

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT)(Insolvency) No. 844 of 2021

[Arising out of Order dated 07th April, 2021 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) in Company Petition (IB) No. 2854(ND)/2019]

IN THE MATTER OF:

Mayor Sports Private Limited

Through its Director

Mr. Nitin Mayor

Registered address at:

384/2, First Floor, Balraj & Sons Building

100 ft. Road, Ghitori, New Delhi – 110030

...Appellant

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

Present:

For Appellant : Mr. Deepak Biswas and Mr. Harshit Gupta, Advocates.

For Respondent : Mr. Animesh Rastogi, Mr. Santosh and Ms. Neha Rastogi, Advocates

J U D G M E N T

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The Present Appeal is filed against the Order dated 07th April, 2021 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) in Company Petition (IB) No. 2854(ND)/2019, whereby the Adjudicating Authority has dismissed the Application filed by the Appellant

under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code').

Brief Facts:

Appellant's Submissions:

2. The Learned Counsel appearing for the Appellant submitted that the Appellant is aggrieved by the impugned order dated 07.04.2021 for the reason that the Learned Adjudicating Authority without appreciating the facts that there is a prima-facie admission by the Respondent its liability to pay to the Appellant. The said admission was made by the Respondent vide its e-mail dated 20.01.2017 to the Appellant much before issuance of the demand notice. It is submitted that the Respondent had deliberately tried to take moonshine defence of pre-existing dispute with ulterior motive and malafide intention in order to evade its liability against the Appellant.

3. It is submitted that the Respondent in their reply stated that the Appellant had invoked arbitration proceedings, however, the Appellant never invoked arbitration proceedings and the Respondent created false and bogus stories in order to avoid its liability. Further, the Respondent also raised allegation that the Appellant filed a police complaint, however, no FIR has been registered till date, therefore, the stand taken by the Respondent regarding the above averments are completely misconception.

4. The Learned Counsel further submitted that from the facts, it is clear that there is no pre-existing dispute amongst the Appellant and the Respondent and there is no notice for invocation of arbitration was sent by the Appellant nor the arbitration proceedings were ever invoked by the

Appellant in terms of Section 21 of the Arbitration and Conciliation Act, 1996. The Learned Adjudicating Authority failed to notice the fact that there is a prima-facie admission by the Respondent its liability towards the Appellant whereby the Respondent assured to pay the dues. The reply letters of the Respondent dated 23.03.2017, 21.06.2017 and 31.08.2017 issued to the demand notice of the Appellant were all sham false and bogus and the same were sent as an afterthought by the Respondent in order to avoid its liability.

5. In view of the reasons as stated above the Learned Counsel prayed this Bench to allow the appeal by setting aside the impugned order.

Respondent's Submissions:

6. The Learned Counsel appearing for the Respondent submitted that there is pre-existing dispute between the Appellant and the Respondent since the year 2016, which was demonstrated by letters dated 18.04.2017, 30.05.2017 and 08.08.2017 sent by the Appellant to the Respondent. The Respondent replied to the above letters of the Appellant vide dated 21.06.2017 and 31.08.2017. Further, the Respondent also sent legal notice dated 23.03.2017 to the Appellant for criminal breach of trust, cheating, misrepresentation, fraud and causing wrongful loss. The Respondent has not consented the request of the Appellant for referring the dispute to arbitration for the reason that the Respondent has made the regular payment to the Appellant.

7. It is submitted that the Appellant deliberately concealed the legal notices sent by them dated 18.04.2017, 30.05.2017 and 08.08.2017 in the affidavit filed before the Learned Adjudicating Authority which proves the pre-

existing dispute between the parties. The Appellant relied upon forged and fabricated bills for the purpose of filing the claim.

8. In view of the reasons as stated above the Learned Counsel prayed this Bench to dismiss the Appeal.

Analysis / Appraisal:

9. Heard the Learned Counsel appeared for the respective parties perused the pleadings, documents filed in their support. The fact remains that the Appellant filed an application before the Adjudicating Authority under Section 9 of the I&B Code, 2016 initiation of CIRP against the Respondent / Corporate Debtor for the reason that the Corporate Debtor failed to pay the Operational Debt owed to it. The Appellant prior to filing of the Application before the Adjudicating Authority issued demand notice in Form-3 wherein the Appellant claimed a total amount of Rs.32,76,848/- including the interest. The basis for the claim is an agreement dated 01.07.2015 entered between the Appellant and the Respondent for supply of footwear under the brand name of SLAZENGER. The Appellant raised invoices on the Corporate Debtor for supply of goods.

10. The Adjudicating Authority having considered the application on merit observed a para 30 of the order as under:

“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.”

11. The Appellant issued a demand notice dated 08.08.2019 to the Respondent claiming an amount of Rs.32,76,648/- due from the date i.e. 27.11.2016 and relied upon the supply agreement dated 01.07.2015. The Respondent replied to the above demand notice by its Reply dated 03.09.2019 wherein it is stated that the Respondent earlier issued legal notice dated 23.03.2017 to the Appellant and they are bound by the stand taken therein. It is also stated in the reply notice that the Respondent filed a criminal complaint against the Appellant dated 15.07.2017. Further, in the reply it is a specific case of the Respondent that there is pre-existing dispute between the parties since the year 2016, therefore, the demand notice is not maintainable since the IBC proceedings cannot be maintainable. It is also stated in the reply, that the amount claimed by the Appellant is disputed since the beginning.

12. The Respondent vehemently contended that there is a pre-existing dispute between the parties and the Application filed by the Appellant is not maintainable and Learned Adjudicating Authority rightly dismissed the application on the ground of pre-existing dispute.

13. To buttress their arguments the Respondents issued legal notice dated 23.03.2017 to the Directors of the Appellant Company stating that the Appellant Company committed fraud and cheated the Respondent. It is stated that the parties have entered into an agreement on 01.07.2015 for supply of footwear products under the brand name SLAZENGER to the Respondent. It is stated that the Appellant represented the Respondent that they are engaged in the business of manufacturing and distributing of equipment, apparel and shoes under the brand name SLAZENGER and is authorised licensee of the said brand. However, the Respondent come to know that the Appellant is not authorised dealer or manufacturer of the brand SLAZENGER.

14. It is evident that the Respondent lodged a criminal complaint with Station Head Officer, PS Jonapuri Village, Fatehpur Beri, Delhi (Page 98, Volume-1) against the Appellant and its Directors for committing criminal breach of trust, cheating, criminal conspiracy, misrepresentation fraud and causing wrongful loss. In the copy of the complaint, the Respondent at para 9 stated that the license of the Appellant for supply of footwear products has been terminated on 19.01.2015 itself, however, knowing fully well the appellant entered into an agreement on 01.07.2015 much later to termination of licence agreement with the Respondent for supply of footwear products of SLAZENGER brand. To ascertain the veracity with regard to termination of agreement as alleged by the Respondent, with SLAZENGER, it is seen from page 106 of volume-1, that the licence agreement to Mayor (Appellant) was lawfully terminated on 19.01.2015 and the Appellant is currently subject to a legal action being pursued by SLAZENGER in the Delhi Courts and no

authorization or consent from SLAZENGER to deal in SLAZENGER branded products by the Appellant. There is no denial with regard to termination of licence by the SLAZENGER way back on 19.01.2015 and the Appellant having full knowledge of the same entered the agreement with the Respondent on 01.07.2015 for supply of footwear of SLAZENGER brand to the Respondent in our view is a pre-existing dispute between the Appellant and the Respondent.

15. The Appellant vide its reply dated 18.04.2017 to the legal notice of the Respondents dated 23.03.2017 admitted the fact that there are some disputes between the group company under which the appellant obtained licence for supply of SLAZENGER. Thus, it is an admitted fact that the Appellant does not hold the licence and entered the agreement subsequent to termination of licence / agreement dated 19.01.2015.

16. Further, there are several correspondences namely the Appellant vide its letter dated 08.08.2017 suggested appointment of arbitrator, however the respondent vide its reply dated 31.08.2017 categorically stated that the void agreement is not enforceable, therefore, the appointment of arbitrator is uncalled for and the respondent is not consented for any requests referring any dispute to arbitrator.

17. The Hon'ble Supreme Court in the matter of ***Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd. reported in (2018) 1 SCC 353 para 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.”

18. Further, the Hon’ble Supreme Court in the matter of ***Innoventive Industries Ltd. Vs. ICICI Bank & Anr. reported in (2018) 1 SCC 407 at para 29*** held 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 sub-section (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.

Conclusion:

19. In view of the decisions of the Hon'ble Supreme Court, this Bench comes to a resultant conclusion that there is pre-existence of disputes between the parties prior to issuance of demand notice dated 08.08.2019 with regard to the very claim of the Appellant and the Adjudicating Authority or this Tribunal cannot go into the disputed issues in a summary jurisdiction. Viewed in that perspective, the order passed by the Adjudicating Authority in rejecting the application filed by the Appellant need no interference.

20. In fine, the Company Appeal sans merit, accordingly, the same is dismissed. However, no order as to costs. Applications, if any, pending stand closed.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Kanthi Narahari]
Member (Technical)**

20th October, 2022

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