IN THE NATIONAL COMPANY LAW TRIBUNAL,

COURT II, MUMBAI BENCH

INTERLOCUTORY APPLICATION NO. 3630 OF 2023

IN

CP(IB) NO. 959(MB)/2022

Application u/s 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016.

In the matter of (I.A. No. 3630/2023):

Mohan Clothing Company Private Limited,

A company having its Registered Office at: 2E/22, Jhandewala Extension, New Delhi-110 055.

…Applicant

Versus

1. **Bank of India,**
   Having its Registered Office at: Star House, C-5, 'G' Block, Bandra-Kurla Complex, Bandra (East), Mumbai-400 051.

2. **Future Lifestyle Fashions Limited,**
   Having its Registered Office at: Knowledge House, Shyam Nagar, Off. JVLR, Jogeshwari (East), Mumbai-400 060.

3. **Mr. Ravi Sethia,**
   The Resolution Professional of Future Lifestyle Fashions Limited

…Respondents

In the matter between

Bank of India …**Financial Creditor**

Vs.

IN THE NATIONAL COMPANY LAW TRIBUNAL, COURT-II,
MUMBAI BENCH

I.A. NO. 3630 OF 2023
IN
CP(IB) NO. 959(MB)/2022

Future Lifestyle Fashions Limited
…Corporate Debtor

Order pronounced on 28.08.2024.

Coram:

Shri. Kuldip Kumar Kareer : Member Judicial.

Shri. Anil Raj Chellan : Member Technical.

Appearances (in Physical mode):

For the Applicant: Adv. Aman Arora a/w Aradhnan More.

For the Respondent: Adv. Nandita Bajpai a/w Nausher Kohli.

ORDER

Per: Coram.

1. This is an application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 11 of the N.C.L.T. Rules, 2016 filed by the Applicant/Lessor mainly seeking the following relief against the Respondent:
   a) The Tribunal may be pleased to issue a permanent mandatory injunction directing the Corporate Debtor/Respondent to return to the Applicant each one of the 11,696 of the Applicant's products [defined as shirts (both formal and informal), t-shirts, trousers, jackets, suits, blazers, khakhi shirts, shoes and accessories bearing the label 'Blackberrys' and/or 'Blackberrys Casuale'];

2. Case of the Applicant:

i. The Applicant is a company incorporated under the Companies Act, 1956 and is inter alia engaged in the business of manufacturing fashion apparel under the brand name 'Blackberrys' and 'Blackberrys Casuale'. The Corporate Debtor is a company incorporated under the Companies Act, 1956 and claimed to be one of the flagship companies of the Future Group. The Corporate Debtor owned and operated a chain of retail stores under the labels "Central" and "Brand Factory".

ii. The Applicant had been registered as a supply partner with the Corporate Debtor for around 20 years and had been supplying readymade garments and fashion merchandise to the Corporate Debtor for them to be marketed and sold through the Corporate Debtor's 'Central' and 'Brand Factory' stores across the country. The Applicant had supplied readymade garments and fashion merchandise to the Corporate Debtor on a Sale or Return ("SOR") basis i.e. the revenues generated by the Corporate Debtor from sales (of the Applicant's merchandise) to customers would be shared on the basis of the margin agreed between the parties and if products remained unsold for an agreed length of time, they would be returned back to the Applicant.

iii. Over the course of time, payments from the Corporate Debtor became irregular, and the Corporate Debtor started defaulting on its payment obligations. However, given the long-standing relationship between the parties, the Applicant continued making supplies for every fresh purchase order raised by the Corporate Debtor on its web portal. While the pending payments were one concern, what was also of concern to the Applicant was that its Products continued to be in possession of the Corporate Debtor.

iv. The Corporate Debtor had, vide its 16th August 2022 email, committed to send to the Applicant, a payment plan along with the inventory pick-up dates by 17th August 2022. However, the Corporate Debtor did not to do so. On

19th August 2022, the Applicant sent an email to the Corporate Debtor with the status of inventory and accounts receivable as on 19th August 2022. A statement containing a detailed break-up of the inventory in possession of the Corporate Debtor was provided. The Applicant further informed the Corporate Debtor that it would like to settle the accounts receivable for both 'Central' and 'Brand Factory' stores and pull back the inventory by 5th September, 2022. However, the Corporate Debtor's promises rang hollow as none of the Applicant's products were returned to it.

v. As a consequence, on 23rd August 2022 the Applicant was constrained to issue two claim notices to the Corporate Debtor. One claim notice was issued with respect to the 'Central' stores and the second with respect to the 'Brand Factory' stores. By way of the aforesaid Claim Notices, the Applicant, *inter-alia*, called upon the Corporate Debtor to make payment of the outstanding amounts towards the goods sold by the Corporate Debtor at its 'Central' and 'Brand Factory' stores and to return the Applicant's products which had been supplied to various 'Central' and 'Brand Factory' stores. In both these notices, the Applicant also provided a store-wise break-up of the products which had been supplied by it to the Corporate Debtor under the various Memorandum of Understanding executed from time to time.

vi. Thereafter, there were several e-mail exchanges between the parties, and meetings too were held with regards to the outstanding dues and return of inventory. However, since the goods were not returned to the Applicant, the Applicant was constrained to once again issue two Demand Notices dated 23rd December 2022 upon the Corporate Debtor. These demand notices reiterated the claims which had been advanced in the aforementioned claim notices. However, even the issuance of two demand notices referred-to-above did not make any difference. Therefore, on 10th April 2023, the Applicant, as a last attempt to resolve the issue, instructed its advocates to

issue two legal notices viz. one with respect to the 'Central' stores and second with respect to the 'Brand Factory' stores. By way of the aforesaid legal notices, the Applicant, *inter-alia*, called upon the Corporate Debtor to make payment of the outstanding amounts and to return the Applicant's products which had been supplied to the Corporate Debtor's stores. However, the default to comply with the notice on the part of the Corporate Debtor did not cease.

vii. Therefore, on 26th April 2023, the Applicant was constrained to approach the Hon'ble Bombay High Court and filed a Commercial Suit (COMSL/11870/2023) and Interim Application (IA/12083/2023) seeking ad-interim and interim reliefs. The reliefs were, *inter alia,* in the nature of a permanent mandatory injunction, directing the Corporate Debtor to return to the Applicant each one of the 11,696 of the Applicant's Products bearing the label 'Blackberrys' and/or 'Blackberrys Casuale' which are in the wrongful custody of the Corporate Debtor.

viii. The Applicant attempted to seek urgent reliefs from the Hon'ble Bombay High Court. However, by an Order dated 4th May 2023, the Company Petition filed by Bank of India against the Corporate Debtor before this Tribunal was admitted. Accordingly, in terms of Section l 4 of the Code, a moratorium has been declared and there is prohibition on the continuation of pending suits or proceedings against the Corporate Debtor.

ix. In view of the above, the Applicant is now constrained to approach this Tribunal with the above-captioned application seeking relief as stated hereinbefore.

3. Reply filed on behalf of Respondent Nos. 02 and 03:

The Resolution Professional of the Corporate Debtor has filed his Affidavit-in-Reply dated 09th October, 2023 on behalf of Respondent Nos. 02 and 03. The pleadings of the Respondents are briefly covered hereunder:

i. The Applicant has failed to bring on record a valid and binding MoU or any other document which has been duly signed by the Corporate Debtor in order to prove that the said MoU is valid and binding against the Corporate Debtor. Further, the Applicant has relied upon a purported Memorandum of Understanding dated 2nd March 2020 which describes the nature of the agreement as "Sale or Return Agreement" (@page no.23) and accordingly has sought return of allegedly unsold said products from the Respondent Nos. 2 and 3. It is pertinent to point that the MoU has not been signed by Respondent No. 2. Therefore, in the absence of any ratification of Respondent No. 2, the Applicant's reliance on the MoU is void and cannot be the basis for the Applicant to claim ownership of the 11,696 products (hereinafter referred to as "said products").

ii. The assets of the Respondent No.02 cannot be taken from the custody of Respondent No.03 by virtue of moratorium u/s 14(1)(d) of the Code. The purpose of moratorium is to keep the Corporate Debtor's assets together during the CIRP in order to facilitate the orderly completion of the same and to keep the company as a going concern. If the goods are ordered by the Tribunal to be returned to the Applicant, then it will affect the status of the Corporate Debtor as a going concern which is against the true spirit and intent of the Code.

iii. The Applicant has already filed its proof of claim under Regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 with the Respondent No.3 on 18th May 2023 for Rs. 8,10,03,206/- (Rupees Eight Crores Ten Lakhs Three

Thousand Two Hundred and Six Only) and the same is still under verification. Until the time such claim of the Applicant is under verification, the Applicant has no cause of action to file and maintain the present application. Further, from a bare perusal of the Claim Form it is clear that, the Applicant has already made a claim for not only its alleged outstanding dues but also for the return of unsold products i.e., 11696 items. It is respectfully submitted, in light of the fact that the Applicant's claim is still verification, there is no cause of action to file the present application. Therefore, the Applicant seems to be wrongfully exploiting its right to approach this Hon'ble Tribunal by creating prejudice against the Respondent No. 2.

iv. In view of the above, the Applicant is not entitled to claim any sort of reliefs against the Respondent Nos. 2 and 3 herein. Therefore, the Respondent submits that the Application ought not to be allowed and dismissed with costs.

4. **Rejoinder of the Applicant**:

a. Since the relevant terms and conditions of all the MoUs are near identical, the Applicant has annexed only a sample MoU to the Application. It is pertinent to highlight that prior to the Reply, Respondent No.2 never denied the subsistence of the MoUs and/or the fact that the Products were supplied by the Applicant to Respondent No. 2 under the said MoUs. In fact, Respondent No.2 has, in its emails dated 16th August 2022, 14th September 2022 and 21st September 2022 admitted to being in possession of the Applicant's Products as well as acknowledged its liability to return the unsold Products.

b. Out of the 11,696 Products in its possession, sometime in 2022, Respondent no. 2 has returned 2125 Products. The balance 9571 Products (5945 Products in respect of the Central malls and 3626 Products in respect of the Brand Factory

malls) are still in possession of Respondent No.2 and the same ought to be returned to Applicant. Vide the emails referred to hereinabove, Respondent no. 2 acknowledged that the Corporate Debtor is in possession of the Applicant's Products and admitted that it was in the process of returning the same. In view of the aforesaid, it is evident that prior to the Reply, Respondent no. 2 has neither denied the subsistence of this transaction with the Applicant nor denied its liability to return the unsold Products to the Applicant. It is for the first time in the Reply that Respondent No. 2 has turned complete volte face and challenged the existence and validity of the MoUs executed between the Applicant and Respondent no. 2. In view thereof, it is clear that Respondent nos. 2 and 3 's objection regarding the validity of MoUs in the Reply is completely baseless and devoid of merit.

c. As per Explanation to Section 18(1) of the Code, the assets owned by a third party in possession of the Corporate Debtor held under trust or under contractual arrangements including bailment, have been excluded from the assets and therefore, if the goods/inventory are returned to the Applicant, then the same would not be in teeth of moratorium. Hence, the plea of moratorium u/s 14(1)(d) taken by the Respondent is baseless.

d. The Applicant submits that the claim form has been filed by the Applicant to claim the outstanding amounts along with interest towards the Applicant's goods sold at the Corporate Debtor's stores viz. 'Central' and 'Brand Factory', and the amount of security deposit paid by the Applicant for fourty-three of the Central stores operated by the Corporate Debtor. Therefore, the contention of Respondent that the Applicant's claim being under verification and the application suffering from want of cause of action, is totally devoid of merit and liable to be dismissed. The Applicant reiterates that the claim form is filed to seek payment of the outstanding dues for the goods sold by the Corporate

Debtor and whereas, the present application is filed seeking return of unsold products of the Applicant which are in possession of the Corporate Debtor.

FINDINGS

5. We have heard the counsels representing the Applicants and the Respondent, and we have duly considered the rival submissions presented before this tribunal.

6. This is an application filed by the Applicant u/s 60(5) of the Code praying for directions to the Respondent to return the unsold inventory which was supplied by the Applicant to the Corporate Debtor on 'Sale or Return Basis'.

7. On perusal of records, we find that the Memorandum of Understanding ('MoU') dated March 02, 2020 relied upon by the Applicant, does not bear the sign and seal/stamp of the Corporate Debtor. Despite an objection being taken to that effect by the Respondent in his affidavit-in-reply, the Applicant has failed to bring on record the duly signed MoU(s) which were executed between the Applicant and the Corporate Debtor as is being pleaded by the Applicant. However, lack of a valid MoU on record does not disprove the case of the Applicant that that inventories were supplied by it to the Corporate Debtor, as the e-mail correspondences between the Applicant and the Corporate Debtor, the copies of which have been annexed to the application, shows that the Corporate Debtor in fact acknowledged the supply of inventories made by the Applicant to its Central and Brand Factory Stores.

8. Further, the email dated 14.09.2022, sent by one Mr. Ravikant Anwekar of Future Group (i.e. on behalf of the Corporate Debtor) to, *inter-alia,* Mr. Nirdosh

Kapil and Mr. Nitin Mohan acting on behalf of the Applicant company, the copy of which is annexed at Exhibit 'H-Colly', reads as under:

"Dear Nirdosh,

Update on inventory Status is as follows:
FLF team is now in Nagpur warehouse of RIL and is organizing Manpower, System and Transportation Matrix, Identification of Boxes has started and we will be able to inform you on RTV for you to arrange Pick up, in next 4-6 days' time.

For further update on Qty and No of Boxes and any other details pl contact Mr. Frank Ripley – 9353025895 frank.ripley@futurelifestyle.in

Regards,
Ravikant Anwekar.
Head Category (Central & Brand Factory)

9. 9.1. Therefore, on perusal of the aforesaid email, it becomes self-evident that not only the goods were supplied by the Applicant to the stores of the Corporate Debtor but also the Corporate Debtor was willing to return the same to the Applicant prior to initiation of CIRP. Further, the Respondent has not explicitly denied the fact of supply of goods by the Applicant to the Corporate Debtor, but has contended that such goods cannot be taken away from the custody of the Respondent on account of moratorium u/s 14(1)(d) of the Code. We agree with the aforesaid contention. For the purpose of determining whether recovery of goods by the Applicant during the period covered by moratorium is prohibited by Section 14(1)(d) of the Code, it is necessary to go through the provisions of Section 14(1)(d) and Section 3(27) of the Code which are reproduced hereunder:

"3. Definitions. In this Code, unless the context otherwise requires,

— xxx xxx xxx

(27) "property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property;"

Section 14 is set out as follows:

"14. Moratorium.

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

9.2. Thus, we see that the word "property" (and not "assets") has been defined u/s 3(27) of the Code to include goods and the expression "occupied by" would mean or be synonymous with being in actual physical possession of or being actually used by, in contra-distinction to the expression "possession", which would connote possession being either constructive or actual and which, in turn, would include legally being in possession, though factually not being in physical possession. Therefore, it is not much relevant for the Bench to get into the question of ownership or title to the goods supplied by the Applicant to the Corporate Debtor, as the actual physical possession of such goods by the Corporate Debtor is sufficient enough to be protected by the moratorium u/s 14(1)(d) of the Code.

10. In the present case, admittedly, the goods supplied by the Applicant are currently in possession of the Corporate Debtor and therefore, its recovery cannot be permitted amid the ongoing insolvency resolution process in view of the moratorium u/s 14(1)(d) of the Code. When a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced under Section 14 the moment a petition is admitted under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14. The statutory freeze that has, thus, been made is expressly limited by Section 31(3) of the Code, from the date of admission of an insolvency petition up to the date that the Adjudicating Authority either allows a resolution plan to come into effect or states that the corporate debtor must go into the liquidation. For this temporary period, at least, all the things referred to under Section 14 must be strictly observed so that the corporate debtor may finally be put back on its feet albeit with a new management.

11. 1. The Learned Counsel for the Applicant has drawn our attention to Explanation to Section 18(1) of the Code to contend that the assets owned by a third party in possession of the Corporate Debtor held under trust or under contractual arrangements including bailment, have been excluded from the assets and, therefore, the Ld. Counsel argues that if the goods are returned to the Applicant, it would not be in teeth of moratorium. However, we are unable to accept the aforesaid contention. A bare reading of Section 14(1)(d) of the Code would make it clear that it does not deal with any of the assets or legal right or beneficial interest in such assets of the corporate debtor. For this reason, any reference to Sections 18 and 36 becomes wholly unnecessary in deciding the scope of Section 14(1)(d), which stands on a separate footing. Our above

view is supported by Para 7 of the Judgment of Hon'ble **Supreme Court** of India in ***Rajendra K. Bhutta v/s. MHADA*** (Citation: [2020] 4 S.C.R. 305) which is reproduced hereunder:

"7. A bare reading of Section 14(1)(d) of the Code would make it clear that it does not deal with any of the assets or legal right or beneficial interest in such assets of the corporate debtor. For this reason, any reference to Sections 18 and 36, as was made by the NCLT, becomes wholly unnecessary in deciding the scope of Section 14(1)(d), which stands on a separate footing. Under Section 14(1)(d) what is referred to is the "recovery of any property". The 'property' in this case consists of land, ad-measuring 47 acres, together with structures thereon that had to be demolished. 'Recovery' would necessarily go with what was parted by the corporate debtor, and for this one has to go to the next expression contained in the said sub-section."

11.2. Hence, in view of the judgment of the Apex Court in Rajendra K. Bhutta v/s. MHADA (supra), we are unable to accept the contention of the Learned Counsel for the Applicant that since the unsold goods are owned by the Applicant, which are in possession of the Corporate Debtor under a contractual arrangement, they have been excluded from the assets and hence, its recovery by the Applicant is not prohibited. In view of the above-cited ruling of the Hon'ble Apex Court, as long as the goods are in actual physical possession of the Corporate Debtor, then, notwithstanding its title or ownership, we are of the considered view that its recovery during the CIRP period is barred by the moratorium u/s 14(1)(d) of the Code. Further, we notice that the goods supplied by the Applicant to the Corporate Debtor are shirts, t-shirts, trousers, jackets, blazers, etc. and such goods may be required to keep the stores of the Corporate Debtor operational so that the it may be kept running as a going concern and therefore, permitting recovery of such goods may adversely impact the CIRP as also the going concern status of the Corporate Debtor. However, if the goods supplied by the Applicant are needed by the Respondent to run the

stores of the Corporate Debtor so as to keep it as a going concern, then, in our considered view, the Applicant is entitled to be compensated with the price as per the contractual terms. The Applicant cannot be put to double jeopardy by depriving him of his goods under the pretext of moratorium and then by not paying him the price in respect of the goods which are sold by the Corporate Debtor during the CIRP period.

12. Counsel for the Respondent has submitted that since the Applicant has already filed a claim of INR 8,10,03,206/- and the same is still under verification, therefore, the present application cannot be entertained. The Applicant has clarified in its rejoinder affidavit that the said claim was in respect of the goods that were sold by the Corporate Debtor upto the insolvency commencement date for which no price was paid to the Applicant as per the contractual terms. Hence, we are of the opinion that the claim filed by the Applicant does not cover the unsold goods which are still lying with the Respondent/Corporate Debtor and thus, the present application cannot be dismissed on that ground. Further, in respect of the goods supplied by the Applicant which are sold by the Corporate Debtor after the insolvency commencement date, the same are not covered by the aforesaid claim and in our view, the Applicant is entitled to the price in respect of such goods as per the agreed terms. It is also not out of place to state that the aforesaid claim was lodged by the Applicant with the Respondent No.03 on 18.05.2023. As per Regulation 13(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the IRP or RP, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims. However, in the instant case, we notice that the aforesaid timeline has not been complied with, as the claim of the Applicant remains to be verified by the RP for over six months. Hence, in the

event the claim of the Applicant still remains unverified as on the date of this order, the Respondent No.03 is hereby directed to verify the claim of the Applicant forthwith without any further delay.

13. In view of the foregoing findings and discussions, we are not inclined to direct the Respondent to return the unsold inventory which was supplied by the Applicant to the Corporate Debtor. Accordingly, we pass the following orders:

ORDER

i. **I.A. No. 3630 of 2023 is hereby dismissed** leaving parties to bear their own costs;

ii. In the event the claim of the Applicant still remains unverified as on the date of this order, the Respondent No.03 is hereby directed to verify the claim of the Applicant filed on 18.05.2023 for INR 8,10,03,206/- forthwith without any further delay;

iii. In respect of goods supplied by the Applicant which have been sold or will be sold by the Corporate Debtor after the insolvency commencement date upto the completion of CIRP period, the Respondent shall be liable to pay to the Applicant the sale price/margin as per the terms agreed upon between the parties;

iv. Needless to state that after expiry of the CIRP period when the moratorium u/s 14 is lifted, in case the unsold goods are not returned, the Applicant shall be at liberty to claim back the same from the Corporate Debtor in accordance with law;

v. The above I.A. accordingly stands disposed of on above terms.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)