



**IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI**

**CP (IB) No. 755/MB/2020**

*[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:

**M/S BINOD TEXTILES**

[PAN: ABSPJ5641F]

**Registered Office:** Harihar Complex

Bhagwat Sahu Street, Mahabir Chowk, Upper Bazaar

Ranchi-834001, Jharkhand.

**...Operational Creditor**

Vs.

**M/S JBS CLOTHING COMPANY LIMITED**

[CIN: U74999MH2013PLC239985]

**Registered Office:** A-216, 2<sup>nd</sup> Floor, Sigma Estate-1

Plot No.1025, Gokhale Road (South), Prabhadevi, Dadar

Mumbai-400025, Maharashtra.

**...Corporate Debtor**

Pronounced: 29.11.2024

**CORAM:**

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

**HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)**

***Hearing: Hybrid***

**Appearances:**

Operational Creditor: Adv. Shashwat Rai i/b. Adv. Syed Ali Kazmi


Corporate Debtor: Adv. Shubhangi Fating a/w. Adv. Vishal Tiwari

**ORDER*****[PER: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]*****1. BACKGROUND**

1.1 This Company Petition, C.P. (IB) No. 755/MB/2020 (Application) was filed on 18.01.2020 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s. Binod Textiles, the Operational Creditor (OC), a sole proprietorship firm, through Mr. Binod Kumar Jain, Proprietor, for initiating Corporate Insolvency Resolution Process (CIRP) in respect of M/s. JBS Clothing Company Limited, the Corporate Debtor (CD).

1.2 The total amount of default alleged is Rs. 5,74,110/- (Five Lakh Seventy-Four Thousand One Hundred Ten Rupees) which comprises of the principal amount of Rs.5,00,000/- and Rs. 74,110/- as interest calculated at the rate of 10 (Ten) per cent. per annum from 29.05.2018 to 23.11.2019. The alleged default amount is based on a refundable security deposit given by the OC to the CD at the time of executing a Distributor Agreement for appointing the OC as the distributor of CD's Textiles products in the State of Jharkhand.

1.3 The date of default as mentioned in Part IV of the Application is 29.05.2018, i.e., the date on which not only the Distributor Agreement was executed between the OC and the CD and it was on the same date the refundable security deposit was paid to the CD by the OC, in terms of the Agreement. Since the CD defaulted in payment of its outstanding dues despite its




acknowledgment, the OC prays that CIRP may be initiated in respect of the CD under Section 9 of the IBC.

## **2. CONTENTIONS OF OC**

- 2.1 It is submitted that the OC is involved in the business of distributorship of various brands in Textiles industry while the CD is a Mumbai-based private company and is not only engaged in the business of manufacturing and marketing of readymade garments and accessories but also is a licensee of brand name called “Brooklyn Borough” (Brand).
- 2.2 Both the OC and the CD executed the Distributor Agreement on 29.05.2018 by which the OC was appointed as the distributor for selling and promoting the Brand in the State of Jharkhand. Under the Agreement, the OC was required to pay a refundable security deposit of Rs.5,00,000/- to the CD for which the CD would pay annual interest at the rate of 10% to the OC.
- 2.3 Pursuant to the Distributor Agreement, the OC tried to procure sales booking of the products under the Brand but due to lack of response from the market, the performance of the products was less than expected. Citing personal reason of marriage in January 2019, as well as sluggish market conditions, the OC terminated the Agreement *vide* email dated 07.01.2019 sent to the CD. The OC sought from the CD immediate repayment of the security deposit with interest. However, as per the terms of repayment, payment was to be made within a period of three months from the date of termination notice.



- 2.4 On account of the CD's failure to repay the security deposit, the OC issued legal notice dated 16.06.2019 to the CD's managing director as well as its Kolkata-based agent for recovery of Five Lakh Rupees with interest at the rate of 10% and stated that failure of such repayment would result in appropriate legal action by approaching the NCLT.
- 2.5 The OC submits that the CD, *vide* notice dated 26.06.2019, replied to the OC's legal notice seeking time for repayment citing tight financial condition and even proposed part-payments on 25.07.2019 and 30.08.2019. However, in the said reply notice, the CD also alleged that all the sales generation activities were to be undertaken by the OC and that the OC failed to show serious interest in generating any business. Further, the CD took a stand that collection of security deposit from distributors is a normal business practice. Since the CD failed to repay the security deposit, the OC issued another legal notice dated 13.07.2019 to the CD for repayment, which was replied by the CD on 23.07.2019. In the said reply notice, the CD not only sought time for repayment but also gave assurance to pay the security deposit before 30.08.2019. Later, the OC issued the third legal notice on 13.09.2019 to the CD for recovering the said security deposit with the interest.
- 2.6 In the above circumstances, the OC issued Demand Notice under Section 8 of the IBC on 23.11.2019, by email, demanding payment of the unpaid operational debt from the CD. The Demand Notice was also sent by registered post to the CD, which was delivered on 19.12.2019.
- 2.7 The OC's banker, Bank of India issued letter dated 07.01.2020, certifying that the OC has not received any payment in its account from the CD for the



period between 28.05.2019 to 07.01.2020. In the circumstances, the OC prays that CIRP may be initiated against the CD.

### **3. CONTENTIONS OF CD**

- 3.1 The present Application is defective in nature since it was filed by a sole proprietorship, which does not have own legal entity and there is no documentary evidence to prove the debt. The OC cannot be regarded as a “person” for the purpose of operational creditor under Section 3(23) of the IBC.
- 3.2 The OC’s claim for refundable security deposit against the CD cannot be treated as an operational debt under Section 5(21) of the IBC since the said deposit is not based on any supply of goods or services rather it was given by the OC for its appointment as distributor of the Brand as per the Distributor Agreement dated 29.05.2018. The OC’s failure to provide any invoice for supply of goods or service shows that such debt is not an operational debt and the OC’s failure to generate sales was mentioned in CD’s reply on 26.06.2019 to the OC’s first legal notice dated 16.06.2019.
- 3.3 The Application is not maintainable on the ground of pre-existing disputes between the OC and the CD as evident from the OC’s letter dated 26.06.2019 sent to the CD. The OC had unilaterally terminated the said agreement *vide* its email dated 07.01.2019, without giving due time to the CD for making repayment of the aforesaid security deposit or finding OC’s replacement as distributor within the area of operation of the OC.



3.4 The OC has approached this Tribunal with malafide intention to harass the CD by filing the Application for recovery purposes which is contrary to the objectives of the IBC.


#### **4. ANALYSIS AND FINDINGS**

4.1 We have perused all the documents and pleadings and heard both the Counsel for the OC and the CD.

4.2 The major objections set up by the CD revolve around (i) OC's status as Operational Creditor; (ii) pre-existing dispute; and (iii) Nature of OC's debt, whether amounting to operational debt or not. Now, let us examine the defences raised by the CD one by one.


4.3 As far as the OC's eligibility as operational creditor to file the Application is concerned, we find that it is a proprietorship firm as per the available records. However, both the Application as well as demand notice on 23.11.2019 were signed by Mr. Binod Kumar Jain, as the Proprietor of the OC. The name of the operational creditor in Part I of the Application is mentioned as 'M/s Binod Textiles'. The Application is signed by Shri Binod Kumar Jain in his capacity as the Proprietor of M/s Binod Textiles. The Distributor Agreement was signed for 'Binod Textiles' by Mr. Binod Kumar Jain as the Proprietor. Hence, it can be safely held that the OC being sole proprietorship, represented by Shri Jain, is entitled to maintain this Application.

4.4 The Hon'ble Calcutta High Court in *Devendra Surana Vs. Bank of Baroda & Ors.* [WP No. 5521 (W) of 2017] held that a natural person and a sole proprietorship firm are the same legal entity. In the instant matter, the



Application was filed by 'M/s Binod Textiles' represented by Mr. Binod Kumar Jain, who is the sole proprietor, and hence, there exists no difference between Binod Textiles and Mr. Jain as far as their right to be the Applicant. We, therefore, hold that the OC is entitled to maintain this Application under Section 9 of IBC against the CD and the issue is decided in favour of the OC.

4.5 Regarding the CD's contention of pre-existing dispute, we find that apart from the notice dated 26.09.2019, the CD never raised any dispute with the OC before termination of the Distributor Agreement *vide* OC's email dated 07.01.2019. The reasons stated for termination of the Agreement by the OC in the email relate to sluggish market conditions and personal reason of fund requirements for marriage in his family. Hence, we are of the view that such a termination of the Agreement cannot be regarded as pre-existing dispute over supply of goods or services. Even in the CD's reply notice dated 26.09.2019 to the OC's first legal notice, it merely mentioned about the OC's lack of serious interest to generate sales. It did not elaborate any other issue of dispute with the OC and the CD has even admitted that due to poor sales conditions of the market, it was unable to repay the security deposit. It is undisputed that the CD gave assurances to the OC regarding repayment of the outstanding dues *vide* its notice dated 23.07.2019. It has also come in evidence that despite receiving the demand notice dated 23.11.2019 on 19.12.2019, the CD neither gave any reply to the demand notice citing pre-existing dispute nor made any payment to the OC. This shows that the defence of pre-existing dispute



contended by the CD is nothing but moonshine in nature and, therefore, the issue is decided against the CD.

4.6 Now, let us consider the nature of the debt in question and see, whether it amounts to operational debt or not. We find that as per Clause 3 (Third Bullet Point) of the Distributor Agreement dated 29.05.2018, executed between the parties, the OC was required to deposit the security amount of Rs.5,00,000/- at the time of its appointment as distributor of its Brand in the State of Jharkhand, on which interest at the rate of 10% per annum was also to be paid by the CD. This Clause demonstrates that the nature of transaction of the security amount was not towards the security of the goods supplied or services rendered rather it was to be paid for the purpose of distributorship for the CD's Brand. Although there is no provision for forfeiture of security deposit in the Distributor Agreement, a security deposit generating annual interest at the rate of 10% does not qualify as an operational debt within the definition of Section 5(21) of the IBC. It has been held by the Hon'ble NCLAT, Principal Bench in *Carestream Health India Private Limited Vs. Seaview Mercantile LLP*. [Company Appeal (AT) (Insolvency) No. 579 of 2023] that refundable security deposit and interest on the deposit of such security amount is a financial debt under Section 5(8)(f) of the IBC. This position of law has been upheld by the Hon'ble Supreme Court in *Global Credit Capital Limited Vs. Sach Marketing Pvt Ltd & Anr*. [Civil Appeal No. 1143 of 2022]. In view of the legal position, we hold that there exists no operational debt in the matter and this issue is decided against the OC.



4.7 In view of the foregoing discussions, we hold that no operational debt is due and payable by the CD to the OC. Once operational debt under the IBC is not proved, the Application deserves to be rejected. The IBC is not a tool for recovery of debt by creditors and the NCLT is not a forum for the same.

### **ORDER**

This Application bearing C.P. (IB) No. 755/MB/2020 under Section 9 of the IBC, filed by M/s. Binod Textiles, the OC, for initiating CIRP in respect of M/s. JBS Clothing Company Limited, the CD is **rejected**.

We make it clear that any observations made in this Order shall not be construed as expressing opinion on merits. The OC's rights available as per law before any judicial/quasi-judicial forum shall not be prejudiced on the grounds of rejection of the present Application. No orders as to costs. Ordered accordingly.

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

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

//Tanmay Jain//