

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

**IA No. 3439 of 2022
IN
CP (IB) No. 527/(MB) 2022**

Under Section 60(5) read with Other relevant provisions and Regulations of the Insolvency and Bankruptcy Code, 2016.

Koinonia Coffee Private Limited

Having address at: House No. 66, Chuim, Ground Floor & 1st Floor, Chuim Village, Khar (West), Mumbai-400 052

.....Applicant

Vs.

1. Vijay Kumar V Iyer

The Resolution Professional of Future Retail Limited

Having registered address: Deloitte India Insolvency Professionals LLP, 32nd Floor, Tower 3, One International Centre, Senapati Bapat Marg, Elphinstone Road (West), Mumbai- 400 013

2. TNSI Retail Private Ltd.

Room No. 107, 1st Floor, Pratap Bhawan, 5 Bahadur Shah Zafar Marg, New Delhi- 110 002

3. Aman Sharma

CEO of Future Retail Limited and TNSI Retail Limited

4. Mukul Jain

CFO of Future Retail Limited and TNSI Retail Limited

.....Respondents

In the matter of

Bank of India

... Financial Creditor

Vs

Future Retail Limited

... Corporate Debtor

Order delivered on: 28.04.2023

Coram:

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Shri Shyam Babu Gautam

Shri Kuldip Kumar Kareer

Appearances:

For the Applicant

: Adv. Ashish Kamat

For the Respondent No. 1

: Adv. Ameya Gokhale

For the Respondent No. 2

: Adv. Ankit Lohia

ORDER

Per: Coram

1. This is an Application filed by the Applicant, **Koinonia Coffee Private Limited** seeking directions from this Tribunal to the Resolution Professional (RP) of the Corporate Debtor from this Tribunal to, *inter alia*:
 - (i) Take custody of the Foodhall business of the Corporate Debtor and to operate the same as a going concern;
 - (ii) Initiate investigation into the affairs of Foodhall and submit a report with respect to the legality of the affairs of Foodhall;
 - (iii) Restrain the employees of the Corporate Debtor and the Respondent No. 2 from interfering in or dealing with the property of the Corporate Debtor and for direction against the

RP for a payment of the outstanding sum due to the Applicant by treating it as a part of Corporate Insolvency Resolution Process (CIRP) costs.

2. The relevant facts in brief are as follows. The Corporate Debtor was admitted into CIRP vide **Order dated 20th July 2022** and subsequently, the Respondent No. 1 was appointed as the RP of the Corporate Debtor. The Respondent No. 2 (hereinafter referred to as “TNSI”) is a wholly owned subsidiary of the Corporate Debtor. The Applicant is engaged in the business of selling specialty coffee and operates various café shops in the country including Coffee shops in the “Foodhall” shops of the Corporate Debtor. Foodhall is a business vertical and an asset of the Corporate Debtor and is essentially a high-end supermarket having multiple stores in major cities like Mumbai, Delhi and Bangalore. The Applicant is a Vendor of Foodhall since the year 2018.
3. In order to crystalize the terms between the parties, a **Shop-in-Shop Agreement dated 30th November 2021** (hereinafter called “Earlier Agreement”) was executed between the Applicant and the Corporate Debtor vide which the relationship between the parties was defined in the following clauses:
 - a. In Clause 1, it was agreed that the Applicant would set up its own shops within the Foodhall shops of the Corporate Debtor at 5 locations;
 - b. In Clause 2.2, it was agreed that the Applicant would be the exclusive roasting and coffee serving partner of Foodhall in Mumbai

- and Delhi which meant that Foodhall could not engage any other coffee serving partner in its premises, other than the Applicant;
- c. In Clause 2.2, it was agreed that the parties would have a revenue sharing model i.e. the invoice would be raised in the name of the Corporate Debtor and then the Applicant would raise an invoice on the Corporate Debtor for its share of the revenue which the Corporate Debtor would then pay to the Applicant.
 - d. In Clause 2.3, the Appellant and Foodhall agreed to co-brand the products sold by the Applicant.
 - e. In Clause 8.1, it was agreed that the term of the Agreement was 5 years.
 - f. In Clause 8.4, it was agreed that the Agreement was Subject to a lock-in of 3 years, which lock-in is still subsisting upto 30th November 2024. Pertinently, during the lock-in period, the Corporate Debtor has no right to terminate the Agreement.
4. In accordance with the above terms, the Applicant continued to run its business at 5 locations out of which 3 were in Mumbai, 1 in Delhi and 1 in Gurugram. Due to financial difficulties faced by the Corporate Debtor and their consequent inability to meet their payment obligations towards the Applicant, the Applicant and the Corporate Debtor entered into a **Fresh Shop-in-Shop Agreement dated 19th March 2022** (hereinafter referred to as “New Agreement”) which was intended to supersede and replace the Earlier Agreement. The key change in the New Agreement was that the revenue sharing model was reversed, which meant that it was the Applicant who would now raise invoices on the customers and would then pay the Corporate Debtor its share from the revenue generated. This new method of invoicing was

implemented in 3 out of 5 coffee shops as for the remaining 2 locations, the Corporate Debtor was unable to provide the necessary documents to permit the Applicant's registration with the GST authorities and therefore, the invoicing continues to be in Foodhall's name. The Applicant also appropriated the Security Deposit of Rs. 25,00,000/- towards the outstanding dues of the Corporate Debtor.

5. Subsequently, the representative of the Corporate Debtor informed the Applicant that TNSI had been appointed as the "operator" of the Foodhall Shops after the Corporate Debtor and TNSI entered into a **Business Service Agreement dated 14th April 2022** (hereinafter referred to as "**BSA**") vide which the control of the Foodhall shops was transferred to TNSI. The representatives of the Corporate Debtor, however, informed the Applicant that the arrangement between the Applicant and the Corporate Debtor would continue but, for internal reasons, the invoices for payment would now be raised on TNSI instead of the Corporate Debtor. Accordingly, the Point of Sale equipment of the Corporate Debtor was replaced with that of TNSI and the Applicant started raising invoices on TNSI under the belief that it was only an operator of the Corporate Debtor. Meanwhile, the Corporate Debtor was admitted into Corporate Insolvency Resolution Process (CIRP) by this Tribunal vide **Order dated 20th July 2022** and the Respondent No. 1 was appointed as the RP of the Corporate Debtor.
6. The Applicant submits the following:

- a. **Firstly**, the Applicant submits that they have a valid, binding and subsisting Agreement dated 19th March 2022 (i.e. new Agreement) with the Corporate Debtor. Since the Applicant is operating its Coffee shops inside the Foodhall premises and thereby generating revenue for the Corporate Debtor, the Applicant is entitled to their share in revenue stipulated under the new Agreement. The Applicant argues that since TNSI is an agent of the Corporate Debtor and an operator of Foodhall, they are bound by the new Agreement and by extension, failure of TNSI to make payments to the Applicant is to be construed as the failure of the Corporate Debtor to fulfil their obligations.
- b. **Secondly**, since TNSI is the wholly owned subsidiary of the Corporate Debtor, the RP must exercise full control over TNSI and its management during the subsistence of CIRP. The Applicant cites Section 18(f) of the Code to argue that the RP is duty bound to take control of the assets of the Corporate Debtor. The Applicant alleges that by not taking over the assets of the Corporate Debtor and by refusing to pay the vendors of Foodhall, the RP is diminishing the value of the Corporate Debtor as a going concern and thereby, jeopardizing its chances of a successful revival.
- c. **Thirdly**, it is submitted that some part of the revenue generated from the coffee shops is still collected by the Corporate Debtor/TNSI out of which the Applicant's share is being held in trust by the Corporate Debtor/TNSI. Keeping in mind the fact that the Applicant generates revenue for the Corporate Debtor, it is argued that the monies due and payable to the Applicant under the new Agreement

by the Corporate Debtor either directly, or through its agent, TNSI, constitute CIRP costs and that it is the RP's legal duty to ensure the timely payment of the same in order to keep running the business of the Corporate Debtor as a going concern.

- d. **Fourthly**, the Applicant submits that the BSA executed between the Corporate Debtor and TNSI seems to be fraudulent and a back-dated document since it has been executed on the same date on which Bank of India, a Financial Creditor of the Corporate Debtor, filed a Petition under Section 7 of the Code. Despite it being a material transaction, the details of the BSA was never disclosed to the Stock Exchanges. Further, despite being a Vendor of the Corporate Debtor which was going to be substantially affected by the terms of the BSA, the Applicant was never provided with a copy of the same. According to the terms of the BSA, the Corporate Debtor has retained complete control over the appointment of Vendors (which includes the Applicant) and therefore, TNSI has no option but to work with the Vendors appointed by the Corporate Debtor. Since the new Agreement between the Applicant and the Corporate Debtor stipulates a lock-in period of 3 years until 30th November 2024, TNSI has no right to terminate the Agreement by itself.
- e. **Fifthly**, the Applicant points out that there is no actual distinction between the Corporate Debtor and TNSI as the employees of the Corporate Debtor seamlessly transition to become employees of TNSI by just changing their e-mail IDs while communicating with the Applicant. Moreover, according to the terms of the BSA, TNSI

is obligated to pay 1-5% of the net sales to the Corporate Debtor, for a business that has margins between 20%-30% and *a fortiori*, the ulterior motive behind the BSA appears to be to keep the Foodhall business outside the purview of CIRP of the Corporate Debtor and to siphon off its proceeds.

7. The RP has filed a **Reply dated 9th January 2023** to this Application wherein it is submitted that the RP has already appointed M/s Nangia and Co LLP as the Transaction Review Auditors to ascertain if the Corporate Debtor has been subjected to any transaction which can be classified as preferential, undervalued, extortionate, fraudulent or wrongful trading under the provisions of the Code. This analysis is currently in progress wherein the Transaction Auditors are reviewing various transactions including the BSA. The RP submits that he shall take further action and file the necessary applications before this Tribunal on the basis of the reports submitted by the Transaction Auditors.

8. Further, the RP states that even though TNSI is a wholly owned subsidiary of the Corporate Debtor, the management of TNSI is not under the control of the Corporate Debtor and TNSI operates as a separate entity. The RP relies on the BSA, which commenced on 28th April 2022 and is to subsist for a period of one year, to explain his position on the commercial arrangement between TNSI and the Corporate Debtor. Moreover, it is submitted that the Applicant themselves initiated the process of vendor registration under TNSI after due acknowledgement of the transfer of operations from the Corporate Debtor to TNSI vide e-mail dated 19th April 2022, a copy of which has

been annexed to the Reply. Based on this, the RP argues that since the Applicant has evidently acknowledged such migration of operations and in effect, endorsed the BSA, the RP is not obligated to make payments of any purported dues to the Applicant. The Respondent No. 2 has also filed a **Reply dated 31st January 2023** to this Application.

FINDINGS

9. We have heard the Counsels appearing for the parties at great length. On perusal of the instant Application and the documents on record, it is seen that the primary issue for consideration before us is whether the BSA is valid and legal. In this regard, we observe that the RP is cognisant of the contentious nature of the BSA and other transactions related to it and has already initiated the Transaction Review Audit of various transactions to ascertain whether any transactions fall under the ambit of preferential, undervalued, extortionate, fraudulent or wrongful trading under the provisions of the Code. We recognise the fact that though the Applicant has filed this Application at a premature stage i.e. prior to the completion of the Transaction Audit, the apprehensions of the Applicants are legitimate.
10. In view of the foregoing, the RP is directed to take all necessary steps to secure that portion of the revenue generated by the Foodhall business that is owed to the Applicant in a separate escrow account until the completion of the Transaction Review Audit and the submission of its final Report to the RP. In case the RP finds any transaction falling under the ambit of preferential, undervalued, extortionate, fraudulent or wrongful trading, after perusal of the final Transaction Audit Report,

the RP is duty bound to file an appropriate Application before this Tribunal under relevant provisions of the Code.

11. With the above observations, IA No. 3439 of 2022 is disposed of in the above terms.

Sd/-

**SHYAM BABU GAUTAM
(MEMBER TECHNICAL)**

Sd/-

**KULDIP KUMAR KAREER
(MEMBER JUDICIAL)**

Anusha
28.04.2023