

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No.249 of 2023
& I.A. No.886 of 2023**

IN THE MATTER OF:

Nike India Pvt. Ltd.

...Appellant

Versus

Enkay Brand Distribution Pvt. Ltd.

...Respondent

Present:

For Appellant: Mr. Arijit Prasad, Sr. Advocate with Mr. Himanshu Deora, Mr. Naqeeb Nawab and Ms. Neeharika, Advocates.

For Respondent:

ORDER

13.03.2023: This Appeal has been filed against the order dated 22.12.2022 by which Section 9 application filed by the Appellant has been dismissed on the ground of pre-existing dispute. Section 8 notice was issued on 06.11.2020 for an amount of Rs.3,15,53,639/-. The Corporate Debtor submitted a reply on 15.11.2020 to Section 8 notice disputing the claim and raising various claims against the Operational Creditor. Reply to the Section 9 application was also filed. The Adjudicating Authority after hearing the parties has dismissed the Section 9 application. The Adjudicating Authority after noticing the judgment of Hon'ble Supreme Court in "*Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd., (2018) 1 SCC 353*", has come to the conclusion that there was pre-existing dispute between the parties.

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2. Learned counsel for the Appellant challenging the order submits that the pre-existing dispute as was raised by the Corporate Debtor in the Reply to the Section 8 notice was a moonshine since in the Distributorship Agreement between the parties there was no liability which could have been fastened on the ground of sale on a lower price by the Corporate Debtor and further under the agreement between the parties, Distributorship Agreement, no claim could have been raised.

3. We have heard learned counsel for the Appellant and perused the record.

4. Reply to Section 8 notice has been annexed as Annexure A-10 to this Appeal where the Corporate Debtor has specifically denied the claim of the Appellant and has raised various claims in Para 9 to 14, totalling to Rs.3,45,59,139/-. In Paras 9 to 14 following has been pleaded:

9. *That after introduction of GST on July 01, 2017, even after signing of Addendum as on 1 July, 2017, NIKE did not reimburse the claims of GST in full on the closing stock held as on 30th June, 2017. Total claim was for Rs.71,44,303/- conveyed on 22nd January, 2018 on Inventory as on 30th June, 2017 and reimbursement was made only to the extent of Rs.42,64,632/- on 23rd February, 2018 and the remaining amount of Rs.28,79,671/- is still outstanding for which a number of reminders have been given but no reply received from NIKE. This statement of stock for GST and GST thereon was*

prepared by NIKE and for the sake of brevity, only the first and last page of this statement is annexed hereto with the email.

10. That 2% additional discount as per Addendum to Agreement has not been paid till date for stock in hand as on 31 May, 2019, conveyed through email on 19th June, 2019 and also on 17th July, 2019. This claim finally conveyed of Rs.27,00,000/- has not been settled as yet.

11. That on the purchases/transfers of stock billed from 1st June, 2019 till 30th November, 2019, having MRP Value of Rs.6,74,66,420/- and Invoice value of Rs.3,33,54,733/-. The additional discount of Rs.20,23,992/- which is due as per previous practice has not been credited to the account of the Distributor.

12. That there are defective stocks lying with the Distributor amounting to Rs.30,55,469/- at Invoice value, conveyed on 14th September, 2020, which has not been adjusted from the account of the Distributor. NIKE was to pick up this defective stock at its own but did not pick up this stock from the Distributor till date. For the sake of brevity, only the first and last page of this statement conveyed to NIKE is attached herewith.

13. That on mutual termination of this proposed Amendment No. 1 to Distribution Agreement, NIKE agreed to take back stocks worth Rs.8.00 crores (MRP) from the Distributor and also agreed to get sold the remaining stock in the market. This telephonic

conversation was confirmed through email on 31 December, 2019. NIKE has not lifted back the promised Return of stocks of Rs.8.00 crores (MRP Value) till date. Further the Distributor has been able to liquidate stocks worth Rs.4,34,09,785/- (MRP Value) having Invoice value of Rs.2,16,51,049/-, has been sold in the market for Rs.1,14,24,616/- on account of non-lifting of stock by NIKE as promised and also not getting liquidated the remaining stock, thereby incurred a loss of Rs.1,02,26,433/- on the Invoice value to the account of NIKE.

14. That balance stock in hand with the Distributor as on today is of Invoice value of Rs.1,86,78,510/-, (MRP Value of Rs.3,33,66,240/-) which is likely to be sold at a tentative total value of Rs.50,04,936/-, making a further loss of Rs.1,36,73,574/-. In case NIKE is interested to pick up this stock at Invoice value or at lower than Invoice Value, the difference of loss at actual would be accounted for instead of loss of Rs.1,36,73,574/-."

5. The reply to the Section 8 notice raises issues pertaining to pre-existing dispute between the parties. We are not satisfied with the submission of the Appellant that dispute is a moonshine dispute. Admittedly, Distributorship Agreement between the parties is not disputed and the Appellant has claims against the Corporate Debtor. Appellant is free to take recourse to the mechanism as provided in the Distributorship Agreement for realisation of its dues. But present is not a case, where Section 9 proceedings under I&B Code

can be initiated, when dispute is raised in reply to the Section 8 notice. We, thus, are of the view that the Adjudicating Authority did not commit any error in dismissing Section 9 application. Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

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