

**IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
NEW DELHI**

Company Petition No. (IB)- 414(PB)/2020

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

IN THE MATTER OF:

Mack Star Marketing Private Ltd. *Applicant / Operational Creditor*

Vs.

Oriflame India Private Limited

.... *Corporate Debtor*

ORDER PRONOUNCED ON: 30.04.2024

CORAM:

**CHIEF JUSTICE (Retd.) RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT**

**SHRI AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For the OC : Sr. Adv. P. Nagesh, Adv. Shivani Rawat, Adv.
Angenika Awasthi, Adv. Akshay Sharma

For the CD : Sr. Adv. Ashish Dholakia and Adv. Mahesh B. Chhibber.

ORDER

1. The instant application is filed by **Mack Star Marketing Private Limited** (hereinafter referred as 'Applicant'/ 'Operational Creditor') incorporated under the provisions of the erstwhile Companies Act, 1956 and having **CIN: U70100MH2002PTC136649** under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process (CIRP) in respect of **Oriflame India Private Limited** (hereinafter referred as Respondent Company or Corporate Debtor (CD) for making default in payment of outstanding amount of **Rs. 1,52,55,394/-** (Rupees One Crore Fifty-Two Lakh Fifty-Five Thousand Three Hundred and Ninety-Four Only). The calculation of operational debt due as per the Applicant includes licensee fee of Rs 1,29,28,300 and GST of Rs 23,27,094.
2. The Respondent Company **Oriflame India Private Limited** was incorporated on 25.08.1994 under the provisions of the erstwhile Companies Act, 1956 and having its registered address at Ground Floor, M-10, South Extension, Part-II, New Delhi South Delhi-110049 India. Since the registered office of the Respondent/ Corporate Debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in

relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of Respondent/Corporate Debtor as per sub-section (1) of Section 60 of the Code.

The Respondent/CD is engaged in the business of manufacturing and selling of cosmetics and wellness products and is a part of “Oriflame” Group of companies which manufactures and markets a wide range of wellness and cosmetics products primarily through direct selling method and has presence in various countries of the world.

Submissions made on behalf of the Applicant/Operational Creditor

3. It is submitted that on 31 January 2011, the Applicant entered into a leave and license agreement (**L&L Agreement**) and an amenities agreement with the Corporate Debtor pursuant to which the Applicant agreed to permit the Corporate Debtor to use and occupy Office No. 203 of a building named Kaledonia in Andheri East (**Licensed Premises**) in consideration for the payment of a monthly license fee and a monthly amenities fee, collectively referred to as (**Monthly Fees**) by the CD to applicant. A subsequent agreement dated 12.01.2018 was executed between the parties in which the Applicant and CD agreed to reduce the Monthly Fee to Rs. 11,75,300.
4. Further, on 28.02.2019, the Applicant, through its attorney Trilegal, wrote a letter to the CD instructing them to make all payments in relation to the Licensed Premises to a bank account specified in the letter. In terms of clause 4.3 of the L&L Agreement read in conjunction with the letter dated 28.02.2019, the CD was

obligated to deposit the monthly fee for March 2019 in the specified account maintained with ICICI bank on or prior to 05.03.2019. However, despite repeated reminders by the applicant, the CD has failed to deposit any payments from the month of March 2019. Date of default as per applicant in the instant case is 06.03.2019.

5. It is submitted that in light of the continuing non-payment, the Applicant was constrained to address a statutory demand notice dated 15.01.2020 to the CD under Section 8 of the Code demanding the amounts due and payable by the CD to the Applicant, aggregating to Rs.1,52,55,394.
6. Furtehr, in response to the demand notice, a letter dated 24.01.2020 was sent by the CD through its advocates wrongly disputing the claims made by the Applicant in the demand notice on completely frivolous and baseless grounds.

Submissions made in Reply by the Ld. Counsel appearing for the Respondent/Corporate Debtor are:

7. It is submitted that the present application is a sheer abuse of the process of law as the Applicant has suppressed material facts from this Tribunal. The basis of initiation of present proceedings by the Applicant is the alleged non-payment of license fee by the Respondent. The Applicant has concealed that there are serious disputes between multiple parties regarding the license fee payable and the said disputes are the subject matter of adjudication by the Hon'ble High Court of Bombay in Commercial Suit No. 77/2020 filed by the Respondent against the Applicant and other parties.

8. It is submitted that the present application has been filed by the Applicant without proper authorization as the present application has been filed & signed by Mr. Sumit Ranjan Saha as the authorized representative of the Applicant. However, the Board resolution dated 06.08.2019 authorizing Mr. Sumit Ranjan Saha to act on behalf of the Applicant has not been validly certified or executed. The said Board resolution has been certified by Mr. Sumit Ranjan Saha alone and not by any other director, thus authorizing himself to act on behalf of the Applicant. This creates a serious doubt as to the authenticity of the Board resolution as the person filing an application under IBC cannot authorize itself by way of Board resolution to file the said application.
9. Further, the claim of Applicant towards outstanding license fee does not qualify as "Operational Debt" as defined in Section 5(21) of the Code. Lease or License of immovable property cannot be considered as supply or rendering any services.
10. It is submitted that the demand notice dated 15.01.2020 issued in Form 3 to the Respondent has been issued by a law firm, but there is no averment in the said notice that the law firm was authorized by the Applicant to issue the demand notice on its behalf. It is trite law that Form 3 requires an authorized agent who is sending the notice to state his position with or in relation to the operational creditor. In the present case, since the demand notice was not sent by an authorized person, the said notice is bad in law.
11. The Applicant has not filed affidavit as required under Section 9(3)(b) of the Code to the effect that there is no notice given by the CD relating to a dispute of the unpaid operational debt. Further, the Applicant has not filed certificate from its financial institution

confirming that there is no payment of an unpaid operational debt by the Respondent as required under Section 9(3)(c) of the code.

12. It is submitted that the license fee was being paid by the Respondent in the bank account of the Applicant against invoices issued by the Applicant. The last invoice from the Applicant was received by the Respondent in June 2019 and thereafter no invoice has been received by the Respondent.

13. **Analysis and Findings**

- i. We have heard the Ld. Counsels for the parties and perused the documents and averments made in the application, reply and the rejoinder. Before going into the merits of this application it would be pertinent to mention here that the Operational Creditor was admitted into CIRP vide order dated 20.09.2021 as filed by Suraksha ARC and the said CIRP was set aside by Hon'ble NCLAT vide order dated 08.09.2022. The order dated 08.09.2022 passed by Hon'ble NCLAT has also been upheld by Hon'ble Supreme Court vide order dated 30.09.2022.
- ii. We take note that certain procedural defects have been pointed out by the respondent regarding the maintainability of the petition in their reply. We would like to answer each of these points first.
 - a) The claim of Applicant towards outstanding license fee does not qualify as "Operational Debt" as defined in Section 5(21) of the Code. Lease or License of immovable property cannot be considered as supply or rendering any services.

We take note that Hon'ble NCLAT in the case of ***Jaipur Trade Expocentre Private Limited (Company Appeal (AT)(Ins) No.***

423 of 2021 has categorically held that the claim of Licensor for payment of license fee for use of demised premises for business purpose is an 'Operational Debt' within the meaning of Section 5(21) of the Code. Therefore, this plea of CD is rejected

- b) The present application has been filed without proper authorization as Mr. Sumit Ranjan Saha who has been authorized as the authorized representative of the Applicant in the board resolution dated 06.08.2019 has been certified by Mr. Sumit Ranjan Saha alone and not by any other director.

On perusal of minutes of board meeting dated 06.08.2019, we take note that the said meeting was attended by 2 directors including Mr. Sumit Ranjan Saha in which it was resolved to authorize Mr. Sumit Ranjan Saha as the sole authorized representative of the Company. Further, Mr. Saha has only certified the 'true copy' of the board resolution and has not authorized himself on behalf of the applicant's board. Therefore, the board resolution is valid.

- c) There is no compliance of Section 9(3)(b) and Section 9(3)(c) of the code.

Section 9(3)(b) of the code requires an applicant to file an affidavit to the effect that there is no notice of dispute given by the CD pertaining to the operational debt. We take note that this provision does not apply to the present case as the CD served a notice of dispute upon the applicant. Further, in terms of Section 9(3)(c) of the code, applicant is required to append a certificate from financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the CD. Though no certificate has been

attached, the CD in its reply has admitted that it has not made payments towards the outstanding debt from May 2019 till date.

- iii. A leave and license agreement dated 31.01.2011 and an amenities agreement was executed between the parties. The term of the agreement was five years and by virtue of the extension letter, the term was extended for another four years. A sum of Rs. 63,32,040/- was paid by Oriflame to Mack Star as refundable security and an additional amount of Rs 2,27,000 for installation of electric meter was also paid by Oriflame. A Subsequent agreement dated 12.01.2018 was executed between the parties in which the Applicant and CD agreed to reduce the Monthly Fee to Rs. 11,75,300. Throughout the contractual period, the license fee was being deposited by Oriflame in a bank account with Yes Bank designated by Applicant Mack Star against invoices issued by Mack Star.
- iv. Pursuant to introduction of Goods and Services Tax, from 01.07.2017 the invoices raised by Mack Star included Goods & Services Tax (GST) component. On 12.02.2018 Oriflame received a notice from Income Tax Department directing it to deposit the license fee with the Income Tax Department instead of Mack Star on account of pending income tax, interest and penalty payable by Mack Star to the Income Tax department. Oriflame received a letter dated 27.02.2018 from Mack Star stating that the license fee is to be paid to the Income Tax Department and GST and TDS is to be deposited to the respective departments. As a result of this, the license fee for the months of March, April and May 2018 was deposited by Oriflame in the bank account designated by the Income Tax department and the Income Tax department withdrew its notice dated 12.02.2018. Thereafter, for the month of June

2018 till April 2019, the license fee was deposited in the Yes Bank of the applicant.

- v. On 28.02.2019 a letter was received by Oriflame from Trilegal (acting on behalf of Mack Star) informing about the fact that the minority shareholders of Mack Star and their nominees caused Mack Star to enter into certain sham loan transactions with Yes Bank Limited and created certain mortgages, in violation of the express terms of the articles of association of Mack Star. The letter dated 28.02.2019 also communicated that any mortgage or charge that was created in favor of Yes Bank or any assignee of Yes Bank such as Suraksha Asset Reconstruction Company Limited are fraudulent, rooted in illegality and in violation of the express terms of the AoA of Mack Star. Letter dated 28.02.2019 also called upon Oriflame to refrain from payment of any license fee to Yes Bank or to Suraksha and provided ICICI bank account number in which licensee fee had to be deposited.
- vi. In response to the letter dated 28.02.2019, Oriflame issued a letter dated 08.03.2019 to Trilegal asking for copy of Board Resolution for confirmation of ICICI bank account and the new authorized representative of Mack Star and a letter of indemnity from Trilegal and Mack Star to indemnify Oriflame from action arising out of instructions given in letter from Trilegal dated 28.02.2019.
- vii. On 12.04.2019 Suraksha wrote to various tenants of Mack Star including Oriflame insisting that payment of leave and license fees is to be made into the originally designated Yes Bank Account. Suraksha also informed that receivables from Oriflame have become a charge in its favour. Relevant part of the letter to Oriflame is extracted as under:

YES Bank Limited ("YBL") granted financial assistance to Mack Star Marketing Private Limited ("MSMPL") for the purposes and on the terms and conditions contained in the loan and security agreements executed therefor. YBL has absolutely assigned their outstanding exposure and underlying securities pertaining to MSMPL, in favour of SARL, vide Deed of Assignment dated September 29, 2017.

Further to the above, SARL has become the secured lender to MSMPL and all the rights, title and interests of YBL, with respect to the financial assistance to MSMPL, have vested in SARL more specifically the charge on receivables from the unit no: 3 on 2nd Floor of Kaledonia taken on lease by you from MSMPL.

Note: SARL = Suraksha Asset Reconstruction Company Ltd.

However, on 23.04.2019, another letter was addressed by Trilegal to Oriflame calling upon Oriflame that any payments made to the account held with Yes Bank will not be considered as a discharge of obligation of Oriflame under the leave and license agreement and once again reiterated that Oriflame should deposit the amount in ICICI bank account.

- viii. Board Resolution dated 20.03.2019 in which it was resolved that ICICI bank account shall be used for receipt of all rent, lease receivables and amenities fees was provided to the CD by virtue of Trilegal letter dated 27.03.2019. Further letter of indemnity was provided to the CD on 29.05.2019. Before Oriflame could deposit

the leave and license fee into the ICICI Bank account, another notice dated 13.06.2019 was received by Oriflame from Income Tax Department for payment of License Fee to the department instead of Mack Star as some amount was due to the department on account of income tax, interest and penalty.

- ix. On 22.11.2019 another letter was received by Oriflame from Suraksha regarding the non-payment of license fee in the Yes Bank account after 30.04.2019 and demanding the license fee to be paid to it.
- x. It is evident from the contents of above paras that the respondent Oriflame was subject to conflicting demands from Mack Star, Income Tax Department and from Suraksha, with the parties demanding that the licence fee be deposited in different bank accounts. Thereafter, Oriflame filed an interpleader suit bearing Commercial Suit No. 77/2020 before the Hon'ble High Court of Bombay against Mack Star, Yes Bank and Suraksha seeking to deposit the licensee fee for the period from 01.05.2019 to 31.01.2020 in Court. Hon'ble Bombay High Court also in its order dated 18.02.2020 mentioned **that there is a serious dispute between the parties as to the licensee fees payable**. Order dated 18.02.2020 passed by Hon'ble Bombay high Court is extracted as under:

In the High Court of Bombay
(BEFORE A.K. MENON, J.)

Oriflame India Private Limited ... Plaintiff;

Versus

Mack Star Marketing Pvt. Ltd. and Others ... Defendants.

Interim Application No. 1 of 2020 in Commercial Suit (L) No. 77 of 2020

Decided on February 18, 2020

Advocates who appeared in this case:

Mr. Anil D'Souza for the plaintiff.

Mr. Sharan Jagtiani, Senior Counsel, a/w Prakash Jain, Vividh Jandon i/b. Trilegal for defendant no. 1.

Mr. Venkatesh Dhond, Senior Advocate, a/w Dharmesh S. Jain, Ms. Ruchi D. Khajanchi i/b. Anil T. Agarwal for defendant no. 3.

P.C.

A.K. MENON, J.:— In this Interpleader Suit, the plaintiff seeks a direction specifying the recipients of license fees in relation to premises occupied by the plaintiff and to ascertain to whom of possession of the licensed premises is to be handover since the plaintiff is desirous of vacating the licensed premises. An injunction is sought against the defendant nos. 1 to 3 restraining them from taking any action against the plaintiff and for other reliefs.

2. By the interim application, the plaintiff seeks an order permitting it to deposit unpaid license fees in this Court after adjusting certain amounts claimed by the plaintiff and for appointment of a suitable person to receive and take possession of the licensed premises. Further directions are sought against the defendants to pay certain outgoings, taxes and charges. As between defendant nos. 1 and 3, there are disputes as to who is entitled to receive payments. According to Mr. Jagtiani, payments are to be made to defendant no. 1 since license fees were originally payable to defendant no. 3 since his clients as Asset Reconstruction Company has taken over the account.

3. According to the plaintiff, the agreement was scheduled to expire on 6th October, 2019 and has since expired, however, in view of disputes as between the defendant no. 1 and the plaintiff which has resulted in some proceedings being filed before the NCLT, the plaintiff is desirous of vacating the premises and handing over the possession to the defendant no. 1.

4. Defendant no. 3 has no objection of possession being so handed over. The only dispute is relating to the license fees. At Exhibit M to the plaint, the plaintiffs have annexed the statement showing the amounts that according to them are due and payable. The plaintiffs have claimed certain adjustments of refundable security deposits. However, this being disputed by the defendant no. 1. According to the plaintiff, the amount due is Rs. 16,68,060/- but according to defendant no. 1, the amount of license fees is payable Rs. 166,42,248/-.

5. There is a serious dispute now as to the license fees payable. In these circumstances, no ad-interim relief can be granted.

6. Ad-interim relief refused.

7. Reply to be filed within four weeks from today.

8. Rejoinder to be filed within four weeks thereafter.

9. List the suit in accordance with its turn.

Note: Defendant No. 1 is Mack Star Marketing Pvt. Ltd

Defendant No. 2 is Yes Bank Ltd.

Defendant No. 3 Suraksah Asset Reconstruction Company

xi. On 18.06.2020 the subject premises were vacated by the CD. In its affidavit dated 30.11.2023 as filed with this Tribunal, the CD after making relevant adjustments has offered to pay the license fee from the month of May 2019 till 18.06.2020 and has also offered demand draft amounting to Rs. 61,34,200 to the Operational Creditor. The details of calculation of the aforesaid amount of Rs. 61,34,200 as attached with the affidavit is extracted as under:

Month	License Fee (including TDS)
May-2019	11,75,300
Jun-2019	11,75,300
July-2019	11,75,300
August-2019	11,75,300
September-2019	11,75,300
October-2019	11,75,300
November-2019	11,75,300
December-2019	11,75,300
January-2020	11,75,300
February-2020	11,75,300
March-2020	11,75,300
April-2020	11,75,300
May-2020	11,75,300
18-June-2020	7,05,180
Total Licence Fee	1,59,84,080
Less: TDS @ 10%	-
	15,98,408

Total Payable	1,43,85,672
Receivable by Oriflame from Mack Star	

Refundable Security deposit as per Leave & License Agreement and Amenities Agreement	63,32,040
Electricity connection Security as per DD paid to Mack Star	2,27,000
GST not reported in GST returns by Mackstar from September 2018 to April 2019	16,92,432
Net Amount (DD Amount)	61,34,200.00

- xii. It is to be noted here that till April 2019, the CD has deposited the licensee fee in the Yes Bank account as designated by Applicant Mack Star and for subsequent period till 18.06.2020 they are ready to make payments as also stated in the affidavit dated 30.11.2023.
- xiii. Moreover the applicant raised last invoice in June 2019 and thereafter no invoice demanding payment of license fee has been received by Oriflame from Mack Star. In these circumstances it cannot be said that the CD has defaulted in making payments for the amount due. Thus the present application is legally untenable and we are inclined to dismiss this application.

14. **Order**

For the reasons mentioned in the preceding paragraphs, the Application bearing **IB-414(ND)/2020** filed by the Applicant/ Mack Star Marketing Pvt. Ltd under Section 9 of the Code r/w Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Respondent/Oriflame India Pvt Ltd is **dismissed**.

No order as to cost.

File be consigned to record storage (final).

Sd/-

**(RAMALINGAM SUDHAKAR)
PRESIDENT**

Sd/-

**(AVINASH K. SRIVASTAVA)
MEMBER, TECHNICAL**