NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1679 of 2023
& I.A. No. 6046 of 2023

[Arising out of order dated 11.10.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench - VI in CP (IB) No.4099/MB/VI/2019]

IN THE MATTER OF:

In Style Fashion,
301, Tanishq Green,
5 Old Vijay Nagar Colony, Agra,
Uttar Pradesh – 282 004 **...Appellant**

Versus

Aditya Birla Fashion and Retail Limited,
Piramal Agastya Corporate Park,
Building A, 4th & 5th Floor,
Unit No. 401, 403, 501, 502
L.B.S. Road, Kurla,
Mumbai – 400 070 **...Respondent**

Present:

Appellant: **Mr. Sanyam Goel, Mr. Deepak Motla and Mr. Mohtashim Kibriya, Advocates**

Respondent: **Mr. Divyansh Jain, Mr. Sanjeev Kumar, Mr. Abhishek Kisku, Mr. Anshul Sehgal and Mr. Pranshu Paul, Advocates**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 ("**IBC**" in short) by the Appellant arises out of the Order dated 11.10.2023 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench - VI in CP (IB) No.4099/MB/VI/2019. By the impugned order, the Adjudicating Authority has rejected the Section 9 application filed by In Style Fashion – Operational Creditor seeking initiation of Corporate Insolvency Resolution Process ("**CIRP**" in short) against Aditya Birla Fashion and Retail Ltd. - Corporate Debtor. Aggrieved by the impugned order, the present appeal has been filed by the Operational Creditor-Appellant.

2. The Learned Counsel for the Appellant making his submissions stated that the Operational Creditor was acting as franchisee and commission agent for running the show room of the Corporate Debtor in terms of Agency Agreements dated 08.07.2011 (hereinafter referred to as "**Planet Fashion Agreement**") and 20.12.2011 (hereinafter referred to as "**Allen Solly Agreement**"). In pursuance of these Agency Agreements signed and executed between the Appellant/Operational Creditor and Respondent/ Corporate Debtor, showrooms had been opened, which however closed on 02.02.2016, which date was before the tenure specified in the Agency Agreements. It is submitted that following the closure of the showroom, the stock in trade was sent back to the Corporate Debtor by the Operational Creditor. Thereafter on the request made by the Corporate Debtor, the Operational Creditor raised

invoices for salvageable and non-salvageable assets on the Corporate Debtor on 18.11.2016. However, the Corporate Debtor made only part payment of Rs.51,283.28 on 28.04.2017. Aggrieved with the meagre, part-payment amount paid by the Corporate Debtor, the Operational Creditor sent a detailed computation sheet showing a total outstanding commission amount of Rs.86.34 lakh and invoices amounting Rs.15.26 lakhs and Rs.4.28 lakhs towards salvageable and non-salvageable assets respectively. Since payment was not forthcoming, in spite of sending three reminders, a demand notice was sent under Section 8 of the IBC to the Corporate Debtor on 07.08.2019 for operational debt totalling an amount of Rs. 1.05 crore. Admitting that the Section 8 notice was replied to by the Corporate Debtor on 21.08.2019, it was added that as no further payments were received, the Section 9 application was filed before the Adjudicating Authority.

3. The Learned Counsel for the Appellant further submitted that the Adjudicating Authority erroneously held the Section 9 application to be non-maintainable on grounds of limitation. While admitting that the date of default had initially been inadvertently entered as 27.08.2016 in the Section 8 demand notice, the same was subsequently rectified by them in the Section 9 application and shown as 28.04.2017. It was also contended that since the last part-payment of commission was received from the Corporate Debtor on 28.04.2017, the date of default has been validly shown as 28.04.2017. The Section 9 application having been filed on 01.10.2019, this date fell very much within the limitation period of 3 years. The date of filing the Section 9

application was thus covered by the limitation period of three years and ought not to have been rejected on grounds of limitation.

4. It has been further pointed out that the Corporate Debtor in their reply dated 21.08.2019 to the Section 8 demand notice made a false claim that no dues were payable to the Appellant. It was contended that on the request of the Corporate Debtor, invoices had been issued by the Operational Creditor for full and final payment of salvageable and non-salvageable assets on 18.11.2016. It was submitted that reminder letters were also sent to the Corporate Debtor on 20.08.2018, 08.12.2018 and 24.06.2019 which went un-heeded. No payments were received qua the invoices. Moreover, the Corporate Debtor had neither paid up fully the amount pending for commission. It is also contended that the Adjudicating Authority failed to appreciate the authenticated and verified record of default issued by the Information Utility registered with the IBBI. It was strongly contended that this is a case where operational debt clearly fell due and payable and there was default by the Corporate Debtor.

5. The Learned Counsel for the Appellant further stated that the Corporate Debtor has raised a spurious defence of pre-existing dispute by referring to a meeting supposedly held on 28.08.2012 between the Operational Creditor and the Corporate Debtor regarding payment of revised/reduced commission. It was vehemently contended that there was neither any meeting held on 28.08.2012 nor any such agreement entered into between the two parties on that date with respect to commission payment arrangement. Alleging further that the purported proceedings of the meeting were fabricated, it was added

that the Adjudicating Authority wrongly relied on this meeting and mistook the forged meeting proceedings to be evidence of pre-existing dispute while dismissing the Section 9 application.

6. Countering the submissions made by the Appellant, the Learned Counsel for the Respondent contended that whereas the date of default mentioned in the demand notice of the Operational Creditor was 27.08.2016, the Section 9 application was filed on 01.10.2019 which was beyond the prescribed three years period of limitation and hence time-barred. It was therefore submitted that the Adjudicating Authority had rightly held that the Section 9 application had been filed beyond three years limitation period and hence not maintainable. It was also pointed out that the Allen Solly Agency Agreement had already been validly terminated by the Corporate Debtor on 02.02.2016. This agreement provided for reconciliation of accounts within 15 days from the date of termination of the agreements. However, the Operational Creditor failed to demonstrate attempts made by it to reconcile its claims/accounts with the Corporate Debtor and is now agitating their time-barred claims.

7. Rebutting the other contentions of the Appellant, it was strongly contended that no amount was due and payable to the Operational Creditor and this was clearly pointed out in their reply to Section 8 demand notice. It was further submitted that though the Corporate Debtor had cleared all the dues of the Operational Creditor, a self-serving computation statement of dues was furnished by the Operational Creditor basis which a false and frivolous claim has been raised by the Operational Creditor. Moreover, the

Operational Creditor had wrongly calculated the commission amount by deliberately not adhering to the variable commission formula which had been mutually decided between the Operational Creditor and the Corporate Debtor in a meeting held on 28.08.2012. It has been contended by the Learned Counsel for the Respondent that the exaggerated and disputed claims were raised by the Operational Creditor with the sole intent to harass the Corporate Debtor. This false and fabricated claim in respect of outstanding commission clearly points out the existence of a pre-existing dispute and hence the Adjudicating Authority had rightly rejected the Section 9 application.

8. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

9. The short point for our consideration is whether any operational debt qua the Corporate Debtor has been proven to have become due and payable and if there has been a default in the payment thereof and whether there is any pre-existing dispute between the parties. This examination would be in consonance with the test which has been laid down by the Hon'ble Supreme Court in ***Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. (2018) 1 SCC 353*** ('**Mobilox**' in short) which is as reproduced below :-

> *"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*
>
> *(i) Whether there is an "operational debt" as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)*
>
> *(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

10. Before we examine as to whether there had arisen a debt and default above the threshold limit, we would like to examine how the Adjudicating Authority has treated the Section 9 application from the point of view of limitation.

11. On the issue of limitation, the findings of the Adjudicating Authority are as extracted hereunder: -

"5.3 As regards applicability of law of limitation under section 238A of the IBC read with Article 137 of the Limitation Act, 1963, the OC's demand notice dated 07.08.2019 under section 8 of the IBC, clearly states the date of default as 27.08.2016. This date has been mentioned against both serial number 1 and serial number 2 of the demand notice. However, in Part IV of the Application, the date of default has been shown as 28.04.2017. The explanation offered by the OC for this is that the date of default mentioned in the notice was a mistake and that the last payment of commission was partly paid by the CD and was received on 28.04.2017. In the rejoinder, the OC has averred in Para 6 thereof that it was an 'advertent' error. Be it as it may, the reliance placed by the OC on the decision of the Hon'ble Principal Bench of the NCLAT in Atharva Auto Logistics Pvt. Ltd. V. Intec

Capital Ltd & Anr. in C.A. (Insolvency) 303/2022, is inapplicable in the present Application. The above matter was in relation to an application u/s 7 and not one u/s 9 of the IBC. Further, record of default available with the Information Utility was brought on record in that case. In view of the above discussions, we hold that the date of default was 27.08.2016 as mentioned in the demand notice, and that this Application filed on 01.10.2019, was beyond 3 years i.e., 26.08.2019 from the date of default. Hence, we are not inclined to accept this argument the OC and this is also found against the OC."

12. We find that the Operational Creditor has admitted that the date of default had initially been inadvertently entered as 27.08.2016 in the Section 8 demand notice. However, it was also pointed out that the error was subsequently rectified by them in the Section 9 application and shown as 28.04.2017. We also notice that part payment of Rs. 51,823 made on 28.04.2017 by the Corporate Debtor has also been brought on record and the relevant bank statement has been placed at pages 125-126 of the APB. In view of the last payment having been made on 28.04.2017 as noted above, the fresh period of limitation would start from that date and the Operational Creditor was entitled for taking benefit of 3 years period of limitation from the date of last payment. Therefore, the Section 9 application was filed well within time. Hence the objection on the ground of limitation raised by the Corporate Debtor basis the date of default mentioned in the demand notice while choosing to ignore the date of default shown in the Section 9 application lacks merit.

13. We are also not in a position to agree with the Adjudicating Authority on the inapplicability of the decision of this Tribunal in ***Atharva Auto Logistics Pvt. Ltd. v. Intec Capital Ltd & Anr. in CA (AT) (Ins.) No. 303/2022*** on the ground that the present is a case relating to an application under Section 9 and not Section 7. This finding of the Adjudicating Authority is misplaced since the provisions of the Limitation Act in this regard is equally applicable to both Section 7 and 9 applications as has been held by the Hon'ble Supreme Court in ***B.K. Educational Services Pvt. Ltd. v. Parag Gupta (2019) 11 SCC 633*** which is to the effect:

> *"42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."*

14. Coming now to the question as to whether debt was due and payable, it is the case of the Operational Creditor that the Corporate Debtor had sought details on 18.11.2016 from the Operational Creditor on the list of salvageable and non-salvageable assets so as to process the full and final payment. The said communication placed at page 121 of the Appeal Paper Book ("**APB**" in

short) has not been controverted by the Corporate Debtor. It is also their case that the invoices for these assets were sent by the Operational Creditor on the same date which has also not been controverted by the Corporate Debtor. Moreover, no dispute was raised by the Corporate Debtor from the date of issue of invoice i.e. 18.11.2016 until the Section 8 demand notice. Further, since the Agency Agreement stood terminated prematurely, the clauses of the Agency Agreements relied upon by the Corporate Debtor to claim that no dues had arisen were inapplicable. Therefore, invoices raised by the Appellant for full and final payment having been received by the Corporate Debtor, without any demur and protest, clearly establishes admission of debt on the part of the Corporate Debtor.

15. The counter raised by the Corporate Debtor is that any claim for salvageable and non-salvageable assets made in contravention of the Allen Solly Agreement is not tenable. Elucidating further it was submitted that in terms of the clauses of the Allen Solly Agreement, the liability to make investments for development of the interiors of the shop premises and the renovation thereof was the responsibility of the Operational Creditor and not reimbursable. Adverting attention to the clauses of Allen Solly Agreement, it was submitted that Clause 5.1 of the Agreement clearly stipulated that the Operational Creditor would invest at its own cost on the interiors as per the specification provided by the Corporate Debtor. Clause 6.10 further stipulated that the Operational Creditor at its own costs would undertake renovating the interiors of the premises to the satisfaction of the Corporate Debtor. Further, Clause 1.11 of the Agreement also provided that the investments made by the

Operational Creditor towards the interiors would depreciate by 20% every year and that at the end of the fifth year, the title to such interiors would vest with the Corporate Debtor. It is therefore the case of the Corporate Debtor that the Operational Creditor were not entitled to make any claims against salvageable and non-salvageable items.

16. We notice that the Adjudicating Authority has taken notice of Clauses 1.11, 5.1 and 6.10 and held that in terms of these clauses, the claim raised by the Operational Creditor '*fall flat*'. We have perused the above clauses of the Agency Agreements as has been placed at Annex 2 of the APB. As we are clear in our mind that neither the Adjudicatory nor the Appellate Tribunal is vested with the competent jurisdiction either to enter into the realm of investigating contractual disputes or to determine the tenability of the claim amount arising out of contractual terms, we cannot subscribe to the finding of the Adjudicating Authority that the claims of the Operational Creditor has fallen flat. Be that as it may, we however do not hesitate from making the observation that in their reply to the Section 8 demand notice, the Corporate Debtor having raised dispute on the amount claimed by the Operational Creditor in the light of the clauses of the Agency Agreements, there was clearly a pre-existing dispute between the parties on the computation of claims.

17. We further find that the Adjudicating Authority has also taken due cognizance of the email dated 18.11.2016 from the Corporate Debtor to Operational Creditor seeking information on the list of salvageable and non-salvageable assets and coming to the conclusion that this detail was sought only for the purposes of settlement of accounts to find out the final figure for

payment. On a plain reading of the said email, we agree with the Adjudicating Authority that the details sought from the Operational Creditor by the Corporate Debtor of salvageable and non-salvageable assets was for the limited purpose of reconciliation and settlement of accounts.

18. Given this backdrop, we have no reasons to differ with the Adjudicating Authority that seeking information for the purposes of asset and account reconciliation cannot be construed as admission of debt and liability on the part of the Corporate Debtor. Further, from the material available on record, it is clear the Agency Agreements were terminated on 02.02.2016. When the Allen Solly Agreement at Clause 10.3 (iv) clearly provided for reconciliation of accounts to be conducted within 15 days of termination of the agreement, it is clear that any information sought for reconciliation of accounts on termination cannot be ipso facto treated as admission of debt and liability.

19. The Learned Counsel for the Respondent also submitted that in terms of the Planet Fashion Agreement, the Corporate Debtor was liable to pay towards commission computed at the rate of 17% of the net sales value as per Clause 7.1 of Planet Fashion Agreement. However, the dues in respect of the unpaid commission, as claimed by the Operational Creditor, was not correct since the monthly slabs of the commission were to be reduced in terms of a revised arrangement which was arrived at between the two parties pursuant to a meeting held on 28.08.2012. The proceedings of the said meeting are at page 162 of APB. It was emphatically asserted that the Operational Creditor had computed the commission amount wrongly by deliberately avoiding the arrangement/agreement recorded in the minutes of the above meeting dated

28.08.2012. The claim has been made on the basis of self-serving documents besides false and fabricated computation. It has been therefore claimed by the Corporate Debtor that this clearly signifies pre-existing dispute with respect to computation of the commission amount and therefore Section 9 application has rightly not been admitted by the Adjudicating Authority.

20. The claim made by the Operational Creditor that it had sent letters to the Corporate Debtor on 20.08.2018, 08.12.2018 and 24.06.2019 regarding their dues has also been stoutly controverted by the Corporate Debtor. It was submitted that these letters were never annexed to the demand notice and that they were never shared with the Corporate Debtor. Moreover, it has been contended that the Operational Creditor failed to demonstrate that the letters were served on the Corporate Debtor. While Clause 12 of the Agency Agreements spelt out the address of the Corporate Debtor as Bangalore, the alleged courier receipts to prove service of the said letters show the address as Gurgaon as placed at pages 138, 140 and 142 of the APB which show that no reminders were actually ever sent to the Corporate Debtor.

21. The Operational Creditor has however refuted the assertion made by the Corporate Debtor with regard to the meeting held on 28.08.2012 and submitted that no such meeting was held with the Corporate Debtor on 28.08.2012. It was denied that any arrangement on the payment of the reduced/revised commission was arrived at on 28.08.2012. It is claimed that the Corporate Debtor had falsely created/fabricated the minutes of the meeting, which minutes have been signed by Shri Nitesh Agrawal, who was not the Operational Creditor.

22. We notice that the denial by the Corporate Debtor of any meeting having been held on 28.08.2012 and the minutes of the meeting drawn therein has been dwelled upon in detail by the Adjudicating Authority. The Adjudicating Authority has noted that the minutes of 28.08.2012 was signed by Shri Nitesh Agrawal on behalf of the Operational Creditor. It has also been observed by the Adjudicating Authority that the same person, Shri Nitesh Agrawal had sent an email dated 09.12.2013 admitting on behalf of the Operational Creditor that an amount of Rs.14.51 lakh had been paid in excess by the Corporate Debtor and that the same could be adjusted against the commission amount due to the Operational Creditor for the period October 2013 to March 2014 in six instalments. The Adjudicating Authority has therefore held that if the Operational Creditor relied on this e-mail of 09.12.2013 sent by Shri Nitesh Agrawal to substantiate their assertion of admission of debt by the Corporate Debtor, there is no cogent ground to claim that the minutes of the meeting dated 28.08.2012 signed by the same Nitesh Agrawal as being unauthorized and fabricated. The Adjudicating Authority has also noticed that Shri Nitesh Agrawal is the husband of Smt. Vinita Agrawal and that he is a witness in the partnership deed of the Operational Creditor.

23. We are inclined to agree with the Adjudicating Authority that the Operational Creditor has been blowing hot and cold in respect of the nexus and role of Nitesh Agrawal in the partnership firm. We do not countenance the arbitrary conduct and double standards of the Operational Creditor in choosing to rely on documents signed by Nitesh Agrawal when it is to their

advantage and discounting the tenability of documents signed by the same person when it does not suit them. We are of the considered opinion that the Adjudicating Authority has rightly concluded that Shri Nitesh Agrawal had nexus with the business transactions of the Operational Creditor and was also their authorized representative and that the minutes of the meeting signed by him on 28.08.2012 has been the basis of a pre-existing dispute between the two parties. We also add here that the allegation of forgery of signature of Shri Nitesh Agrawal as raised by the Appellant is a subject which requires detailed investigation which is not possible to be carried out by the Adjudicatory/Appellate Tribunal given their summary jurisdiction.

24. It is relevant at this juncture to refer to the guiding principles laid down by the Hon'ble Supreme Court in **Mobilox** supra. Para 56 of the **Mobilox** judgment is extracted hereunder which reads as follows:

> *"56. 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."*

25. On going through the submissions made by the parties and keeping in mind the settled position of law as laid down in the **Mobilox** judgment cited supra, it is amply clear that there exists a pre-existing dispute with respect to the computation of claims by the Operational Creditor qua the Corporate

Debtor in the backdrop of an arrangement which had come into existence following a meeting held on 28.08.2012. For such disputed operational debt, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor. Where Operational Creditor seeks to initiate insolvency process against a Corporate Debtor, it can only be done in clear cases where no real dispute exists between the two which is not so borne out given the facts of the present case.

26. It is well settled that in Section 9 proceeding, the Adjudicating Authority is not to enter into final adjudication with regard to existence of dispute between the parties regarding the operational debt. What has to be looked into is whether the defence raises a dispute which needs further adjudication by a competent court. In our considered view, if we apply the above cited test laid down in **Mobilox** supra by the Hon'ble Supreme Court to the facts of the present case, it is clear that defence raised by the Corporate Debtor in their reply to the Section 8 demand notice and detailed reply filed in Section 9 application is not illusory or moonshine and that the nature of dispute raised was such that it required adjudication by competent court.

27. Considering the overall facts and circumstance of the present case, and in view of the foregoing discussion, we are satisfied that the Adjudicating Authority did not commit any error in rejecting the Section 9 Application filed by the Appellant on the ground of pre-existing dispute. However, as reasoned out earlier, we do not agree with the finding of the Adjudicating Authority that the Section 9 application was time-barred and hit by limitation. We also make it clear that the Appellant shall have the liberty to seek remedy in

respect of *inter se* contractual disputes, before any other appropriate forum as admissible in law. There is no merit in the Appeal. Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi
Date: 09.01.2024

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