

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 4099/MB-VI/2019

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

IN STYLE FASHION

Address- 301, Tanishq Green,
5 Old Vijay Nagar Colony, Agra,
Uttar Pradesh-282004

...Operational Creditor

V/s

ADITYA BIRLA FASHION AND RETAIL LIMITED

Address: 701-704, 7th Floor,
Skyline Icon Business Park, 86-92 of A.K. Road,
Marol Village, Andheri (East), Mumbai,
Maharashtra-400059.

...Corporate Debtor

Reserved for Orders: 12.09.2023

Pronounced: 11.10.2023

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances:

Operational Creditor: Adv. Suresh Kumar Bhutani

Corporate Debtor: M/s. Lex Firmus

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. Background

1.1. This C.P. (IB) No. 4099/MB/C-VI/2019 (Application) was filed on 01.10.2019 by 'In Style Fashion', the Operational Creditor (OC), under section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of 'Aditya Birla Fashion and Retail Limited', the Corporate Debtor (CD). An amount of Rs. 1,05,89,714.83/- fell due to the OC from the CD against 2 pending bills which includes unpaid commission of 'Planet Fashion' amounting to Rs. 86,34,891/-, Salvageable Assets amounting to Rs. 15,26,681.11/- and Non-Salvageable Assets amounting to Rs. 4,28,142.72/- from August 2012 to August 2016. The OC has also claimed interest @ 24% per annum from August 2012 to August 2016 as per MSME Act.

1.2. The date of default as mentioned in the Part IV of the Application is 28.04.2017 i.e., the date on which the OC received the last part-payment of commission from the CD.

2. Contentions of OC

2.1. The OC is a partnership firm, engaged in the business of garments and other businesses and was acting as the Franchisee and Commission Agent of the CD for running the CD's showrooms in the name and style of 'Allen Solly' and 'Planet Fashion' at Agra, Uttar Pradesh and had invested in the interior of the said showrooms. The parties had entered into two Agreements dated 08.07.2011 and

20.12.2011 for this purpose. The said showrooms for which the OC provided its services were closed on 02.02.2016 as admitted by the CD in its reply to the Demand Notice dated 07.08.2019 under Section 8 of the IBC. Consequently, the stock of readymade garments was returned by the OC to the CD.

2.2. Th OC further states that the computation sheet for reconciliation regarding pending commission was sent to the CD, after receipt of the last commission by it on 28.04.2017. The OC sent various reminders for release of dues; however, there was no response from the CD till issuance of demand notice. The OC has annexed its bank statement for the period from 01.04.2016 to 26.08.2019 to evidence the same. The last payment of Rs. 51,283.28/- made by the CD is reflected from the said statement. In view of the above, the OC contends that CIRP in respect of the CD be initiated for an unpaid operational debt of Rs. 1,05,89,714.83/- which fell due, payable and defaulted by the CD.

3. Contentions of CD

3.1. The CD on the contrary, disputes the amount claimed by the OC in toto and submits that no amount is due and payable, as the alleged claims are beyond the scope of 'Allen Solly Agreement' as per clauses 5.1, 5.3 and 6.10 of the said Agreement. According to the CD, the claim is contrary to the agreement recorded in the minutes of the meeting dated 28.08.2012, at which reduction of commission payable to the OC was decided. Consequently, 9 debit notes were shared by

the OC to the CD. The CD further contends that though the OC had issued debit notes and agreed to set-off the amount of approximately Rs. 14 lakhs *vide* email dated 09.12.2013, pursuant to the meeting dated 28.08.2012, the same was adjusted in the commission for the subsequent months, and hence, no amount is due and payable by the CD.

3.2. The CD also contends that the present Application is barred by limitation since the date of default mentioned in the OC's demand notice was 27.08.2016, whereas the Application was filed only on 01.10.2019, which is beyond the limitation period of 3 years from the date of default.

The CD further submits that the liability to make investments against the interiors and renovation of interiors at the premises as per the 'Allen Solly Agreement' vested solely with the OC and the amounts claimed under this account were not reimbursable by the CD in terms of the Agency Agreement. As per Clause 7.1, the CD was only liable to pay to the OC, commission @17% of the net sales value and the service tax on the commission on receipt of the commission bills from the OC, and also bank guarantee charges on receipt of necessary supporting documents from the OC. According to the CD, 'Allen Solly Agency Agreement' was terminated by the CD on 02.02.2016 and the OC deliberately clubbed the alleged claims out of the two separate agency agreements. Therefore, it is the case of the CD that the OC's belated claim against Salvageable and Non-Salvageable items for the 'Allen Solly Agreement' is beyond their entitlement and that there is no

debt and default under the Agency Agreements, and in terms of Section 3(12) of the IBC.

3.3 The CD contends that there was a pre-existing dispute between the OC and the CD before the issuance of the demand notice. As per the CD, the OC *vide* email dated 09.12.2013, admitted that the commission recoverable by the CD to be Rs. 14,79,329/- as the same was paid in excess by the CD. This amount was to be divided by the CD into 6 installments and deducted from the commission payable to the OC for the months of October 2013 to March 2014. The CD submits that the OC has intentionally avoided to file its ledger account and has filed only the debit notes issued by it and computation prepared by it. The above do not disclose the correct amounts received by the OC in its account, according to the CD.

3.4. The CD denies receipt of letters dated 24.06.2019, 08.12.2018 and 20.08.2018 demanding repayment of the outstanding dues and states that the said letters were neither annexed to the Demand Notice nor shared with it separately and that it was merely an afterthought to annex the same to the present Application subsequent to its reply denying the claims of the OC. Further, the OC has deliberately not disclosed the meeting held on 28.08.2012 between the officials of both parties for reconciliation.

3.6. The CD further contends that the present Application is an attempt by OC to abuse the process of law for recovery of money. It further states that the OC failed to submit the certificate from the

financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the CD in terms of Section 9(3)(c) of the IBC. The CD further contends that the OC's power of attorney dated 26.08.2019 is insufficiently stamped.

4. Rejoinder by OC

- 4.1.** With respect to the date of default as mentioned as 27.08.2016 in the demand notice dated 07.08.2019, the OC submits that it was an 'advertent' error, which was rectified by it in the Application. The OC, banks upon the decision of the Hon'ble NCLAT in *Atharva Auto Logistics Pvt Ltd v Intec Capital Limited & Anr. [Company Appeal (AT) Insolvency No. 303/2022, decided on 24.03.2022]* to buttress this point.
- 4.2.** The OC further contends that the default by the CD, within the meaning of Section 3(12) of IBC, is indicated in the email dated 18.11.2016, wherein the CD has asked for a list of Salvageable and Non-salvageable Assets to proceed with 'Full and Final' settlement. The OC has also produced WhatsApp communications with the CD on 27.01.2020 and 29.01.2020 as evidence of debt and liability.
- 4.3.** According to the OC, the minutes of meeting alleged to have been held on 28.08.2012 are forged and fabricated and that the person who signed the minutes was not the authorised representative of the OC.

4.4. It is also the contention of the OC that it has complied with clauses 5.1 and 5.3 of 'Allen Solly Agreement' while Clause 6.10 is inapplicable as its showroom was already closed on 02.02.2016. The liability of the CD to pay unpaid debt includes the investment made by OC as per the annual depreciation rate of 20% p.a.

5. **Analysis & Findings**

5.1. The relationship between the OC and the CD arose by virtue of Agency Agreements dated 08.07.2011 and 20.12.2021 whereby the OC was appointed as a non-exclusive agent of the CD, *inter alia*, to sell branded apparels of the CD. The Agreements were terminated on 02.02.2016. The case of the OC rests on the email sent by the CD to the OC dated 18.11.2016, asking the OC for the invoices of Salvageable and Non-salvageable Assets, which according to the OC is an admission of debt and liability. The OC has produced certain invoices in the name of the CD, raised by it on the same day. According to the OC, this email evidences existence of non-payment of debt, which is due and payable and is not paid by the CD within the meaning of section 3(12) of the IBC. However, we find that the email dated 18.11.2016 only indicates that the CD had asked for Salvageable and Non-Salvageable assets for settlement of accounts to find out the final figure for payment. It can no way be construed as an admission of debt and liability of the amount claimed by the OC as having fallen due and payable. Further, it is seen that clauses of both the Agreements dated 08.07.2011 and 20.12.2011 are similar.

Clause 5.1 respectively of the Agency Agreements show that liability to make investments in respect of interiors, shall vest with the OC. Clause 6.1, respectively of the Agency Agreements stated that liability for renovation shall be borne by the OC. Clause 1.11 respectively of the Agency Agreements indicate that the investment made by the OC towards interiors as provided under clause 5.1 shall be depreciated by 20% every year, and at the end of the fifth year, the title to such interiors shall vest with the CD. Hence, the OC's claims in respect of the above fall flat.

- 5.2.** There was certain revision with respect to the commission *vide* minutes dated 28.08.2012 as signed by the representatives, which has been denied by the OC. The OC contends that there was neither any meeting between the OC and the CD on 28.08.2012 nor any arrangement/agreement made on 28.08.2012 and that the CD has falsely created the minutes of the meeting along with making a forged signature of its representative. However, on examination of the records, it is seen that the person who signed as the representative of the OC was one Shri Nitesh Agrawal. We find the name of Shri Nitesh Agarwal in the news report on the opening of the flagship shop of the OC, reported by 'dlamedia.com' dated 13.04.2012. The said news report, *inter alia*, states that "*The flagship store franchisee **Nitesh Agrawal** said on the occasion of the inauguration of the store, customers can avail a discount of Rupees five hundred on purchase of Rupees three thousand worth of clothing.*" (Emphasis supplied). This is evident from the English translation of the said news report

(which is in Hindi), enclosed as Annexure X of the Application on page 105A. Again, the same Shri Nitesh Agrawal made an admission *vide* email dated 09.12.2013 that an amount of Rs. 14,51,329/- which was paid in excess by the CD to the OC could be divided into 6 installments and recovered from the commission of October, 2013 to March, 2014. Interestingly, OC's claim as to admission of debt by the CD is based on this email dated 09.12.2013. Furthermore, Shri Nitesh Agrawal is stated to be the husband of Mrs. Vinita Agrawal, who represents the partnership firm of the OC and has filed this Application, as seen at Page 41 of Annexure 6 and at Page 70 of Annexure 7 of the Application. The same Shri Nitesh Agrawal has signed the minutes dated 28.08.2012. Shri Nitesh Agrawal's signature is verifiable as witness of the partnership deed dated 10.07.2007 and as attached at Page 26 of Annexure 1 of the Application. Also, copy of the Aadhaar card of Smt. Vinita Agarwal at Page 31 of the Application shows her husband's name as Shri Nitesh Agrawal. Shri Nitesh Agrawal was also a witness in the partnership deed of the OC dated 10.07.2007 as produced at Page 23 of the Application. All the above show that the person who signed the minutes dated 28.08.2012 is the same Shri Nitesh Agrawal, who has nexus to the business transactions of the OC, and was its authorised representative to sign the minutes. In view of the above findings, the OC cannot now claim that the said minutes drawn by the OC and the CD is fabricated. The email dated 09.12.2013 sent to the CD by the OC clearly indicates the existence of pre-existing dispute between

the OC and CD. Further, the OC has chosen to produce only certain invoices raised by it but has not made available any ledger statement reflecting actual amounts due and payable by the CD. Hence, all these go against the claim of the OC.

- 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 of the OC and this is also found against the OC.

ORDER

In the result, this C.P./Application fails and is **Rejected**. However, this order does not preclude the Applicant/OC from pursuing any other remedy if available to it before any legal forum. Ordered accordingly.

**Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)**

**Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)**

//TJ/