

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

(IB)-1024(ND)2020

IN THE MATTER OF:

Concept Group, Limited Liability Company
Registered Office at :
25, Kazanskaya Str. Lit. A.,
Office 304, 190031,
Saint Petersburg, Russian Federation

...Applicant/Operational Creditor

VERSUS

CNS Fashion Retail Private Limited
Registered Office at :
252E, 2nd Floor, Front Portion,
Sant Nagar, New Delhi - 110065

...Respondent/Corporate Debtor

Section: 9 of the IBC, 2016

Order Delivered on: 06.06.2022

CORAM:

SHRI ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (JUDICIAL)

SHRI L. N. GUPTA, HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant : Mr. Gyanendra Kumar, Adv, Mr. Robin Grover,
Adv., Ms. Shikha Tandon, Adv.
For the Respondent : Mr. Nitish K. Sharma, Adv.

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

The present Application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the '**IBC, 2016**') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Concept Group, Limited Liability Company (for brevity, the '**Applicant/Operational Creditor**'), with a prayer to initiate the Corporate Insolvency Resolution Process against CNS Fashion Retail Private Limited (for brevity, the '**Respondent/Corporate Debtor**').

2. That the Corporate Debtor namely, M/s CNS Fashion Retail Private Limited is a Company incorporated on 12.09.2016 with CIN U18104DL2016PTC309024 under the provisions of the Companies Act, 2013, having its registered Office at 252E, 2nd Floor, Front Portion, Sant Nagar, New Delhi-110065, which is within the jurisdiction of this Adjudicating Authority.


3. That the Authorized Share Capital of the Corporate Debtor is Rs.2,50,00,000/- and Paid-up Share Capital is Rs.2,50,00,000/- as per the Master Data of the Corporate Debtor.

4. It is stated by the Applicant that on 23.08.2017, the Operational Creditor entered into a Goods Supply Contract No. 01/IN/SC (“**Contract**”) with the Corporate Debtor, under which the Operational Creditor agreed to supply goods to the Corporate Debtor on the terms and conditions agreed. It has been added that as per the terms and conditions of the Contract, the Applicant supplied goods to the Corporate Debtor in accordance with the specifications approved by the Corporate Debtor.

5. That the detailed particulars of the Operational Debt including the total amount of default and the date of default as furnished in the Part IV of the application are reproduced below for the convenience :


Part – IV


PARTICULARS OF OPERATIONAL DEBT		
1.	TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE	<p>USD 281,203.41 equivalent to approx. INR 20,143,443.87/- (United States Dollar Two Hundred Eight One Thousand and Two Hundred and Three and Forty One Cents – equivalent to Indian Rupees Twenty Million, One Hundred Forty Three Thousand, Four Hundred and Forty Three and Eight Seven Paise).</p> <p>1. On August 23, 2017, Concept Group Limited Liability Company (hereinafter referred to as “the Operational Creditor”) and CNS Fashion Retail Private Limited (hereinafter referred to as “the Corporate Debtor”) entered into a Goods Supply Contract No. 01/IN/SC</p>


		<p>01/IN/SC (hereinafter referred to as “Contract”), under which the Operational Creditor agreed to supply the goods to the Corporate Debtor on the terms and conditions agreed thereunder.</p> <p>A copy of the Goods Supply Contract No. 01/IN/SC dated August 23, 2017 is annexed herewith and marked as Annexure – 4.</p> <p>2. As per the terms of the Contract, the Operational Creditor supplied goods to the Corporate Debtor in accordance with the specifications approved by the Corporate Debtor.</p> <p>3. The Operational Creditor would like to mention that though the specifications were issued in relation to the Goods Supply Contract No. 01/IN/SC dated August 23, 2017, however, inadvertently, the contract date mentioned on the specifications is August 11, 2017. The Operational Creditor would like to clarify that this is a typographical error on the specifications, as no contract dated August 11, 2017 exist between the Operational Creditor and the Corporate Debtor.</p> 
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		<p>4. According to clause 2.2 of the Contract, the Corporate Debtor was required to effect the post-payment of 100% of the value of the goods supplied within a period of 365 days from the date of finalization of the specifications for the goods supplied.</p> <p>5. However, the Corporate Debtor defaulted on its payment obligations towards the goods supplied, <i>vide</i> the following invoices, under the Contract. The details of the defaulted invoices are as below:</p> <ul style="list-style-type: none">i. Invoice No. JV-IN0001 for USD 84,963.68 dated September 05, 2017;ii. Invoice No. JV-IN0002 for USD 29, 309.73 dated November 07, 2017;iii. Invoice No. JV-IN0002/1 for USD 61.34 dated November 07, 2017;iv. Invoice No. JV-IN0003 for USD 19, 899.12 dated February 10, 2018;v. Invoice No. JV-IN0004/1 for USD 24, 802.54 dated April 01, 2018;
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		<p>vi. Invoice No. JV-IN0004/2 for USD 112.89 dated April 01, 2018;</p> <p>vii. Invoice No. JV-IN0004/1 for USD 79,942.17 dated October 16, 2018;</p> <p>viii. Invoice No. JV-IN0005/1 for USD 42,111.94 dated June 08, 2018.</p> <p>A copy of each of the aforesaid invoices, alongwith the corresponding specifications of goods, are annexed herewith and marked as Annexure – 5 (Colly).</p> <p>6. On August 27, 2018, the Operational Creditor also entered into an unnumbered Addendum to the Contract with the Corporate Debtor (hereinafter referred to as the “Addendum”), whereby it was agreed that the payments towards the goods supplied under the Contract would be made by the Corporate Debtor to the Operational Creditor’s account by direct bank transfer before September 01, 2019.</p> <p>A copy of the Addendum to the Goods Supply Contract No. 01/IN/SC dated August 27, 2018 is</p>
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		<p>annexed herewith and marked as Annexure – 6.</p> <p>7. However, the Operational Creditor defaulted and did not make the payments for the goods supplied even by September 01, 2019.</p> <p>8. Consequently, exercising its rights under the Contract, the Operational Creditor on September 03, 2019 sent a 'Notice/ Pre-trial Claim' to the Corporate Debtor requesting for payment of the amounts owed towards the goods supplied within a period of 14 days from the date of receipt of the said Notice.</p> <p>A copy of the Notice/ Pre-trial Claim dated September 03, 2019 is annexed herewith and marked as Annexure – 7.</p> <p>9. The Corporate Debtor on September 23, 2019 responded to the said Notice of the Operational Creditor and acknowledged and admitted the supply of goods by the Operational Creditor under the Contract. However, the Corporate Debtor refused to make any payments against the said goods on the superficial grounds such as goods are of 'no value' in the Indian Market and they are 'willing to return' the goods.</p> 
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		<p>A copy of the reply of the Corporate Debtor dated September 23, 2019 is annexed herewith and marked as Annexure – 8.</p> <p>10. Due to the aforesaid feigning actions of the Corporate Debtor, the Operational Creditor was compelled to finally issue a demand notice dated January 23, 2020 under Section 8 of the Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor demanding outstanding payments due towards the goods supplied (hereinafter referred to as “Demand Notice”).</p> <p>11. The said Demand Notice was delivered to the Corporate Debtor on February 05, 2020.</p> <p>A copy of the Demand Notice dated January 23, 2020 along with the tracking report is annexed herewith and marked as Annexure – 9.</p> <p>12. However, the Corporate Debtor failed to respond to the said Demand Notice within 10 days from the receipt of Demand Notice. Further, despite receiving the said Demand Notice, the Corporate Debtor did not make the payment of the outstanding dues till date.</p> <p>13. The Corporate Debtor only replied to the Demand Notice <i>vide</i> </p>
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		<p>dated February 15, 2020 (as received by the Operational Creditor on February 25,2020). However, the Corporate Debtor in its Reply has again failed to dispute the invoices or its default under the Contract and the Addendum. A copy of the Reply dated February 15, 2020 is annexed herewith and marked as Annexure-10.</p> <p>14. Accordingly, an amount of USD 281,203.41 equivalent to approx. INR 20,143,443.87/- is due and liable from the CNS Fashion Retail Private Limited, the Corporate Debtor.</p>
2.	<p>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED</p>	<p>USD 281,203.41 equivalent to approx. INR 20,143,443.87, (United States Dollar Two Hundred Eight One Thousand and Two Hundred and Three and Forty One Cents – equivalent to Indian Rupees Twenty Million, One Hundred Forty Three Thousand, Four Hundred and Forty Three and Eight Seven Paise) is claimed to be in default.</p> <p>The initial default in payment occurred on September 01, 2019, i.e., the date agreed between the parties vide Addendum to the Contract. Subsequently, the default occurred on October 04, 2019 (i.e. 14 days from the</p> 

		<p>receipt of Notice/ Pre-trial Claim), on February 15, 2020 (i.e. 10 days from the date of Demand Notice) and stays a continuing default as on date owing to the continuous failure of the Corporate Debtor to make payments to the Operational Creditor for the goods supplied under the Contract.</p> <p>The details of the workings for computation is annexed herewith and marked as Annexure - 11.</p>
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6. That from perusal of Part IV of the Application, it is observed that the Applicant has claimed an unpaid Operational Debt of Rs. 02,01,43,443.87/- and mentioned September 01, 2019 as the date of default.

7. It is stated by the Applicant that since the Corporate Debtor did not make the due payment of his operational debt, it had issued a Demand Notice dated 23.01.2020 under Section 8 of IBC, 2016 at the registered office of the Corporate Debtor, which was served vide Russian Post on 05.02.2020. The Tracking Report has been placed by the Applicant on record at page no. 599 of the Application. The Applicant has also annexed the reply to the Demand Notice dated 15.02.2020.

8. That on issuance of notice, the Corporate Debtor has filed its reply and written submissions and stated that the Operational Creditor has concealed the fact that the Respondent/Corporate Debtor is a Joint Venture Company, wherein the Operational Creditor is a 49% Shareholder and in terms of Clause 9 of the Share Purchase, Subscription and Shareholders Agreement (**hereinafter, termed as SHA**) dated 23.05.2017 (Annexure R-2 of the Reply), the Operational Creditor undertook to contribute a minimum amount of USD 15,00,000/- by way of contribution to the share capital of the Corporate Debtor for the purpose of carrying on the business. As against the above, it is submitted by the Corporate Debtor that the total contribution of the Operational Creditor towards working of the Corporate Debtor has only been Rs.1,36,10,550/-.

9. It is stated by the Corporate Debtor that it had raised dispute with the Operational Creditor regarding the goods supplied by the OC not being marketable in India vide its emails dated 31.08.2018 and 27.10.2018.

10. It is further stated by the Corporate Debtor that the Operational Creditor, with sheer *mala fide* and in order to escape its liability of making due contribution to the Corporate Debtor in terms of the SHA, has dragged the Corporate Debtor into the present insolvency proceedings. It has been added that the said fact is also admitted by the Operational Creditor vide its email dated 30.05.2019 (Annexure R-5 of the Reply). The Corporate Debtor had asked the Operational Creditor to make contributions to the JV as per the SHA but all its efforts went in vain.

11. It is submitted by the Corporate Debtor that it had earlier sent an email dated 22.03.2019 to the Operational Creditor on account of non-performance of contribution obligations by the Operational Creditor (Annexure R-6 of the Reply). That the Operational Creditor has even admitted the fact vide its letter dated 21.03.2019 that it had failed in making contributions as per the SHA and offered to the other shareholder of the Corporate Debtor to purchase its shares in the Corporate Debtor (Annexure R-7 of the Reply). The aforesaid facts indicate that the Operational Creditor being a 49% shareholder of the Corporate Debtor have failed to make contributions in the efficient running of the corporate debtor and therefore, in order to avoid its liability, it has approached the Adjudicating Authority to initiate the insolvency proceedings.

12. The Applicant has filed its rejoinder and written submissions and stated that the argument raised by the Corporate Debtor that non-contribution to the share capital of the Corporate Debtor for the purpose of carrying its business has led to losses to the Corporate Debtor has no bearing on the admission of the present Application or initiation of CIRP. Any such statement by the Corporate Debtor is irrelevant in the context of the present application as the Corporate Debtor cannot claim any set-off.

13. It is stated by the Applicant that the SHA executed between the Parties and others, governs the terms of the share subscription and is completely different and unrelated to the transaction in question, which is governed as per the terms of the Supply Contract (read with Addendum). The SHA and the Supply Contract (read with Addendum) are two different contracts and are not co-related. Any purported breach of the SHA by the Operational Creditor cannot give a right to the Corporate Debtor to raise a defense/or claim immunity for breach of the Supply Contract. It is submitted that any dispute or issue arising in relation to the validity, interpretation, implementation or any alleged breach of any provision of the SHA is governed by the terms of SHA, which provides for a dispute resolution mechanism. The same cannot act as a bar against initiation of CIRP for an admitted Debt.

14. It is further submitted by the Applicant that provisions of Section 9 of the IBC, 2016 do not allow any set-off or counter claims, and therefore, any reliance on the terms of SHA or purported non-contribution of Operational Creditor does not come in the way of admission of the present Application. In this regard, reliance is placed on the judgment of the Hon'ble NCLAT in the case of ***AP Coated Drums & Barrels Pvt. La & Anr. v. Haresh Dharmani, 2019 SCC OnLine NCLAT 549, Relevant Para 8-11***, wherein the Hon'ble NCLAT while dealing with a Section 9 application clearly held that *“the question of set off after determining the claim or counter claim cannot be decided by the Adjudicating Authority.”*

15. It is further submitted by the Applicant that there is no *bona fide* pre-existing dispute in relation to the operational debt and the allegation of the pre-existing dispute raised in the Reply is nothing but a mere sham and moonshine defense by the Corporate Debtor. That there is no pre-existing genuine dispute, which becomes clear from the following facts :

- (i) The Operational Creditor supplied goods to the Corporate Debtor in accordance with the terms of the Supply Contract and as per the specifications approved by the Corporate Debtor. The Corporate Debtor did not raise any concern about the quality or quantity of goods at the time of delivery or even thereafter, as required in terms of the Supply Contract.
- (ii) The execution of the Addendum on August 27, 2018, i.e., post supply of goods to the Corporate Debtor and almost one year after raising of first invoice, makes it evident that the Corporate Debtor has at multiple occasions clearly and unequivocally acknowledged the supply of goods and existence of the Debt, and has not raised any concern about the quality or quantity of goods.
- (iii) Reliance placed by the Corporate Debtor on its email dated August 31, 2018 or any subsequent email is baseless and a moonshine defense being raised now, as the said emails do not raise any dispute regarding quality or quantity of goods but only about its use in India on account of weather change. Further, these emails were sent much after the invoices were raised and goods delivered to the Corporate Debtor, which were accepted by the Corporate Debtor.
- (iv) Reliance placed by the Corporate Debtor on its reply dated September 23, 2019 to Applicant's notice dated September 03, 2019 is completely misplaced as the Corporate Debtor did not raise any dispute about the quality or quantity of goods but had made a

frivolous assertion that the goods supplied by the Operational Creditor has `no value in Indian market' and 'is not capable of fetching a market in India'. Further, this reply was almost two years after the delivery of first consignment of goods and invoice raised in relation to the same, and almost 13 months after the execution of the Addendum.

- (v) The reply to the demand notice also does not mention any pre-existing dispute relating to the execution of the Supply Contract, Addendum, supply of goods by the Operational Creditor, receipt of goods by the Corporate Debtor, or any averment regarding non-acceptance of goods in terms of the Supply Contract.

16. It is added by the Applicant that it is the trite law, as held by the Hon'ble Supreme Court of India in the case of ***Mobilox Innovations Private Limited v Kirusa Software Private Limited, (2018) 1 SCC 353, Para 51 and 56***, that the Adjudicating Authority while examining the admissibility of an application under Section 9 has to examine that the contention regarding '*pre-existing dispute*' is not a patently feeble legal argument or an assertion of fact unsupported by evidence, as is being done in the present case. Further, mere assertion regarding existence of dispute does not give rise to a pre-existing dispute as it is important to separate the grain from the chaff and to reject a spurious defence which is a mere bluster.

17. It is further added by the Applicant that in ***Macquarie Bank Limited v. Shilpi Cable Technologies Limited, (2018) 2 SCC 674, Para 24***; the Hon'ble Supreme Court has stated that an earlier letter written by the corporate debtor to the operational creditor confirming that a particular

operational debt is due and payable is a sufficient piece of evidence that such debt is due and default has taken place. In the present case, the execution of the Addendum after supply of goods makes it evident that the Corporate Debtor had acknowledged its obligations to pay the Debt.

18. After perusing the documents/pleadings placed on record and hearing submissions of both the parties, this Bench observes that the Applicant/Operational Creditor is a 49% Shareholder in the Corporate Debtor which is a JV by virtue of the Shareholders Agreement (SHA) 27.01.2017, as evident from the admission made by both the parties.

19. It is further observed that though the said fact was not disclosed by the Applicant/Operational Creditor in its application, it was brought to the notice of the Bench by the Corporate Debtor in its Reply, and which was later confirmed by the Applicant in its Rejoinder.

20. That here it is worthwhile to refer to the contents of the Shareholders Agreement, which in the Clause 10.1.1 (e), depicts that the Applicant is having voting rights as a shareholder in the Corporate Debtor. The scanned copy of the relevant portion of the SHA is reproduced overleaf :

which are in line with market practices and are approved by the Board. Provided that the Shareholders shall not be required to provide any guarantees, warranties or security:

- 9.3.4 In case either Shareholder is in breach of its obligations to make the agreed capital contribution under Clause 9.1 of this Agreement and such breach is not remedied within sixty (60) Business Days of a notice from the other non-breaching Shareholder identifying such breach, such other non-breaching Shareholder shall have the right, but not the obligation, to subscribe to and pay for such Shares against the agreed capital contribution that have not been subscribed and paid by the breaching Shareholder, subject to Applicable Law, without prejudice to any and all other remedies that are or will be available to the other non-breaching Shareholder, as a result of which the ownership ratio in the JV Company of the Shareholder in breach shall dilute proportionately.
- 9.3.5 The future funding requirements of the JV Company shall be decided by the Board acting unanimously.

10. BOARD OF DIRECTORS

- 10.1 The business of the JV Company shall be overseen by the Board pursuant to the Act, Memorandum of Association, Articles of Association and this Agreement. Subject to the Act, and excluding the Directors nominated/ appointed by any financial institution or bank, if any, each of Saamag and Concept shall, at all times, ensure the following:


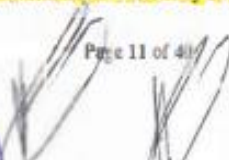


10.1.1 Constitution of the Board:

- (a) The Board and any committees formed by the Board shall comprise of Directors nominated by the Shareholders in proportion to their shareholding in the JV Company.
- (b) Until such time that the shareholding of the Shareholders in the JV Company is held in the proportion of 51(Saamag):49(Concept), the Board shall comprise of the following:
- (i) Three (3) directors nominated by Saamag;
 - (ii) Two (2) directors nominated by Concept.

It is agreed that the existing directors of the Company i.e. Mrs. Kusum Panday and Mr. Pramod Panday will continue to act as the directors of the Company as two (2) of the nominee directors of Saamag.

- (c) If the shareholding ratio between the Shareholders changes to 50:50 as proposed by Clause 6 above, the Board shall comprise of the following:
- (i) Three (3) directors nominated by Saamag;
 - (ii) Three (3) directors nominated by Concept.
- (d) None of the Directors shall be required to hold any qualification shares and shall not be liable to retire by rotation.
- (e) **Each Shareholder agrees and undertakes that it shall use its voting rights and/ or extend consents, as the case may be, and to take all other action as may be necessary, in relation to Shares held by it in the JV Company in such manner so**


True Copy
Advocate

21. From the fact that the Applicant is a 49% shareholder in the Corporate Debtor by virtue of the Shareholder's Agreement, it can be inferred that both the Operational Creditor and the Corporate Debtor are "related parties" in terms of Section 5(24)(j) of the IBC 2016, which reads as below :

*"5(24) **“Related party”**, in relation to a corporate debtor, means –*

*(j) any person who controls **more than 20% of Voting rights in the corporate debtor** on account of ownership or a voting agreement."*

(Emphasis supplied)

22. Here, we refer to the Decision of this Bench passed in the matter of **Zoom Communications Private Limited Vs. M/s Par Excellence Real Estate Private Limited in IB No. 616/ND/2020, dated 17.05.2022, (2022) ibclaw.in 345 NCLT**, wherein the following has been observed in relation to initiation of the CIR process by the "related party":


"20. That we are conscious of the provision contained in Proviso to Section 21(2) of IBC, 2016, whereby no right of representation, participation or to vote has been granted to a 'Related Party' on initiation of CIRP of the Corporate Debtor. Hence, in our considered view, the related party is having no control in the CIR Process. Therefore, the intention of a related party of initiating the CIR Process shall always raise eyebrows..."

23. That the Corporate Debtor has averred that the Operational Creditor has not made contributions in terms of the Addendum to the Shareholders Agreement dated 23.05.2017, therefore, the Operational Creditor in order to escape its liability has filed the present application

under Section 9 of IBC, 2016. Hence, it has been argued by the Corporate Debtor that the present Application to initiate CIR process against it has been filed with a malicious intent.

24. At this juncture, we refer to the email dated 31.05.2019 sent by the Operational Creditor to the Corporate Debtor (placed at Page 61-62 of the Reply), the scanned copy of which is reproduced below :

ANNEXURE R-5 **61**

 Srikanth S. <srikanth@saamag.com>

Fwd: Official mail respond for the proposal from 7th of March
4 messages

Dinesh Pandey <dinesh@saamag.com> Fri, May 31, 2019 at 11 24 AM
To: Srikanth Saamag <srikanth@saamag.com>

Best regards,

Dinesh Pandey
Saamag Group
Saamag House
B-72, Sector 57
Noida 201301
UP, India
Tel : +91 120 4711111
Fax : +91 120 4711100
www.saamag.com

----- Forwarded message -----
From: **Богомолова Елена** <elena.bogomolova@conceptgroup.ru>
Date: Thu, May 30, 2019 at 5:55 PM
Subject: Re: Official mail respond for the proposal from 7th of March
To: Dinesh Pandey <dinesh@saamag.com>
Cc: **Гришаева Вера** <vera.grishaeva@conceptgroup.ru>


Dear Mr. Dinesh Pandey!

During the last three months we have duly tried to solve current situation (arose around the financial and operational status of the Indian JV) through discussions and negotiations but unfortunately all our attempts have not resulted in a mutual solution that would meet all shareholders' interests.

Under all these circumstances, we do believe that a company's bankruptcy is the only right and efficient solution that would satisfy interests of the company's creditors as well as its shareholders.

We would like to kindly draw your attention that one of the reasons for a decision of going into bankruptcy is the fact that (starting from its launch) the Indian JV has had no profitability. In particular, there has been no positive sales trend in line with official Financial Statement for the year 2018. This situation has been discussed with you on several occasions (including our discussions regarding transfer to you all shares owned by us in the Indian JV), but unfortunately we could not found common decision.

Taking into account reasons mentioned above, and in order to stop and mitigate any further financial burden and risks for the company's shareholders, we do suggest initiating a bankruptcy procedure within the shortest period of time (but not later June 2019). For that purpose, we suggest to engage a legal advisor who would handle all necessary steps to undertake the bankruptcy process. We are looking forward to receiving your proposal on possible candidates of law firms.


True Copy
Advocate

We would appreciate to hearing from you within this week.

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Sincerely yours,

Best regards
Elena Bogomolova

25. From the perusal of aforesaid e-mail, it can be observed that the Operational Creditor, on the date of writing the e-mail on 31.05.2019, was of the opinion that the Indian Joint Venture (JV) of the Operational Creditor with the Corporate Debtor was not profitable. Further, through the said e-mail, it has been suggested to engage a legal advisor to undertake the bankruptcy process of the Corporate Debtor. The e-mail dated 31.05.2019 further reads as below :

“This situation has been discussed with you on several occasions (including our discussions regarding transfer to you all shares owned by us in the Indian JV), but unfortunately, we could not find common decision.

*Taking into account reasons mentioned above, and in order to stop and mitigate any further financial burden and risks for the company's shareholders, **we do suggest initiating a bankruptcy procedure within the shortest period of time (but not later June 2019)..”***

26. That the aforesaid communication clearly indicates that even much before the date of default of 01.09.2019 mentioned in the present application, on account of the dispute between the Operational Creditor and Corporate Debtor over transfer of shares, the Operational

Creditor had made up its mind to drag the Corporate Debtor into the Insolvency process.

27. Per contra, the Applicant has submitted that non-transfer of shares by the Applicant has no bearing on the admission of the application as the Corporate Debtor has not claimed set off in terms of SHA.

28. As already observed by us in Para 21 above, both the Operational Creditor and the Corporate Debtor are related parties. However, this material fact has been concealed by the Applicant/ Operational Creditor while filing the present application. Also, from perusal of the record, we observe that there is a dispute between the parties as regards to transfer of shares as per the Shareholders Agreement.

29. Since the intention of the Applicant, who happens to be a related party of the Corporate Debtor, to initiate the CIR process will always raise eyebrows, and further here it is a case, where the Operational Creditor, even before the date of default, had made up its mind to initiate the Insolvency proceedings against the Corporate Debtor, the possibility of filing this Application under Section 9 of IBC with an intent to escape its liability in respect of the transfer of shares cannot be denied.

30. That the Corporate Debtor has also raised a defense that there is a pre-existing dispute between the parties. The Corporate Debtor has relied upon the emails dated 31.08.2018 and 27.10.2018 in order to

demonstrate that there is a pre-existing dispute between the parties, the scanned copy of which are reproduced below :

ANNEXURE R-4

58



Rahul Ranjan <rahul.ranjan@saamagexim.com>

Acoola Issues

1 message

Rahul Ranjan <rahul.ranjan@saamagexim.com>
To: Игорь Большаков <igor.bolshakov@conceptgroup.ru>

Fri, Aug 31, 2018 at 3:27 PM

Hi Igor,

Good Afternoon !!!

As discussed i am highlighting few point which we can work on to improve Acoola operation and sales.

1. Stock Issue

- Size set-No proper size set received thats tends to non availability of stock
- Need more and more smaller size from the range 92-128.
- Presently receiving 70:30 ratio of girls and boys stock need to increase number of styles for boys as well.
- No seasonal stock- need stock prior of 01 month of any particular season presently receiving in Mid or end of the season.
- More numbers of style in Maloo.
- Non availability of occasions & Party-ware.
- Need more stock of Accessories not including lingerie and socks.
- We need proper quantity for any particular style to start e-commerce business.

2.Fund Issue

- Running short of fund as accelerated time to time.we are doing a business around 1.5 million all together and fix expense itself reaches to 1.8 million that includes rental CAM and salary.Apart from this we have other operation expenses around 2 lacs as marketing material,conveyance and other finance expense so it reached to 2 million a month.

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- Shop in shop location to be focused as rentals are higher on side and as a kids brand it difficult to perform that label.I have approach all major Anchor store but not able to freeze anything right now.Expected within 4-6 month
- Smaller sizes format of store- We should come with small size store concept around 600-700(carpet)size to avoid heavy rentals.
- Logix store closure-need to take decision to close logix store as one year one month is over and lock-in is 18 months(Possession date-04August'17).
- Need approval and 50 K budget for ambiance for marketing as like to give paper advisement for one month on Saturday & Sunday,will send proposed separately.
- Manager Operation and Sales - As discussed we need operation manager who is strong in retail operational can achieve sales target currently Yasmeen is more and more focus on staff management,roaster and other operation activities as team is also increased.handling one store is perfect for her but she alone is not able to handle multiple store and focused on sales along with day to day operations.i cannot see any professional approach to increase sales or store label initiative to increase sales.
- Franchisee model on process but again due to high rental all franchisee interested for % rent support from us with lesser margin.I have got few opportunities in smaller town but its not worth doing in B and C class cities as sitting at Metro cities we are not able to perform good.I can fix meeting with few master franchisee on your visit to India.

Kindly share your opinion if need any correction.

Thank You & Best Regards,

Rahul Ranjan(BDM)

Cell: +91 9818968998

Skype:rahulranjan1804

www.saamag.com



Rahul Ranjan <rahul.ranjan@saamagexim.com>

Stock Issue-Acoola India

8 messages

Rahul Ranjan <rahul.ranjan@saamagexim.com>

Sat, Oct 27, 2018 at 3:22 PM

To: Игорь Большаков <igor.bolshakov@conceptgroup.ru>

Сс: Екатерина Иващенко <ekaterina.ivashchenko@conceptgroup.ru>, Dinesh Panday <dinesh@saamag.com>, Vinod Poddar <vinod.poddar@saamag.com>, yasmeen khan <yasmeen@acoolaindia.com>

Hi Igor,

As i have gone through the current consignment detail,i found 80% stock is for summer,as we had planed this consignment three month back(July) and now its winter here in India,next three month it will be winter only,rather than going for current supply i request you to arrange fresh supply with full winter clothing and this current consignment we can plan in January so that from February onward we can use these clothing for summer season.

Therefore request you to share winter stock sheet on priority and kindly arrange stock before 15th of November to run store smoothly as currently we are lacking with the proper stock of winter.

We have started operation at E-commerce site Tatacliq and sales picking up day by day,but even they are forcing us to add more and more winter stock to generate good sales.

Kindly take this as priority,Waiting for your confirmation.

Also request Skype meeting on Monday.

Thank You & Best Regards,

Rahul Ranjan(BDM)

Cell: +91 9818968998

Skype:rahulranjan1804

www.saamag.com

True Copy
Advocate

Большаков Игорь <igor.bolshakov@conceptgroup.ru>

Mon, Oct 29, 2018 at 2:16 AM

To: Rahul Ranjan <rahul.ranjan@saamagexim.com>

Сс: Иващенко Екатерина <ekaterina.ivashchenko@conceptgroup.ru>, Dinesh Panday <dinesh@saamag.com>, Vinod Poddar <vinod.poddar@saamag.com>, yasmeen khan <yasmeen@acoolaindia.com>

Dear Rahul,

I'm really surprised with the statements you're writing. Yes, you're right – stock has been in preparation for a month and a half but we've been waiting for confirmations from your end and Dinesh's side. On 10th of September I have sent the list to get the final confirmation and straight after getting confirmation we started preparation. You're right – this delivery includes summer stock (th4) but mostly this is th0,1,2 of 2018. And this list was validated by you and team. Yes, we were late but just because there was a lack with information flow from both sides.

Now on when we're ready to ship we're unable upon strange request. My question is – why the final check was done only now?

31. Per contra, the Operational Creditor has submitted that the aforesaid dispute is moonshine in nature, since the emails do not raise any dispute regarding quality or quantity of goods but only about the use of goods in India on account of weather change. Further, these emails were sent much after the invoices raised and goods delivered to the Corporate Debtor, which were accepted by the Corporate Debtor.

32. In our considered view, the dispute vide emails were raised much prior to the issuance of the Demand Notice. Therefore, a plausible contention has been raised by the Corporate Debtor.

33. In sequel to the above, we conclude that both the Applicant/Operational Creditor and the Respondent/Corporate Debtor are “related parties” in terms of Section 5(24)(j) of the IBC 2016. Further, there is a pre-existing dispute between the parties, which requires further investigation.

34. In view of the discussion and reasons stated above, the present Application is Dismissed.

**Sd/-
(L. N. GUPTA)
MEMBER (T)**

**Sd/-
(ABNI RANJAN KUMAR SINHA)
MEMBER (J)**