

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH – IV

I.A. No. 1579/MB/2023

AND

I.A. No. 3877/MB/2023

IN

C.P. (IB) No. 923/MB-IV/2020

Under Section 35(1) and 60(5) of the *Insolvency and Bankruptcy Code, 2016* r/w. Rule 11 of the *National Company Law Tribunal Rules, 2016*.

In the matter of

I.A. No. 1579/MB/2023

Gajesh Labhchand Jain

...Applicant / Liquidator

v/s.

Growfitter Private Limited

...Respondent

AND

I.A. No. 3877/MB/2023

Mrs. Vandana Mohanani & Anr.

...Applicant

v/s.

Gajesh Labhchand Jain

...Respondent / Liquidator

In the matter of

C.P. (IB) No. 923/2020

Axis Bank Limited

...Financial Creditor

v/s.

Talwalkars Healthclubs Limited

...Corporate Debtor

Order Pronounced on: 07.02.2024

Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Applicant : Mr. Prakashal Jain *a/w* Mr. Pushkar Deo, Ld. Counsel for the Applicant Liquidator in I.A. No. 1579/2023 and for Respondent in I.A. No. 3877/2023.

For the Respondent : Mr. Aditya Ajgaonkar *a/w* Mr. Bhavesh Joshi *i/b* GP and Associates, Ld. Counsel for the Respondent in I.A. No. 1579/2023.

ORDER

I.A. No. 1579/MB/2023

1. The present Application has been filed on 06.01.2023 by Mr. Gajesh Labhchand Jain ("**Applicant / Liquidator**") of Talwalkar Healthclubs Limited ("**THL / Corporate Debtor**") *u/s.* 60(5) *r/w.* s.35(1)(n) of the Insolvency and Bankruptcy Code, 2016 ("the Code") *r/w.* Rule 11 of the National Company Law Tribunal Rules, 2016 in terms of s.35(1)(b) of IBC, 2016 and Regulation 9(1)(c) of IBBI (Liquidation Process) Regulations, 2016.

Submissions of the Applicant

2. The Liquidator *viz.* Applicant herein submits that pursuant to petition bearing C.P. (IB) No. 923/NCLT/MB/C-II/2020 filed by Axis Bank Limited ("**Financial Creditor**") *u/s.* 7 of IBC, 2016; This Tribunal initiated the Corporate Insolvency Resolution Process ("**CIRP**") of the Corporate

Debtor herein *vide* Order *dated* 09.03.2021. Subsequent thereto, Mr. Saurabh Kumar Takwani was appointed as the Interim Resolution Professional and was later confirmed as the Resolution Professional (“**RP**”) of the Corporate Debtor.

3. The Applicant submits that, on not receiving any Resolution Plans in the CIRP of Corporate Debtor, the members of Committee of Creditors (“**CoC**”) resolved to initiate Liquidation proceedings of the Corporate Debtor, by way of 90.27% voting share in its eleventh meeting *dated* 22.12.2021, and thereby directed the erstwhile RP to file an appropriate application. Pursuant to the erstwhile RP filing the same, this Tribunal allowed the initiation of Liquidation proceedings of the Corporate Debtor *vide* Order *dated* 28.04.2022 and appointed the Applicant herein as the Liquidator of the Corporate Debtor, who later published the Liquidation Order on 27.06.2022. Subsequently, the Applicant submits that it issued a public announcement *dated* 30.06.2022, inviting claims from stakeholders on or before 27.07.2022.
4. The Applicant further submits that Talwalkar Better Value Fitness Limited (“**TBVFL**”), a sister-concern of the Corporate Debtor herein undergoing CIRP *vide* Order *dated* 11.01.2021 *r/w* corrigendum *dated* 18.01.2021 and liquidation as well pursuant to the afore-mentioned Liquidation Order *dated* 28.04.2022, entered into a Share Subscription and Shareholders Agreement (“**SHA**”) *dated* 27.12.2016 with Growfitter Private Limited (“**Respondent**”) along with its promoters and key shareholders. In accordance with terms of the said SHA, TBVFL was vested with 9598 equity shares (~19% shareholding) having face value of INR 10 (Rupees Ten only) for a total consideration of INR 5,00,00,000 (Rupees Five crores only).

5. The Applicant additionally submits that this Tribunal approved a Scheme of Demerger (“Scheme”) *vide* Order *dated* 21.12.2017, whereby the gym business (including investments pertaining to the same) of TBVFL was to be transferred to the resulting company *i.e.* Talwalkars Lifestyles Limited, which was later renamed as Talwalkars Healthclubs Limited *viz.* the Corporate Debtor herein. The Applicant claims that the said demerger was not properly implemented by the ex-management of the Corporate Debtor thereby resulting in a lack of clarity in distinguishing the assets of the Corporate Debtor and TBVFL.

6. Further, the Applicant submits that in accordance with the afore-mentioned Scheme of Demerger, the investment made by TBVFL was to be transferred in the name of Corporate Debtor. Pertinently, the aforesaid investment includes the shares held by the Corporate Debtor in the Respondent Company. However, the same was neither reflected in the books of the Corporate Debtor *viz.* THL post-commencement of CIRP, nor any intimation regarding the same was found in its records. While discharging its duties as the Liquidator of the Corporate Debtor, the Applicant Liquidator took note of the physical share certificate with regards to investment made by TBVFL, being in Corporate Debtor’s name and in its/ Liquidator’s possession. The Applicant further submits that a perusal of Annual Return filed by the Respondent for F.Y. 2020-21 in Form MGT-7A (*as available on the website of Ministry of Corporate Affairs (MCA)*) duly reflected the name of TBVFL as one of the shareholders of the Respondent and that per the Transaction Audit Report of the Corporate Debtor *dated* 24.12.2021 and its Financial Statements for F.Y. 2018-19; The shares held by TBVFL in the Respondent are deemed to be transferred to and vested in, the Corporate Debtor as its assets.

7. The Applicant places reliance on the Transaction Audit Report *dated* 24.12.2021 wherein it was observed that, the Corporate Debtor *viz.* THL owns about 19% equity share capital of Respondent (being 9598 equity shares of face value INR 10 per share), and that the Respondent has extinguished shareholder rights of the Corporate Debtor due to *alleged* non-fulfilment of conditions per Investor Clause {2.2} (T&Cs pertaining to “Subscription to the Investor Shares”) of the SHA. In this regard, the Applicant approached management of the Respondent requesting for information regarding shareholding of TBVFL in the Respondent to which the Respondent highlighted that neither TBVFL nor THL holds any shares with the Respondent due to non-fulfilment of conditions per Investor Clause {2.2} of the SHA.
8. The Applicant issued a Legal Notice *dated* 02.11.2022 to management of the Respondent requesting for redemption of shares belonging to the Corporate Debtor. Subsequently, management of the Respondent shared the revised shareholder list purported to be filed with MCA, showcasing share transfer from TBVFL to one of the members from the management of the Respondent stating that the rights of TBVFL were extinguished in June 2020. The Applicant therefore contends that no ‘vesting and buy-back’ right was exercised by the management of Respondent until 31.03.2021 and that accordingly, the said shares form a part of the asset pool of the Corporate Debtor and thereby the Liquidator is empowered to take the same into its custody.
9. The said 9598 equity shares, as the Applicant contends, form part of the liquidation estate of the Corporate Debtor and that because of their purported extinguishment by the Respondent, the Applicant *viz.* Liquidator

is unable to redeem, sell or transfer the same and is thereby unable to proceed forward in the Liquidation proceedings of the Corporate Debtor. The Applicant therefore seeks directions to the Respondent Company to acknowledge the said equity shares as part of liquidation estate and for the Respondent Company to issue fresh share certificates for the said 9598 equity shares in favour of Talwalkars Healthclubs Limited within 7 (seven) days. Hence, the present application.

Submissions of the Respondent

10. The Respondent submits that the SHA dated 27.12.2016 was executed between the Respondent and TBVFL, and not the Corporate Debtor herein, as the investment by TBVFL was neither reflected in the books of the Corporate Debtor nor any intimation regarding the same was found in its records. It further contends that the purported extinguishment of rights of being the shareholder was a result of non-fulfilment of Investor Clause {2.2} of the said SHA. It is therefore the Respondent's case that the shares do not stand allotted to the Corporate Debtor and cannot be claimed by it.
11. The Respondent submits that in absence of the scheme, either explicitly or by necessary implication, contemplating the transfer of shares to the Corporate Debtor, the Corporate Debtor has no right or title to the shares. Additionally, the Respondent submits that the shares purported to be claimed by the Corporate Debtor currently vest with the Respondents and are neither with TBVFL nor the Corporate Debtor herein.

Findings

12. Heard the Ld. Counsels and after perusal of all records, this Bench is of the considered view that:

- 12.1.** It is an admitted fact that TBVFL's investment in the Respondent Company's shares pertains to its gym business, as is validated by the express reference drawn by the SHA *dated* 27.12.2016 to Talwalkars' gym business and Clause {2.1.5} of the Scheme of Demerger *dated* 21.12.2017.
- 12.2.** We find that there exists no clause under the SHA *dated* 27.12.2016, which allows the Respondent to extinguish the shareholder's rights in Respondent's "vested" shares. Clause {2.2} of SHA *dated* 27.12.2016 entails rights and obligations in furtherance of "Subscription to Investor Shares" between the parties concerned therein. Admittedly, the possession of physical share certificates with regards to investment made by TBVFL, vest with the Applicant Liquidator and are duly in the name of Corporate Debtor herein.
- 12.3.** The said equity shares issued by the Respondent herein therefore, form part of the asset-pool of the Corporate Debtor and will have to be considered as part of its liquidation estate in terms of Section 36(3) of the IBC, 2016. The Respondent herein extinguished the shareholder rights of TBVFL contrary to Section 68 of the Companies Act, 2013, and as against the CIRP/ Liquidation Regulations. The Moratorium under Section 14 of the IBC, 2016, expressly prohibits any transfer of assets of the Corporate Debtor. Therefore, any alleged extinguishment of rights, post-moratorium, shall be illegal and violative of Section 14 of IBC, 2016.

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I.A. No. 3877/MB/2023

13. The present application has been filed on 11.08.2023 by Mrs. Vandana Mohanani and Mrs. Vimla Mohanani (jointly “**Applicants**”) against Mr. Gajesh Labhchand Jain (“**Respondent / Liquidator**”) under Rule 11 of the National Company Law Tribunal Rules, 2016.

13.1. The Applicant(s) herein pray for possession and arrears of rent as against their property (as mentioned hereinafter) *w.e.f.* 09.12.2019 till the date of payment at the rate of the last rent paid *i.e.* INR 2,46,000/- per month as per the calculation sheet annexed with the present application forthwith.

Submissions of the Applicant

14. The Applicants submit that they are the owners/landlord of the commercial space admeasuring 4971 sq. ft. carpet area bearing/ situated at 1st, 2nd and 3rd floor, V-Square, 630A, B Road, Sardarpura, Jodhpur (“**Demised Premises**”) which were leased out to M/s. Talwalkar Better Value Fitness Limited (“**TBVFL**”) *vide* Lease Agreement *dated* 08.11.2009 *w.e.f.* 09.11.2019 to 08.01.2019, with a clause for further extension for a period of 36 months. The lease rent was INR 1,71,000/- p.m. for the first 12 months and thereafter, the rent was to be increased @ 5% over the last rent paid after completion of every subsequent 12 months.

15. The Applicants submit that after expiry of the aforesaid Lease Agreement, the tenancy was continued by oral agreement between the parties. Further, the Applicants claim that TBVFL paid the lease rentals till 08.12.2019 and thereafter committed default and the arrears, on account of the said lease rental, are due *w.e.f.* 09.12.2019. Pursuant to this default, the Applicants

filed a Civil Suit before the Court of Senior Chief Judicial Magistrate (Rent), Jodhpur for eviction and recovery of arrears of rent in *circa* December 2020.

16. The Applicant submits that CIRP was initiated against their tenant *viz.* TBVFL *vide* Order *dated* 11.01.2021 *r/w* corrigendum *dated* 18.01.2021, which was followed by the Corporate Debtor herein *viz.* Talwalkar Healthclubs Limited being admitted into CIRP *vide* Order *dated* 09.03.2021. The Applicants thereafter submitted their claim in FORM-B on 25.03.2021, before the concerned RP.
17. The Applicant submits that the Liquidator of the Corporate Debtor *viz.* Respondent herein circulated the list of claims of Operational Creditors, verified pursuant to Regulation 30 of Liquidation Regulations, and the name of the Applicants figured at Serial No. 68 of the said list. However, the Applicants contend that *vide* Note 6 and 11 of the said list, the claim of the Applicants were summarily made as “*not admissible*” because of lack of documents related to renewal of rent agreement and that, this was duly communicated to them by the Liquidator *vide* E-mail *dated* 30.08.2022.
18. The Applicants therefore contend that neither the possession of the said premises was handed over to the Applicants by the RP/ Liquidator nor the arrears of rent were paid and nor were the claim of the Applicants admitted; Hence, the present Application.

Submissions of the Respondent

19. The Liquidator *viz.* Respondent herein submits that the pursuant to the Liquidation Order *dated* 28.04.2022, the public announcement *dated* 30.06.2022 was issued by the Liquidator and the last date for submission of

claims by the concerned stakeholders was 27.07.2022. The Respondent submits that the claim on behalf of the Applicant(s) was submitted belatedly *vide* E-mail dated 30.08.2022 and 'twas subsequently rejected on grounds of lack of documents (Non-availability of rental agreement for the claim period, non-executed/registered copy of rental agreement provided along with claim form) and thereby, deserves to be dismissed.

20. The Respondent contends that the present application for payment of claim amount is filed much belatedly from rejection of claim by the Respondent Liquidator and that, there exists no basis for the Applicants to seek the rent for the period post rejection of their said claim.
21. The Respondent further contends that the gym equipment lying at the Premises are the assets of the Corporate Debtor in the captioned petition, and the safe-keeping of the same is paramount to efficacy of the ongoing liquidation proceedings.
22. Furthermore, the Respondent submits that the unpaid lease rentals of various lessors (including the Applicants) during the CIRP period with regards to the Corporate Debtor, have been duly considered as part of the CIRP costs (till April 2022, whereby the liquidation order dated 28.04.2022 was passed) and that any payment at this stage would be preferential in nature and contrary to the terms of the waterfall mechanism as prescribed under Section 53 of IBC, 2016.

Findings

23. Heard the Ld. Counsels and after perusal of all records, this Bench is of the considered view that:

- 23.1.** Admittedly, there is no agreement presently between the owner/ landlord of the demised premises *viz.* Applicant(s) herein as the Lease Agreement *dated* 08.11.2009 expired on 09.11.2019, and there has been no subsequent renewal thereafter. The said premises continue to be in the physical possession of the Corporate Debtor herein, on account of its assets lying therein.
- 23.2.** It is also noted that the rentals beyond 2019 and upto the date of Liquidation Order (April 2022) have been considered by the erstwhile Resolution Professional and have been made part of 'CIRP Costs' as duly reflected in the present application forthwith. However, in the absence of any written agreement subsequent to 09.11.2019, we opine that the erstwhile Resolution Professional has rightly accounted for the rentals due only as per the earlier available lease agreement.
- 23.3.** This Bench observes that in view of facts stated *supra* and in the absence of any written agreement to the contrary, the claim of the Applicant(s) herein for the enhanced rent including interest @ 15% p.a. is devoid of any merits and that, the inclusion of the said rent value by the erstwhile Resolution Professional among the 'CIRP Costs' does not require any interference.
- 23.4.** This Bench also notes that the possession of the said premises continues to be with the Liquidator, and the Liquidator is therefore duly liable to continue to account for the rentals post the Liquidation Date *i.e.* with effect from May 2022, to the extent of occupation of premises till such date as it persists, in the 'Liquidation Costs' as per the terms of the Lease Agreement *dated* 08.11.2009, and in accordance with the Section 53 of IBC, 2016

23.5. Having regard to the afore-stated, the Applicant(s) herein are duly entitled to their claims with regards to the unpaid rentals after expiration of the lease deed between both the parties, on account of continued possession *w.e.f.* 09.12.2019 in terms and conditions of the Lease Agreement *dated* 08.11.2009. The Respondent *viz.* Liquidator is hereby accordingly ordered.

ORDER

In light of the afore-mentioned observations, this Bench hereby orders:

- 24.** I.A. No. 1579/MB/2023: The I.A. is **Allowed** and the Respondent herein *viz.* Growfitter Private Limited is directed to issue fresh share certificates as against the corresponding 9598 equity shares in favour of Talwalkars Healthclubs Limited forthwith within a period of 07 (seven) days from the date of pronouncement of this Order.
- 25.** I.A. No. 3877/MB/2023: The I.A. stands **Disposed of** and the Respondent Liquidator is hereby ordered to include the unpaid rentals of the Applicant(s) *w.e.f.* May 2022, to the extent of occupation of premises till such date as it persists in the 'Liquidation Costs', in terms of the Lease Agreement *dated* 08.11.2009, without any interest and/or enhancements contrary to the aforementioned agreement whatsoever, and the same may be dealt with in accordance under law.

Sd/-

ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)
07.02.2024
Aditya Kalia

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)