

IN THE NATIONAL COMPANY LAW TRIBUNAL,
NEW DELHI
COURT-VI

C.P. NO. IB-1016 (ND)/2019

IN THE MATTER OF:

M/S Renu Shukla

..... Petitioner

V.

Varun Beverages Limited Respondent

SECTION: Under Section 9 of The Insolvency and Bankruptcy Code, 2016

Judgment delivered on: 17.12.2019

Coram:

(Dr.)P.S.N PRASAD, HON'BLE MEMBER (J)

DR. V.K. SUBBURAJ, HON'BLE MEMBER (T)

Present: Mr. Satish Kumar, Advocate.

ORDER

(Dr.) P.S.N PRASAD, HON'BLE MEMBER (Judicial

1. The present application has been filed by Ms. Renu Shukla, partner of partnership Firm named M/s. Mahadeo Traders, who has been authorized by the operational creditor, vide authorization dated 11.03.2019, to initiate a corporate insolvency resolution process against M/s. Varun Beverages Limited.



2. It is the case of the applicant that Mahadeo Traders, is a partnership firm formed on 28.08.2013 with two partners namely Smt. Renu Shukla and Sh. Vinod Kumar Upadhyay.
3. It is stated that as per the requirements made by M/s. Pepsico to fulfill the eligibility conditions for obtaining sole distributorship and to fulfill its obligations required under the agreement, M/s. Mahadeo Traders invested huge sum of Rs. 38,90,000/- (Thirty eight lacs ninety thousand only) details are given in the table below:

SI.NO.	ITEM	DATE	AMOUNT IN RS.
1	PREPARATION OF 2900 SQ. FEET SHED FOR KEEPING STOCK, OFFICE, OFFICE EQUIPMENTS AND FURNITURE.	2014	Rs. 8,00,000/-
2	SECURITY DEPOSIT	2015-16	RS. 5,90,000/-
3	TATA TRUCK 407	2015	RS. 6,75,000/-
4	CASH	2015	RS. 12,25,000/-
5	PROFIT FOR ONE YEAR INVESTED	2017-2018	RS. 6,00,000/-
		TOTAL	RS. 38,90,000/-



4. It is also stated that a distributorship agreement was entered between the operational creditor and Pepsico under which sole distribution rights of products manufactured by Pepsico were given to M/s. Mahadeo Traders..
5. That the corporate debtor took over the business interest of distribution of Pepsico products in the year 2015 and since then operational creditor is distributing the product of Pepsico while dealing with corporate debtor on the same original terms and conditions of the above said distribution agreement.
6. It is claimed that under the terms and conditions of the distribution agreement the corporate debtor, before termination of the agreement, was obliged to follow the terms and conditions provided under the relevant clauses of the distribution agreement but the corporate debtor, in utter breach of the terms and conditions of the distribution agreement abruptly stopped supplying goods to the operational creditor w.e.f. October 2018.
7. It has been argued that the corporate debtor in violation of the terms and conditions of the distribution agreement, granted distributorship to other firm belonging to other partner of operational creditor. Thus, there is no dealing between corporate debtor and operational creditor resulting in heavy losses to M/s. Mahadeo Traders.



8. Therefore, it is stated that the corporate debtor is liable to pay an amount of Rs. 38,90,000/- and interest @ 18% per annum up to March 2019 amounting to Rs. 3,50,100/- totaling to Rs. 42,40,100/- to the applicant.
9. The applicant had issued demand notice to the corporate debtor through registered post on 23.03.2019 which was duly served and received by the corporate debtor on 25.03.2019. The corporate debtor vide its reply dated 02.04.2019 the corporate debtor denied the existence of debt due to the operational creditor.
10. With regard to the reply of demand notice filed by the Corporate debtor the operational creditor has submitted that the reply is false, bundle of lies, misconceived, illegal being contrary to the applicable laws thus, unsustainable in the eyes of law for the following reasons:
- a) That the corporate debtor has not referred to any clause or statutory document as envisaged under the code to support its claim that no debt is due and the manner in which it has been paid to the operational creditor.
- b) That the corporate debtor has not submitted certified copies of the ledger account in support of its claim in reply that the security amount has been refunded or adjusted.



c) That the corporate debtor instead submitted copy of an e-mail dated 16.10.2018 intimating closure of account with them along with a copy of alleged statement of final statement. This document is prima facie false and manufactured in so much as it has been falsely stated in the said settlement that "M/s. Mahadev Traders has resigned from the distributor ship without any document containing the said resignation. Further the said settlement has not been validly executed by the parties to the distribution agreement, nor it bears the seal of Varun Beverages nor it mentions the name of the person who has signed it on behalf of the corporate debtor nor it has date and resolution number as to when the said person has been authorized to enter into settlement with the operational creditor nor the said settlement is signed by both the partners of the operational creditor especially when the distribution agreement between the parties has been signed by both the partners.

11. The respondent filed its reply and raised various objections against the admission of the present application. Gist of Contention of corporate debtor are as:

11.1 Whether the Petitioner can claim to be an Operational creditor under the Distribution Agreement dated 24.03.2015 at all?

1. The petitioner has wrongly relied upon an undated and unsigned distribution agreement which it claims to have been signed between her partnership firm



Mahadev Traders and Pepsi Co. The Respondents have nothing to do with the said undated Agreement.

2. The respondents (Operational-debt), as franchisee of Pepsi Co., had taken over territory rights from Pepsi Co. for the Gazipur Market. Thereafter, OD appointed Mahadev Traders (a partnership with two partners namely Petitioner and one Vinod Kumar Upadhyay) as distributor of carbonated beverage products produced by the OD as franchisee of Pepsi Co, in its factories vide Distribution Agreement dated 24.02.2015 executed between the firm Mahadev Traders and the OD. Pursuant to the said Distribution Agreement, the said Firm shall buy all products produced by the OD on principal to principal basis from the OD and pay price for it to OD. The firm shall then sell and distribute the products in the market to its retail buyers. The following features of the Distribution Agreement defining role of Mahadev Traders are important:

- Distributor to effectively distribute the products ensuring fair and equitable distribution within the Territory so as to grow the market share.
- Distributor to employ and provide such no of vehicles such as trucks, tempos and three wheelers found necessary for efficient and



adequate distribution of the Products. Employ salesmen, supervisor etc., shall have a proper warehouse/godown to stock the Products.

- Since some of the Products are produced and sold by OD in returnable glass bottle and crates (property in which continues to ret and belong to OD), Distributor responsible to collect such glass and return to OD. To secure this, Distributor to keep a specified amount as security deposit with OD. In case of non-return of such glass, OD has right to adjust and recover value of such glass and crates from such security deposit.
- OD at its discretion provides Neon Signs, posters, visicooler/refrigerators etc to assist the Distributor in promoting sale of its products. Property in such material continues to vest in OD. Therefore, expense incurred in placing these Neon Signs, refrigerators etc in the market by the Distributor is reimbursed to him by OD.
- Products sold to distributor per invoices issued for each transaction. Goods sold on principal to principal basis. On delivery property in gods vests in distributor. Hence, risk passes to distributor on delivery. No service whatsoever. No fee can be claimed by



distributor for role it plays a distributor per Distributor Agreement dated 24.02.2019.

- Goods are sold to Mahadev Traders under invoices issued from time to time. Samples of invoices attached.

11.2. Can it be held that the petitioners firm was providing “services” of the Company?

1. The petitioner has made a futile attempt to argue that the Firm Mahadev Traders was providing “services” to the company. The argument is absurd and lacks any legal basis. Clauses of Distributor Agreement are very clear and candidly state that Mahadev Traders was appointed to buy company Products to be re sold by them in the market on principal to principal basis. The property of the Products shall pass on to the firm immediately on delivery.

2. Roles to be performed by the Firm were candidly and clearly stated in the agreement dated 24.02.2015. Products were sold to distributor under specific invoices issued from time to time for each transaction.

3. Distributor was to place assets belonging to the company like Neon Signs and Refrigerator in its market which will assist the firm to promote sale of its products. Since these assets belonged to the company all through, expense incurred in doing so, would be reimbursed to the Distributor as per process. No other revenue or fee payable



to the distributor other than what is stated in the Distributor Agreement. No service Fee Payable.

11.3. Whether claim as made in the petition can be treated as “Operational debt” as defined under the provisions of Section 5(21) of IBC, 2016.

1. Petitioners claim for a sum of Rs. 38,90,000/- which she claims to have ‘invested’ towards setting up the business of Mahadev Traders and its constituents such as cost of sheds, office furniture, cost of Tata Truck, cash, profit for year 2017-18 which adds up to the aforesaid sum of Rs. 38,90,000/- have been spelt out. Interest @ 18 % per annum on the said sum of Rs. 38,90,000/- has also been claimed. The said sum has been claimed as ‘loss’ suffered due illegal termination of agreement, towards ‘damages’ on account of loss suffered by the petitioner as loss of profit, wastage of investment made on the infrastructure.

2. A claim for ‘investment’ made in the business and a claim towards ‘damages’ suffered on account of ‘loss’ suffered due illegal termination of the agreement, can never be termed as ‘Operational Debt’ as defined in Section 5 (21) of IBC, 2016.

3. The reality is that the petitioner was having some serious disputes with the other co-partner of the firm (Mr. Vinod Kumar Upadhyay) and wrote letter dated 18.08.2018. A Letter dated 09.08.2018 being a certificate issued by the Union Bank of India, Gazipur which states that the Firm’s bank account was frozen at the behest of petitioner due infighting between the partners. Clearly therefore running of the



Firm to do business of distributorship was becoming difficult. Finally, the partners approached the OD and tendered resignation of the firm as a distributor of the company products and asked for settlement of account. Pl see Letter dated 01.10.2018 at page 42 of the reply filed by the OD. Together with this, a Ikrarnama dated Nil duly signed by both the partner of the firm was also submitted. Pl see page 43 of the reply. This showed that both the partners had agreed as regard dissolution of the firm and settlement of their accounts. It is in this background the firm tendered its resignation as distributor of the company which was duly accepted by the company and its accounts were settled vide mail dated 15.10.2018.

4. Later on, the petitioner has done a second thought in the matter and wrote letter dated 04.10.2018. Alleged other partner is doing a loot. Talked about filing of F.I.R.

5. Thereafter, mail dated 16.10.2018 sent to petitioner's husband Krishna Nand Shukla who had visited OD's office and discussed the issue of settlement of account of the Firm. Conveyed no payment due. Also that suitable new distributor shall be appointed. What it therefore means is that:

(a) The alleged claim of the petitioner's is not the claim of "debt" as defined in the IBC, 2016 but is merely a claim for recovery of investment made in setting up of the firm and damages on account of alleged termination of its Distributorship. Such a

7


claim of “damages” cannot be treated as “Operational Debt” within the scope of IBC, 2016.

(b) The basic grievance seems to be alleged illegal termination of the Distribution Agreement dated 24.03.2015. Petitioner admits that she had signed an Ikararnama dated Nil with other partner for dissolution of the firm but claims that the Ikararnama was not acted upon. Pl see Page 15 of rejoinder. This per se establishes that this petition is nothing but an eyewash and real aim is to settle a dispute between two partners of the Firm under the garb of petition filed under Section 9 of the IBC, 2016.

(c) Independent of the above and as regards claim of Rs. 12,25,000/- which constitutes part of the total claim of Rs. 38,90,000/- this amount was given as loan by the petitioner to the firm vide Memorandum dated 21.02.2015 executed between two partners. Likewise, Tata Truck was also purchased by the Firm. The firm was then dissolved and the Ikrarnama dated Nil deals with settlement of account between the partners. Petitioner therefore cannot drag the company into their personal feud.

(d) As regards security deposit of Rs. 5,90,000/- which is another constituent of the alleged claim as Operational Debt’, Company had right to recover value of empty glass and crates in case of failure of distributor to do so. Accordingly this amount was adjusted by setting off against value of glass empties and crates which were not returned by the Firm on resignation. The details accounts were furnished to the



petitioner through her husband Krishna Kant Shukla vide mail dated 16.10.2019. Therefore, independent of the fundamental submission that investment made cannot be treated as operational debt under the IBC, 2016 even otherwise each and every component stands amply demonstrated to show that the claim is patently bogus and/or it is nothing but a disputed item between the partners.

11.4. Whether there exists a “dispute” as regards alleged claim of “Operational Debt” in terms of Section 9 of the IBC, 2016.

1. First and foremost, above documents irrefutably establish that there was a serious dispute between the two partners as regards running of the Firm.

2. Legal Notice Dated 27.12.2018 issued by the Petitioner. Asked for return of security deposit. Claimed suffered loss and damage. Replied by the Company Dated 18.01.2019. Correct facts explained. Therefore issue was disputed right from inception. Petitioner has since changed its claim.

3. Thereafter statutory Notice Dated 23.03.2019 issued. Replied vide letter Dated 02.04.2019. All facts stated and correct legal position explained. Therefore, the alleged claim has been a fiercely disputed question right from beginning both on facts and grounds of law.

4. Petitioner has wrongly alleged that the dispute was ‘spurious’ when it is the Petitioner who had talked about filing of FIR against the other partner. In fact petition

 12

has once again filed another criminal complaint dated 09.08.2019 before Delhi Police. Notice Dated 10.08.2019 were issued to Company's executive by the SHO, Okhla Industrial Area, Phase-i. New Delhi under Section 91 of the Cr.P.C. The Police authorities have been duly informed of all relevant facts vide letter dated 12.09.2019. A copy of Notice dated 10.08.2019 and reply dated 12.09.2019 is attached as Annexure "A".

6. Independent of the above arguments, it needs to be stated that the petitioner was simply one of the two partners of the Firm Mahadev Traders which had entered into distribution Agreement dated 24.02.2015 with the Operational Debtor. The petitioner had no separate or independent relationship with the company. The firm Mahadev Traders was an unregistered partnership firm. In Law therefore, petitioner being a partner of an unregistered partnership firm cannot file any suit or other proceedings for enforcing a claim or right arising from a contract as per Section 69 of the Partnership Act, 1932.

12. Moreover, it is claimed by the respondent that the applicant has wrongly relied upon an undated and unsigned distribution agreement which it claims to have been signed between her partnership firm Mahadeve Traders and Pepsi Co. and the Respondent corporate debtor have nothing to do with the said undated Agreement.

13. Heard the parties and perused the case records.



14. It is seen from the records that the amount claimed by the applicant is claimed on behalf of the partnership firm M/s Mahadeo Traders, formed on 28.08.2013 with two partners namely Smt. Renu Shukla and Sh. Vinod Kumar Upadhyay. However, there is nothing on record to show that the applicant is individually entitled to file the present application on behalf of the said partnership firm. It is also seen that the amount claimed by the applicant is not claim against the supply of any goods or services by the applicant. There is nothing on record to show that the respondent has received goods and has defaulted in payment.
15. In the case of *Balaji Traders v. Varun Beverages Limited* this Tribunal vide its order dated 17.07.2017 has held that in the absence of the petitioner establishing itself to be an “Operational Creditor” as defined under Section 5 (20) of the IBC, 2016, as it has not supplied an goods or rendered any services to the Corporate Debtor, it cannot be categorized as an “ Operational Debtor” and the claim made by it cannot be considered as an “ Operational Debt” clothing itself with the right of approaching this Tribunal under IBC, 2016.
16. The applicant has failed to prove its authority to file present application and therefore the present application deserves to be rejected on this count alone.
17. The insolvency resolution process has serious civil consequences on the welfare of the company including its members and employees. Admittedly the no goods has been supplied by the applicant or the claim of applicant is not related



to provisions of goods and services. It is therefore incumbent on the applicant to establish that the claimed operational debt is legally recoverable under provisions of goods and services by the applicant. Mere self-serving pleading that the entire assets including the investment in the firm has been made by the applicant, in the absence of documentary evidence, cannot be accepted. There is no whisper about the present status of the said partnership firm. The applicant however could not prove with documentary evidence as to how the claimed amount is an operational debt in terms of the Code. In addition to that the authority letter signed by the applicant is also not valid as the entire claim made by the applicant is related to the said partnership firm and there is no evidence of any transaction made between applicant and respondent. Therefore, as discussed above the disclosure in the requisite mandatory form was not complete and true. Besides applicant has failed to make its status clear. The applicant has not come with clean hands, as the disclosure in the application was not full and true. On this count alone the application is liable to be rejected.

18. For the reasons stated above this petition fails and the same is rejected.

19. We make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy and the right of the Applicants before any other forum shall not be prejudiced on account of dismissal of instant application.



Serve copy of the order to the parties and consign the case records to the record room.

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DR. V.K. SUBBURAJ,

MEMBER (T)

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(Dr.) P.S.N PRASAD,

MEMBER (J)