered office at  
Via Julius, Durst-Strasse 4,  
Brixen-39042, Italy.  
through its Power of Attorney Holder,  
Mr. Sahil Bhatia s/o Krishan Bhatia  
resident of C-206, Vikas Puri,  
New Delhi-110018

...Petitioner-Operational Creditor

Vs.

**IR Apparel & Accessories Private Limited  
(formerly known as IR Accessories Private Limited)**  
having its registered office at  
Plot No. 154M, Sector-7, Phase-2,  
IMT Manesar, Gurgaon-122050, Haryana.  
CIN No. U18109HR2010PTC093300

...Respondent-Corporate Debtor

**Judgment delivered on: 06.07.2023**

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

For the Petitioner- : Mr. Tarun Vir Singh Lehal, Advocate  
Operational Creditor

For the Respondent- : Ms. Karuna Sharma, Advocate  
Corporate Debtor

**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 Unicredit S.P.A. through Sahil Bhatia S/o Krishan Bhatia, Power of Attorney Holder of Unicredit SPA, (**for brevity 'Operational Creditor' / 'Petitioner'**), with a prayer to initiate Corporate Insolvency Resolution Process (**CIRP**) in case of **IR Apparel & Accessories Private Limited** (formerly known as IR Accessories Private Limited) (**for brevity 'Corporate Debtor' / 'Respondent'**).

2. The Corporate Debtor, namely, **IR Apparel & Accessories Private Limited**, is a Company incorporated on 16.11.2010 under the provisions of Companies Act, 1956 with CIN No. U18109HR2010PTC093300 with its registered office at IMT Manesar, Gurgaon, Haryana, India. 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 P-10.

3. The facts of the case, briefly, as stated in the petition are that the supplier Durst Phototechnik AG (hereinafter referred as 'supplier') is a global corporation operative in the production of premium digital printer systems for the decoration and functionalization of surfaces. The corporate debtor approach the supplier and requested to purchase a dispersed system digital textile printer with 32ph with standard accessories on credit. On aggregation to the initial terms for the supply of goods, a contract dated 20.03.2017 was

executed wherein entire terms pertaining to the supply of goods were agreed between the supplier and corporate debtor. Proforma Invoice bearing No. 90006348 was issued. However, Corporate Debtor failed to make the payment of Rs. 4,21,000.00 in Euros including interest. The Corporate debtor issued six promissory notes dated 11.05.2017 towards payment of outstanding debt. The supplier delivered the goods by Bill of Lading No. 705EMA0446-EMA-170421 dated 18.05.2017. The supplier vide transfer agreement dated 23.08.2017 transferred the ownership of credit under the supply agreement signed between the supplier and corporate debtor dated 20.03.2017 to UniCredit SPA. The corporate debtor issued an acceptance certificate dated 28.08.2017 wherein the Corporate debtor duly acknowledge receipt of goods. The payment towards the first promissory note was made by the corporate debtor for the amount of Euro 72,666.67/- on 20.12.2017. The operational creditor tried to reach the corporate debtor for outstanding payment however, no payments were made.

4. It is submitted by the petitioner in Form 5, Part IV that the amount claimed to be in default is Euro 348,333.33 (Euro Three Hundered Forty Eight Thousand Three Hundered Thirty Three and Sixty-Eight Cents Only), however in terms of the notification issued by the Government of India, the Operational Creditor by way of the present application is claiming partial outstanding Debt of Euro 280,666.68 (Euros Two Hundered Eighty Thousand Six Hundered Sixty Six and Sixty Eight Cents) Equivalent to Rs. 2,44,20,948.16 (Rupees Two Crore Forty Four Lakh Twenty Thousand Nine Hundered Forty Eight and Sixteen Paise Only) calculated @ 1 Euro = 87.0105 as on 23rd August 2021 claiming the balance amount of Euro

67,666.65 against the promissory note for an amount of with maturity dated 18.05.2020. The default occurred on 19.05.2020 i.e. the maturity date of the last promissory note for Euro 67,666.65/-. Copy of particulars of claim (Annexure P-1), Sale Contract dated 20.03.2017 (Annexure-P-2), proforma Invoice No.90006348 dated 20.03.2017 (Annexure-P-3), Invoice No.21706064 dated 15.05.2017 (Annexure P-4), Bill of Lading No. 705EMA0446-EMA-170421 dated 18.05.2017 (Annexure-P-5), Transfer Agreement dated 23.08.2017 (Annexure-P-6), Acceptance Certificate dated 28.08.2017 (Anneuxre P-7), Promissory Notes (Annexure-P-8) are attached with the main petition.

5. A demand notice in Form 3 is stated to be issued by the operational creditor on 19.05.2021 to the corporate debtor through email attached at Annexure-P9. The corporate debtor did not reply 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.01215/2 dated 26.07.2022. The corporate debtor has filed a reply vide diary No.01215/03 dated 01.08.2022, wherein it is stated that there is a pre-existing dispute between the corporate debtor and operational creditor. The affidavit under Section 9(3b) of the Code is false and misleading. The e-mail exchanged clearly established there were issues and disputes regarding the functioning of the products involved. The demand notice was never received by the corporate debtor. The operational creditor is not an operational creditor under the Code as the sale contract was executed between the corporate debtor and Durst Phototechnik SPA,

Italy and the operational creditor is the banker of Durst and has no *status quo* to make the application. The printer order was not delivered as per the e-mail dated 04.04.2017. There were e-mails exchanged between the parties. The printer was delivered on 28.08.2017, however, the machine was not in a running position. Durst and Durst India were clearly aware of the default regarding the working of the printer. On 12.10.2017 corporate debtor sent an e-mail stating that the machine received was not performing and confirmed that they will not pay any further unless the machine is handed over properly. The corporate debtor requested to take back the machine. The Durst and Durst India agreed to debit the cost of fabric provided to identify the default and fix the printer. The corporate debtor met Mr. Robert Tucker, counsel and representatives of Durst. In July 2018, Durst agreed to execute a confidential, non-litigation settlement agreement and mutual release vide e-mail dated 26.07.2018.

7. The rejoinder was filed by an operational creditor vide diary No.01215/4 dated 31.10.2022 wherein it is stated that there was no dispute with regard to the outstanding amount as per the invoice raised. Considering '*terms of sale*' the price of said machine was agreed for a total sum of Euro 535,780.00. The corporate debtor made a down payment of Euro 135,780.00 and issued six promissory notes dated 11.05.2017 mounting to a total of Euro 412,000.00. On receipt of the down payment and promissory notes, the supplier issued invoices dated 15.05.2017 to the corporate debtor and the supplier made arrangements to immediately delivered the said machine to the corporate debtor vide bill of lading dated 18.05.2017. There was no delay in the delivery of the machine and even payment towards the

first promissory note was released. The claims are based on the document and acknowledgments issued by the corporate debtor. The machine was performing satisfactorily and working was hindered due to non-compliance by the corporate debtor of the basic pre-requisite for operation of the machine. The e-mails by the corporate debtor only pertain to the usage of the machine and not the price of the machine. The corporate debtor has artificially created the entire dispute to secure the huge amount and manage to secure the discount of Euro 86,666.00/- towards payment of an outstanding debt (July 2018) of Euro 333,333.00/- and admission culminated in the non-litigation settlement agreement and mutual release in July 2018. There is no pre-existing dispute with respect to the performance or warranty or value of the machine sold and regarding the quantum of debt. the dispute as alleged by the corporate debtor is limited to the print on a particular fabric desired by the corporate debtor and that too could be achieved with proper utilization of the machine and its functions. There is no dispute as to the delivery of the demand notice. The averments made in the reply are not supported by any document. Vide e-mail dated 25.09.2017 the corporate debtor acknowledges the working of the machine.

8. The short written submissions have been filed by the petitioner vide Diary No.01215/07 dated 21.04.2023 and by the respondent corporate debtor vide Diary No.01215/06 dated 07.03.2023.

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 on 19.05.2021 was properly served. The demand notice dated on

19.05.2021 was served to the corporate debtor through email attached at Annexure-P9. The demand notice was not sent through speed post/ registered post. Its receipt is denied by the Corporate Debtor and there is no service affidavit annexed by the Operational Creditor that the said email was not bounced back. The corporate debtor did not reply to the demand notice till date. Therefore, the demand notice was not 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 affidavit by learned counsel for the operational creditor that the corporate debtor has not re-paid or disputed the debt (page 53-57).

However, it is seen from the records that the 'Confidential Non-Litigation Settlement Agreement and Mutual Release' executed in the month of July, 2018 is not signed by the parties.

Further, as per the Sale Contract dated 20.03.2017 provides the terms and conditions which were agreed between the parties (Annexure-P2). The agreement provides the arbitration clause as follows:-

*"All disputes, controversies or differences which may arise between the parties hereto, out of, in relation to or in connection with this agreement or for the breach hereof, which cannot be resolved amicably by the parties, shall be finally settled by arbitration in Wien (Austria), in accordance with the existing rules of conciliation and arbitration of the International Chamber of Commerce by three arbitrators to be selected in accordance with said rules. The language to be used in the arbitral proceedings shall be English, and the award rendered herein no, shall be final and binding on both parties".*

Therefore, it clearly shows that there was an arbitration clause to sought out the dispute between the parties.

Further, the acceptance certificate dated 28.08.2017 (Annexure-P7) provides that:-

*“We refer to the above equipment supplied by Durst Phototechnik SPA under supply contract No. DG7384TD02 and P.1. No. 90006348 dated March 20\*\* 2017 entered into force between Durst Phototechnik SPA and IR Accessories Pvt. Ltd. for the total value of Euro 535,780.00= (says Euro five-hundred-thirty-five-thousand and seven-hundred-eighty) In this respect, we hereby confirm that: the above machine has been duly received and accepted without any objection all the contractual obligations of the seller have been duly executed”*

Therefore, the contract was executed between the Durst Phototechnik SPA and IR Accessories Pvt. Ltd. and not with the operational creditor in the present petition.

As per the email dated 11.09.2017, it was stated by the corporate debtor that, *“Unless and until my machine will not start and earn money how can I pay the installments pls explain....Also showed order to you qty apprx 36000 mtrs poly fabric till shipment oct and if the shipment will not go on time then also responsible for liability of loss of sale”*. Thus, the dispute existed between the parties much before the issuance of the demand notice dated 19.05.2021. 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. Apart, there is an Arbitration Clause in the sale contract, in case any dispute arises. 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 19.05.2021 in Form 3 attached as (Annexure-P9) was not duly served on the corporate debtor. Therefore, the period of limitation would begin from the date of default 19.05.2020 i.e. the maturity date of the last promissory note for Euro 67,666.65/-. This application was filed vide Diary No. 01215 on 04.10.2021 and was re-filed on 22.10.2021. 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 regarding the amount claimed by the petitioner, arbitration clause and non-service of demand notice, 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 06, 2023  
VN/TB