



IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 3626/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

Indu Jain

(Sole Proprietor of M/s. IB Jewels)

Registered Office: 173, Zone-II, M P Nagar

Bhopal-462011, Madhya Pradesh.

...Operational Creditor

V/s

Birla Jewels Limited

[CIN- U74999MH2011PLC217746]

Registered Office: Unit No. 101A and 102

1st Floor, Plot No. B-17 Morya Landmark II

Andheri (West) Mumbai – 400053, Maharashtra.

...Corporate Debtor

Pronounced: 09.08.2024

CORAM:

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

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Operational Creditor: Adv. Gopal Machiraju a/w Adv. Krusha Maheshwari

i/b Lakshmirkumaran & Sridharan

Corporate Debtor : Adv. Mutahhar Khan a/w Adv. S. A. Pathak & Adv.

Lalit Joshi

**ORDER**

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

1. BACKGROUND

This Application bearing C.P. (IB) No. 3626/MB/C-VI/2019 was filed on 11.10.2019 by Ms. Indu Jain, Sole proprietor of M/s. IB Jewels, the Operational Creditor (OC), 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 (AA Rules), for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Birla Jewels Limited, the Corporate Debtor (CD). The debt involved in the present Application is Rs.49,81,921/- which is alleged to have arisen from three unpaid invoices raised by the OC for supply of rough and uncut diamond jewellery to the CD. In the circumstances, the OC prays that CIRP be initiated in respect of the CD.

2. CONTENTIONS OF OC

2.1 The OC is the sole proprietor of IB Jewels, which is engaged in the business of wholesale trade of diamond jewellery. The OC is an individual, who operates two separate proprietary concerns, viz., (i) 'IB Jewels' and (ii) 'Brij Ratnam'. IB Jewels is a wholesale supplier of rough and uncut diamond jewellery, while Brij Ratnam is a retail supplier of finished jewellery. Both proprietorships have separate GST registrations and bank accounts. IB Jewels sells rough and uncut



diamond jewellery to third parties. One such third party is the CD to whom jewellery was delivered and the invoices were raised. The CD used to finish goods and sell them to its franchisees including Brij Ratnam. The contract between the OC, (IB Jewels) and the CD (Birla Jewels Ltd.) is for sale of goods, which is evidenced by the invoices and correspondence exchanged between them.

2.2 The Franchisee Agreement dated 05.12.2018 was executed between the CD and Brij Ratnam. The franchisee agreement dated 05.12.2018 does not make mention of the business carried on by the OC for selling goods. Since there arose certain disputes under franchisee agreement, the CD terminated the same *vide* Termination Notice dated 12.08.2019. Later, the Brij Ratnam, *vide* notice dated 27.08.2019, sent notice to the CD regarding termination of the aforesaid Franchisee Agreement.

2.3 The Ld. Counsel for the OC submitted that the CD failed to make payments against three invoices, which were under the separate contract relating to sale of goods. The details regarding the three unpaid invoices for the aggregate amount of default of Rs.49,81,921/- are as follows:

- i. Invoice No. 017 dated 16.06.2019 for Rs. 26,52,781/- due on 15.08.2019;
- ii. Invoice No. 018 dated 20.06.2019 for Rs. 11,81,272/- due on 19.08.2019; and



iii. Invoice No. 019 dated 20.06.2019 for Rs. 11,47,868/- due on 19.08.2019.

2.4 The OC submits that the CD has accepted delivery of the jewellery against the invoices. At the time of issuing the invoices, the CD never objected to the terms of the invoices or the amounts covered under the same.

2.5 As per the terms of the said invoices, a credit period of 45 days was granted to the CD to make payment from the respective dates, which was subsequently increased to 60 days. However, the CD failed to make payment on the due dates and even after the expiry of the credit periods. Hence, the dates of default for the three invoices are 16.08.2019; 20.08.2019; and 20.08.2019 respectively.

2.6 The OC issued a Demand Notice on 26.08.2019 in Form-3 under Section 8 of the IBC and in accordance with Rule 5(1)(a) of the AA Rules. The CD replied to the Demand Notice *vide* letter dated 05.09.2019, disputing the claim of the OC and denying its liability on the grounds that (i) the amount of Rs. 49,81,921/- is not payable as there was no "formal agreement" between the parties; and (ii) the CD has an existing dispute with 'Brij Ratnam', under a franchisee agreement with it, alleging that the OC is part of the supply chain for the procurement of diamonds by its related company, Brij Ratnam, and, thus a dispute exists between the CD and OC.

2.7 It is the OC's further submission that the OC is not a party to the stated franchisee agreement; and that it is a separate proprietorship, having



its own bank account and GST Registration and thus a separate entity, called Brij Ratnam. The transaction of sale of the jewellery to the CD under the invoices is a separate transaction and unconnected with any alleged dispute with Brij Ratnam. The OC states that no dispute was raised by the CD as to the amount due under the invoices or the quality of the jewellery or relating to breach of representation or warranty. Thus, the OC prays that CIRP may be initiated in respect of the CD.

2.8 The Ld. Counsel for the OC submits that the CD's contention of pre-existing dispute is misplaced since the alleged pre-existing disputed didn't involve the OC. Moreover, the contract between the OC and the CD involved sale of goods whereas the contract between Brij Ratnam and the CD was related to aforesaid franchisee agreement which are two different agreements and businesses.

3. CONTENTIONS OF CD

3.1 The CD in its Affidavit-in-reply, challenged the maintainability of the present application on following grounds, viz., (i) there is no formal agreement between IB Jewels and the CD; (ii) there is a pre-existing dispute between the parties under the Franchisee Agreement; (iii) the goods were not delivered to the CD; and (iv) the invoices are forged and fabricated.

3.2 The CD further states that Ms. Indu Jain, the sole proprietor of the OC, in her capacity as proprietress of Brij Ratnam entered into and signed franchisee agreement dated 05.12.2018 with the CD, wherein she had



approached the CD to obtain its franchise for sale of exclusive branded jewellery. As such, the CD had appointed Brij Ratnam as its Franchisee for 'BJEWELZ' store at Bhopal for retail sale of exclusive branded jewellery and lifestyle products procured from the CD. The terms and conditions for retail sale of CD's products are contained in the franchise agreement.

3.3 It is further contended that Ms. Indu Jain, is the proprietress of two related proprietary concerns (i.e., Brij Ratnam and IB Jewels) and had introduced IB Jewels as vendor-partner for the purpose of sale of OC's dead diamond and other jewelry stocks under the brand name 'BJEWELZ' store situated at Bhopal, Madhya Pradesh. The operations and scale of businesses were carried out by the OC from the same franchised premises, which clearly depicts that IB Jewels is a part of the supply chain for procurement of diamonds by its related entity, Brij Ratnam. According to the CD, such dual business activities by a single individual, viz., Ms. Indu Jain is clearly understandable from the emails dated 19.06.2019; 20.06.2019; 21.06.2019; 04.07.2019; 06.07.2019; and 16.07.2019.

3.4 The Ld. Counsel for the CD submits that various disputes arose between the OC and the CD as to defects in certain products sold by the OC and to fulfillment of her obligations as mentioned under the franchise agreement dated 05.12.2018, and the same have been notified by the CD through various emails dated 22.06.2019; 02.07.2019; 04.07.2019; and 05.08.2019, but no defects had been



cured by the CD. This ultimately led to the issuance of Letter of Termination dated 12.08.2019 by the CD. Later, Brij Ratnam, *vide* its letter dated 27.08.2019 replied to CD's Termination Letter evincing all the ongoing disputes between the parties.

3.5 The CD further states that there is neither any purchase order nor privity of contract between the CD and the OC as regards placing of any order for the alleged jewellery. There is no proof of delivery of goods or any acknowledgement as to the alleged invoices, which makes it clear that no goods were ever delivered to the CD. The CD also states that there is no evidence of invoice No. 17 dated 16.06.2019 and invoice No. 19 dated 20.06.2019 as created by the OC in the course of business and that the same is forged and fabricated. There is no signature of the OC or Jewel Goldi in the delivery challan dated 06.06.2019.

3.6 Further, the CD states that the OC contented that the goods under Invoice No. 19 were delivered along with the goods covered under Invoice No. 17 through the agency Sequel Pvt Ltd.; however, in the Invoice No. 19, the column of the dispatched through is left blank. Further, the OC charged margin in Invoice No. 19 whereas in Invoice No. 17, the same was not done. Thus, the OC is attempting to present a fallacious contention about delivery of goods to the CD.

3.7 Further, the Ld. Counsel for the CD submits that evidence of forgery and the afterthought false case being cooked up by the OC is established from the discrepancies and mismatch in the total invoice



value of Rs.26,52,781/- under Invoice No. 17; and invoice value of Rs.11,47,868/-under Invoice No. 19; totaling to Rs.38,00,649/- and also from the Invoice value of Rs.36,89,124/- written on the Courier Receipt issued by the Sequel Pvt. Ltd. The Ld. Counsel for the CD further denies the signature and invisible stamp affixed on the courier receipt. It is also argued by him that there is no Government issued identification such as Driving Licence, Passport, Aadhaar, PAN, Voter ID mentioned on the courier receipt. According to him, absence of any such identification of the addressee clearly shows that the signature and the stamp have been forged. Further, there are discrepancies in the date of delivery i.e., on 17.06.2019. It is alleged that of goods pertaining to Invoice No. 19 dated 20.06.2019 have been delivered.

3.8 The CD denied all the allegations contained in the demand notice dated 26.08.2019 sent to it by the OC *vide* its reply dated 05.09.2019. The CD issued Arbitration Invocation Notice dated 26.09.2019 for appointment of Arbitrator in terms of Clause 18 of the franchise agreement following which the OC refuted it *vide* their reply dated 20.11.2019.

3.9 The CD vehemently denies purchase of any diamond jewellery as alleged and claimed by the OC. The CD categorically denied delivery and receipt of any jewellery as alleged by the OC. According to the Ld. Counsel for the CD, there was no formal agreement between the OC and the CD for the transaction in question. It is the case of the CD that



there was dispute between the parties which has been raised in the demand notice.

3.10 The CD vehemently denies that i) M/s. IB Jewels is not a party to the stated franchisee agreement; (ii) M/s. IB Jewels is a separate proprietorship, having its own bank account and GST Registration and thus a separate entity from M/s. Brij Ratnam. The CD denies the transaction of sale of the Jewellery to the CD under the Invoices is a separate transaction and unconnected with any alleged dispute with M/s. Brij Ratnam. The CD categorically states that the Applicant in fact has falsely represented that the Applicant is not a party to the Franchise Agreement dated 05.12.2018, whereas the stated Franchise Agreement was signed by Mrs. Indu Jain, the Applicant herein in the capacity of Proprietor of Brij Ratnam. Admittedly Mrs. Indu Jain, is the proprietor of two related entities (i.e. Brij Ratnam and IB Jewels) and had introduced IB Jewels as vendor partner for sale of Mrs. Indu Jain's dead diamond and other jewellery stocks under the brand name of 'BJEWELZ' store situated at Bhopal, (M.P.) - 462011 i.e. the operations and scale of business were carried out by Mrs. Indu Jain from the same franchised premises which clearly depict IB Jewels is a part of the supply chain for procurement of diamonds by its related concern M/s. Brij Ratnam and this understanding is clearly depicted under email dated 19.06.2019, 20.06.2019 and 21.06.2019. Furthermore, Mrs. Indu Jain had terminated the Franchise Agreement *vide* Termination letter dated 29.08.2019 by signing the letter.



Therefore, it is stated that all the transactions are connected transactions and are part of the pre-existing dispute between the OC and the CD.

4. REJOINDER BY OC

4.1 The OC clarified that the objections raised by the CD are two-fold - (i) non-delivery of goods and false Invoices, and (ii) dispute under Franchise Agreement dated 05.12.2018 entered into between CD and Brij Ratnam ("Franchise Agreement"). Both contentions are illusory and meritless.

4.2 The OC further states that in its reply dated 05.09.2019 to the statutory Demand -Notice, the CD neither disputed the Invoices, nor the deliveries made under it. These objections are being raised for the first time in the Affidavit in Reply only for the sake of it without any substance in them. Further, even prior to the reply to the statutory Demand Notice, the CD had not raised any dispute in respect of the Invoices or the goods delivered pursuant thereto. It is settled law that the existence of the dispute' and/ or the suit or arbitration proceeding must be pre-existing - i.e., it must exist before the receipt of the statutory demand notice. In the present case, no notice of dispute has been raised by the CD either before issuance of the statutory Demand Notice or in its reply to same.

4.3 Further, the OC states that the goods under Invoice Nos. 17 and 19 had been couriered by the OC on the CD through one Jewel Goldi, a



renowned diamond manufacturer. Jewel Goldi had couriered the goods to the CD through Sequel Global Critical Logistics, a renowned courier company exclusively for precious metals, stones and jewellery. The goods in respect of Invoice No. 17 amounting to Rs. 26,52,781/- (Twenty-Six Lacs Fifty-Two Thousand Seven Hundred and Eighty-One Rupees) had been procured from Jewel Goldi under a "Bill To Ship To" model, i.e., the OC had placed order on Jewel Goldi and Jewel Goldi had sent the goods directly to CD as the consignee. Jewel Goldi issued an invoice dated 15.06.2019 to the OC and the OC issued Invoice No. 17 to the CD in respect thereof. The amounts in both invoices are the same as the Petitioner did not charge any margin to the CD.

5. ANALYSIS AND FINDINGS

5.1 We have heard both the Ld. Counsel for the CD and considered the pleadings and arguments advanced by both sides. The issues for consideration in the matter are **(i) whether the goods got despatched by the OC were delivered and received by the CD; whether there was pre-existing dispute between the parties; and whether the Application is maintainable under Section 9 of the IBC.**

5.2 So far as the issue relating to dispatch, delivery and receipt of goods is concerned, it is the case of the OC that the goods under Invoices Nos. 17 and 19 were couriered to the CD through one Jewel Goldi, a renowned diamond manufacturer. The said Jewel Goldi couriered the



goods through Sequel Global Critical Logistics, a courier service company exclusively for precious stones, metals and jewellery, according to the CD. It is again the case of the OC that under “Bill To Ship” model, orders were placed by the OC with Jewel Goldi which in turn sent the goods to the CD. The said Jewel Goldi issued invoice to the OC which in turn invoiced the CD. To substantiate this sequence of events, the OC has produced with its Rejoinder, Tax Invoice No. 192000892JG dated 15.06.2019 of Jewel Goldi (India). It is written in the Invoice that certain goods as detailed are for dispatch through ‘Sequel Log P Ltd’. However, in the said Tax Invoice by Jewel Goldi, it is endorsed “Payment in Favour of “JEWEL GOLDI (INDIA)”, which means that for the goods delivered by Goldi India through Sequel Log Pvt. Ltd., the amount was to be paid by the CD to Jewel Goldi and in turn, Jewel Goldi had to make payment to the OC. Such an arrangement may not be uncommon in business parlance. However, in order to convince us, the OC needs to prove that the Tax Invoice issued by Jewel Goldi was genuine and consequently, after delivery of goods through Sequel Log Pvt Ltd., it did not receive any payment either from the CD directly or through Jewel Goldi. Interestingly, there is no evidence to suggest that any similar payment has ever been received from Jewel Goldi anytime in the past. The only entry in the bank statement dated 27.09.2019 shows a payment to Jewel Goldi by the OC of an amount of Rs. 80,000/- by way of Cheque No. 21988. Payment to



Jewel Goldi by the OC does not relate to the transaction in question.

This again puts the case of the OC under a cloud.

5.3 As regards the Tax Invoice raised by Jewel Goldi, it does not contain signature of any authorised person of Jewel Goldi or any stamp affixed thereon in order to prove that it was actually issued. The Copy of the delivery challan produced by the OC does not carry acknowledgment of receipt of goods by Birla Jewels Ltd (CD). When dispatch and delivery of goods are not proved, it becomes difficult to hold that the Tax Invoice and the Delivery Challan were actually issued, goods transported and received by the consignee. As discussed above, the bank statement does not reveal any similar payment made to the OC by Jewel Goldi in the past under “Bill To Ship” model. Hence, the only inference that emerges is that there was no actual delivery of goods by the OC and receipt of the same by the CD. Hence, this issue is decided against the OC.

5.4 Now, as regards the issue of pre-existing disputes between the parties, it is relevant to examine the franchisee agreement between the OC and Brij Ratnam. According to Part IV of the application, the debt is seen to have first fallen due on 15.08.2019. It is, however, seen that certain disputes were already raised by the CD *vide* several email correspondences before this date pursuant to the termination notice issued *vide* emails dated 22.06.2019 and 26.07.2019, followed by the termination letter dated 12.08.2019 addressed by the CD to the OC. The demand notice was issued on 26.08.2019. The dispute raised by



CD is not found to be a patently feeble legal argument unsupported by evidence. The OC has contended that the pre-existing disputes raised by the CD is in relation to the franchisee agreement between IB Jewels and the CD which is completely different, and hence, any dispute between the CD and Brij Ratnam has no relation with the OC. However, in the minutes of meeting held between the CD and Brij Ratnam as attached to the email dated 02.07.2019, the following item was discussed:

“3. IB Jewels sourced Diamond Inventory Payment Plan.”

Additionally, both these firms operate out of the same registered address and are managed by the same person i.e. Indu Jain. However, in all the documents placed on record, the business seems to be operated by the husband of the sole proprietor i.e. one Mr. Sanjay Jain on behalf of Brij Ratnam as well as IB Jewels. It has come out in evidence from the Affidavit dated 13.03.2023 under Section 9(3)(b) of the IBC that Ms. Indu Jain, who is the deponent was identified by one Shri. Adish Jain for the purpose of verification of the identity of Ms. Indu Jain before the notary public. We have seen that copies of many email communications between the CD and Brij Ratnam were marked to one ‘adish.jain03@yahoo.com’. Further, it is seen that in the affidavit in support of the Application dated 05.10.2019 filed by Ms. Indu Jain, she was identified by the same Shri Adish Jain. It is again found that Shri Adish Jain is the son of Shri Sanjay Jain as endorsed on the back page



of the non-judicial stamp paper on which the said Affidavit was sworn to before the notary public. Further, the emails in connection with the transactions of Brij Ratnam dated 20.06.2019; 21.06.2019; 22.06.2019; 02.07.2019; 04.07.2019; 06.07.2019; 15.07.2019; 16.07.2019; 05.08.2019 indicate that Shri Sanjay Jain was communicating with the CD on behalf of Brij Ratnam. Interestingly in the email dated 21.06.2019 addressed to the CD, Shri Sanjay Jain writes that *“As a part of earning for **IB Jewels** as a vendor, you will provide 3% commission to **IB Jewels** on a total invoice value of Diamond Jewellery (mode of transaction of 3% can be decided mutually, if needed). And then, Brij Ratnam will not ask for any credit from Bjewelz in future.”* (Emphasis supplied). The above clearly indicates that both the businesses namely, IB Jewels and Brij Ratnam were intertwined and also managed and undertaken by Ms. Indu Jain and her family members collectively by recognising her as the sole proprietor. Hence, the disputes existing between IB Jewels and Brij Ratnam cannot be regarded as separate. Hence, we hold that the judgments quoted and relied upon by the OC regarding pre-existing dispute have no application in the matter on hand. Having found that both IB Jewels and Brij Ratnam, being two business names of the same sole proprietor, the pre-existing dispute with the CD in relation to the franchisee agreement by Ms. Indu Jain in her capacity as sole proprietor, with Brij Ratnam, cannot be brushed aside saying that the same has no bearing on the business carried on by Ms. Jain under the business name IB Jewels with the CD.




5.5 Ms. Indu Jain is the sole proprietor of IB Jewels and Brij Ratnam.

According to the OC, both IB Jewels and Brij Ratnam were conducting separate businesses under her as the sole proprietor. The contention of the OC is that since both IB Jewels, the OC and Brij Ratnam operate different bank accounts and having different GST registrations, both are two different entities. But the fact that Ms. Jain is the sole proprietor of both the businesses and conducting such business under different styles and names does not make them separate entities as she is the sole proprietor of both business concerns. Proprietorships are not recognised as separate legal entities. Ms. Indu Jain as the business owner has every right to do multiple businesses under different names in law, although sole proprietorship is an unincorporated business concern. It has come into evidence that both the business concerns were owned, managed and operated by the same sole proprietor, Ms. Indu Jain. The person who carries on business in the name of two business concerns, namely, IB Jewels and Brij Ratnam, being the proprietor is solely responsible for the conduct of their affairs. Two business names under which an individual is carrying on businesses would not make the businesses separate entities as the sole individual conducting both the businesses is the same. The contention of the OC that since the franchisee agreement between another sole proprietary concern of the OC, viz., Brij Ratnam is separate and distinct from the contract between the CD and the OC herein, viz., IB Jewels, thus falls flat. Separate bank accounts, GST registrations, separate contract or arrangement does not obliterate the



nexus of the OC as a sole proprietor with both the business concerns. In *Vinayak Purushottam Dube (Deceased) through LRs Vs. Jayashree Padamkar Bhat & Ors.*, [Civil Appeal Nos. 7768-7769/2023], the Hon'ble Supreme Court observed that the person who carries on business in the name of a business concern would be solely responsible for conduct of its affairs. Hence, we hold that IB Jewels and Brij Ratnam are only two business names for carrying on two separate businesses by the same 'sole' proprietor. Hence, the pre-existing disputes of the CD with the OC's business concern Brij Ratnam has nexus with the business concern IB Jewels run by the same sole proprietor. The disputes were already raised by the CD before the demand notice was issued.

5.6 Now, let us consider the issue regarding the maintainability of this Application under Section 9 of the IBC. On a careful consideration of the demand notice dated 26.08.2019 under Section 8 of the IBC, it is seen that it was issued by IB Jewels as proprietary concern. Section 8 contemplates issuance of demand notice by the operational creditor. Section 5(20) of the IBC defines operational creditor to be a "person" to whom an operational debt is owed. Section 3(23) of the IBC does not list out sole proprietorship as a legally recognisable "person" Hence, a sole proprietorship is not competent to issue demand notice under Section 8 of the IBC. In the instant matter, although the Application was filed by Ms. Indu Jain in her capacity as Sole Proprietor of IB Jewels, the demand notice was issued by IB Jewels as the operational creditor. Hence, we



hold that the demand notice is defective and such a defect is not merely technical but legal, which cannot be cured.

5.7 In view of foregoing discussions, we find that the Application does not deserve to be admitted. We have, thus, no hesitation to reject it.

ORDER

In view of the above discussions, this Application bearing C.P. (IB) No. 3626/MB/C-VI/2019 filed by Indu Jain, Sole Proprietor of M/s. IB Jewels), the OC, under section 9 of the IBC for initiating CIRP in respect of Birla Jewels Limited, the CD, is **rejected**.

No orders as to costs. However, this order does not prevent the OC from pursuing any remedy available as per law.

Registry is directed to forward an electronic version of this order to the Insolvency and Bankruptcy Board of India for information and record.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

(Tanmay/Vani)

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