



**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT- 5, MUMBAI BENCH**

C.P. No. 492/IB/MB/2021

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of

Mr. Kishor Prakash Lunawat,

.... Financial Creditor No. 1

Mr. Shivaji Ramling Sakhare,

.... Financial Creditor No. 2

Ms. Sharmila Shivaji Sakhare,

.... Financial Creditor No. 3

M/s. Sakhare Brothers,

.... Financial Creditor No. 4

M/s. Sakhare Industries,

.... Financial Creditor No. 5

V/s.

M/s. GDS Buildcon Private Limited

.... Corporate Debtor

Date of Order : 24.03.2023

Coram:

Hon'ble Shri. Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (Via Videoconferencing):

For the Petitioner : Adv. Viraj Parikh a/w Adv. Prakhar Tandon i/b Adv. Agam H Maloo



For the Respondent: Mr. Amir Arsiwala (Advocate)

Per: Anuradha Sanjay Bhatia, Member (Technical)

ORDER

1. The above Company Petition is filed by **Mr. Kishor Prakash Lunawat**, Financial Creditor No.1, **Mr. Shivaji Ramling Sakhare**, Financial Creditor No. 2, **Mrs. Sharmila Shivaji Sakhare**, Financial Creditor No. 3, **M/s. Sakhare Brothers, proprietorship concern of Sharmila Shivaji Sakhare (FC 3)** Financial Creditor No. 4, **M/s. Sakhare Industries, proprietorship concern of Shivaji Ramling Sakhare (FC 2)** Financial Creditor No. 5 (hereinafter called (**'FC 1, FC2, FC3, FC4 and FC5 respectively'**) seeking to initiate of Corporate Insolvency Resolution Process (**"CIRP"**) against GDS Buildcon Private Limited (hereinafter called the **'Corporate Debtor'**) by invoking the provisions of Section 7 Insolvency and Bankruptcy code (hereinafter called **"Code"**) read with rule 4 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of an unresolved Financial Debt of Rs. 8,26,20,295.89/-.
2. The present petition has been filed u/s 7 of the Insolvency and Bankruptcy Code, 2016, (**"IBC"**) by the Petitioners abovenamed, claiming to be **"Financial Creditors"** of the Corporate Debtor company. As per the Petitioners, the Respondent company is indebted to them for an aggregate amount of Rs. 8,26,20,295.89 (Rs. 5,80,50,000 principal amount and Interest of Rs. 2,45,70,295.89/-) and has committed a default in repayment of this debt. On the basis of this debt and default, the Petitioners seeks initiation of Corporate Insolvency Resolution Process (**"CIRP"**) of the Respondent/ Corporate Debtor. The present petition has been filed jointly by all 5 petitioners:
 - a. Kishor Prakash Lunawat - (FC 1)
 - b. Shivaji Ramling Sakhare - (FC 2)
 - c. Sharmila Shivaji Sakhare -(FC 3)



d. M/s Sakhare Brothers (proprietorship of Petitioner No. 3)- (FC 4)

e. M/s Sakhare Industries (proprietorship of Petitioner No. 2- (FC 5)

3. The Ld. counsel for the Petitioner submits that in the year 2011-12, the FC 1, had his own construction business. During this time, he claims to have met with Mr. Yashwant Sawant, a Director of the Corporate Debtor company who requested him for financial assistance. FC 1 was informed by Mr. Yashwant Sawant, Director of the Corporate Debtor that the Directors of the Corporate Debtor had taken approximately 27 acres of land comprising of Plot no. A-7/2. This plot belongs to Nighoje Logistic Limited. Nighoje Logistic Limited was a partnership of the farmers of Nighoje and was being developed on Joint Venture basis with the Corporate Debtor. The FC 1 was invited by the Directors of the Corporate Debtor to contribute Rs. 5,00,00,000/- approximately in either form i.e. as share capital or becoming partner or a shareholder or a director in the Corporate Debtor company and was also promised high returns on his investment. At this juncture, the FC 1 invested a sum of Rs. 3,50,00,000/- in cash during the year 2011-12 against the investment of Rs. 3,50,00,000/- by FC 1 shares amounting to Rs. 40,50,000/- were allotted to FC 1.
4. The FC 1 claims that he was requested to pay an amount of Rs. 4,00,00,000/- in cash to the farmers as settlement amount. He also claims that the Directors of the Corporate Debtor asked him to invest Rs. 5,00,00,000/- towards share capital of the Corporate Debtor.
5. However, the Petitioner claims to only have advanced a sum of Rs. 3,50,00,000/- in cash to the Corporate Debtor during the financial year 2011-12. It is an admitted position that there is no written agreement or even correspondence evidencing this advance (which was stated to be in cash), nor is there any record of this advance being reflected in the books of accounts of the Corporate Debtor.
6. Thereafter, the FC 1 invested an amount of Rs. 8,55,000/- into the Corporate Debtor company against issuance of 85,500 equity shares of



face value of Rs. 10/- only. This is an admitted position and the FC 1 continues to be a shareholder of the Respondent. The FC 1 also deposited an amount of Rs. 40,50,000/- into the share capital account of the Respondent against allotment of further equity shares.

7. The FC 1 has also relied on certain bank statements to claim that an amount of Rs. 15,00,000/- was advanced by cheque to the Respondent in the year 2012. Admittedly, however, there was no written agreement recording the purpose for which this amount was transferred. The FC Nos. 2 & 3 subscribed to 47,500 equity shares of the Respondent on 13.03.2012.
8. In 2014-15, the FC Nos. 2 & 3 allege that they gave a loan of Rs. 5,40,00,000/- as an unsecured loan to the Corporate Debtor on the basis of an oral request and that the FC 2 was appointed as a Director. The Petitioners further submits that this amount was transferred to the Respondent from the accounts of the FC Nos. 4 & 5 (i.e., their respective proprietorship concerns). Admittedly, there was no written agreement or correspondence evidencing that the amount was advanced towards an unsecured loan, or setting out its terms and conditions.
9. On 31.03.2018, the FC Nos. 2 & 3 were allotted 2,47,000 and 78,375 equity shares of the Corporate Debtor, respectively. It is an admitted position that the FC Nos. 1, 2 & 3 continue to be shareholders of the Corporate Debtor. In fact, the FC No. 2 was also a Director of the Corporate Debtor.
10. On 04.01.2019, the Petitioners stated that they entered into an MOU with the Corporate Debtor for repayment of the alleged debt owed to them. The Petitioners have therefore filed the present petition claiming that the amounts stated above give rise to a Financial Debt, which the Corporate Debtor has defaulted on.

Reply filed by the Corporate Debtor

11. The Respondent has filed an affidavit-in-reply controverting the allegations made by the Petitioner.



- That a Financial Debt exists or that they are Financial Creditors;
- That the Respondent has committed a default in the repayment of the outstanding financial debt.

12. Addressing the contention of the Ld. Counsel for the Petitioner, in its reply filed, the Ld. Counsel of the Corporate Debtor submitted as under;

“Whether the Petitioners are Financial Creditors to whom a financial debt is owed and/ or whether there is any default”

- a. FC No. 1 claims to be a Financial Creditor on the basis of non-allotment of shares to him and for the amounts advanced by him in cash, to the Corporate Debtor. However, the FC No.1 has not placed any documents in support of his claim, to show that he is a Financial Creditor. Further, perusal of the documents referred to by the Petitioner No.1 shows that the claim is barred by limitation. The date of default in respect of Financial Creditor No.1 i.e. Mr. Kishor Prakash Lunawat is 14th July, 2012, which is clearly barred by limitation. **During the course of arguments, the Ld. counsel for the petitioners indicated and admitted that FC No1’s claim is beyond limitation and hence not pressed.**
- b. There must be a clear case setting out the date on which the default occurred and that there must be some written agreement/ document indicating the purpose of the loan/ transaction and in absence of any such written contract, there cannot be an assumption that the monies advanced were towards loan as claimed by the Petitioners in the present case. The Authority must be satisfied that the Corporate Debtor is not being dragged into CIRP for any malafide purpose other than the Resolution of the Insolvency. In the present case, it will be evident that there is no agreement/ document which evidences that the transaction is 'Loan Transaction'.



- c. The FC Nos. 2 and 3 have claimed to be the Financial Creditors on basis of the MOU executed between the FC Nos. 2 and 3 and the Respondent and on the basis of the alleged monies advanced by them to the Respondent. However, it was submitted to this Bench that the FC Nos. 2 and 3 have not produced any document or agreement at the time sums were advanced. From the submissions, it appears that entire claim of the Financial Creditor nos. 2 and 3 is based on a Memorandum of Understanding dated 4th January, 2019 (MOU) executed between Corporate Debtor and the FC Nos. 2 and 3 which purports that Mr. Gurmail singh and Mr. Raj Chaddha would pay to the FC Nos. 2 and 3 an amount of Rs. 2,30,00,000/- in lieu of the shares held by them i.e. 22800 shares by Mr. Shivaji Ramling Sakhare and 78375 shares of Ms. Sharmila Shivaji Sakhare. Further, the MOU also contemplates that the Corporate Debtor shall allot to the FC Nos. 2 and 3 plot No. A/7/H in the project “Capital Square” and for execution of a separate sale agreement and some properties that are set out in the MOU. Further, as stated by the Petitioner in para 22 of the Petition, clearly, it appears to be a case of noncompliance of the MOU, which is a subsequent document allegedly executed in the year 2019. It was submitted on behalf of the Corporate Debtor, that as per the documents annexed by the Petitioner themselves, the MOU appears to be fabricated as the Petitioners have relied upon a document being a Complaint to the Police Commissioner and in para 8 thereof have sought to rely upon Page 13 of the Agreement. However, perusal of the MOU attached to the present petition would show that the total number of pages of the MOU is only 11 pages. Thus, it appears that the MOU being referred to in the Complaint is fabricated and not the same as the MOU annexed to the present petition.
- d. It is a settled position that the right to initiate CIRP process against the Corporate Debtor occurs only when a default occurs. However,



in the present case the Petitioners have infact failed to show that there was any default or that there was any financial debt owned by the Corporate Debtor much less their claim of being Financial Creditors. Thus, perusal of all the averments and documents on record would show the FC Nos. 2 and 3 have also not produced any agreement/ document to show that there was a financial debt.

- e. The entire Petition is silent about the date on which the alleged default occurred or the manner in which the alleged default has occurred as the Petitioner has not placed on record any document/ agreement showing the understanding or the alleged transaction between the parties of advancing any loan to the Corporate Debtor. Thus, in the absence of the same, there is no cause giving rise to any cause of action and thus the Petition is not maintainable and deserves to be dismissed.
- f. The entire claim of the FC Nos. 2 and 3 are based on the alleged MOU which is of a much later date than the date of the alleged loans. Further, even perusal of the MOU shows that there is no provision for repayment of the debt and only refers to transfer of some properties in favour of the FC Nos. 2 and 3.**
- g. Furthermore, from the perusal of the account statements/ ledgers annexed by the FC Nos. 2 and 3 will reflect that the account that is being shown to be the Loan Account of the Corporate Debtor, have multiple third party entries. Thus, there is no relationship of a loan between the Petitioners and the Corporate Debtor. Further the ledgers indicate that there are several amounts that are towards the personal expenses of the FC Nos. 2 and 3 at the behest of the Corporate Debtor. Thus, the Petitioners were siphoning off the amounts of the Corporate Debtor and that the FC No.2 being a Director of the company at the relevant time, had all the access to the accounts of the Corporate Debtor and infact was responsible for all the transactions of the Corporate Debtor.



- h. Further the ledgers being referred to in the Petition are the ledgers for the year when the FC No.2 was responsible for the operation of the company since 2013 and also responsible for purchase of all materials and during his tenure he has authorised several fake bills. FC No.2 has got several bills for delivery of goods. Thus, the various entries in the ledgers have been on account of the fraudulent activities of FC Nos. 2 and 3, who are now seeking to rely upon the same in the present petition against the Corporate Debtor. It is only when a detailed inspection of the book of accounts of Corporate Debtor was done, did the directors realise about the fraud played by Sakhare upon the Corporate Debtor and have also filed a police complaint for the same.
- i. The above fact has been also observed by the police authorities whilst carrying out an investigation against the Petitioner No.2 in FIR no. 364 of 2021. The investigation report sets out the siphoning off of funds by the FC No.2 of the Corporate Debtor. The investigation report makes the following observations:
- i. The Petitioner No. 2 has illegally sold the Plots for development without consent of the other directors and has registered documents on a lower price than the market price and has siphoned off the monies that have been received over and above the agreement values.
 - ii. Between 1st February, 2016 to 30th March, 2016, an amount of around Rs1,15,00,000/- (Rs. One Crores and Fifteen Lakhs Only) has been remitted in the account of Eros Industries bearing account No. 1301/647 and an amount of around Rs. 2,50,00,000/- (Rupees Two Crores Fifty Lakhs Only) in Eros Industries of which the FC No. 2 is the Partner.
 - iii. An amount of around Rs. 70,00,000/- (Rupees Seventy Lakhs Only) has been transferred on 2nd February, 2016 in account No. 2307/193 of FC No.2 and on 4th February, 2016 an amount



of around Rs. 1,00,00,000/- (Rupees One Crore Only) in the account of the FC No.2.

- iv. Further, on 30th March, 2016, the FC No. 2 has embezzled an amount of around Rs. 3,52,00,000/- (Rupees Three Crores Fifty Two Lakhs Only) in cash in form of bearers cheque in favour of different names.

It is pertinent to note that in the investigation carried out by the investigating authorities, they have observed that during the investigation it was revealed that the Petitioner No.2 had used bearer cheques and has used them and siphon off monies from the Corporate Debtor Company.

- v. The other Directors of the Corporate Debtor Company had no knowledge of the aforesaid transactions and therefore it is evident that this is a clear case of fraud committed by the Petitioners in collusion with one another.
- vi. The Hon'ble Supreme Court of India in **S.P Chengalvaraya Naidu vs Jagannath** held that *"it is a settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings"*. It was further held that *"fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage"*. It was further added by the Hon'ble Supreme Court that *"A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite part"*.



- vii. In **Indus Biotech Private Limited v/s Kotak India Venture (Offshore) & Ors**, held that ‘that a petition by a financial creditor involving disputed claims where the default is not clear on the face of it cannot be admitted under section 7 of the IBC’. If the Adjudicating authority, NCLT finds from the material available, that there are certain other factors which require consideration before coming to a conclusion as to whether the petition under Section 7 of IBC is to be admitted, then in such event an objective assessment of the whole situation must be made by the Adjudicating Authority. It is noteworthy to mention that in the above referred case a section 7 application was dismissed by the Adjudicating Authority and the said decision was upheld by Hon’ble Supreme Court.
- viii. Similarly, in the present matter, there is a lot of material which proves that after having drained all the funds from the Respondent, the Petitioners are now enforcing coercive measures to recover its alleged outstanding loan. The Petitioners have in collusion have initiated the proceedings under Section 7 of IBC before this Hon’ble Court and the same requires serious investigation. Hence this petition is liable to be dismissed.
- ix. The Hon’ble Apex Court has in the judgement of **Vidharba Industries Power Ltd. vs Axis Bank Ltd.** 2022 (8) SCC 352 has observed that:
- “76. The fact that Legislature used ‘may’ in Section 7(5)(a) of the IBC but a different word, that is, ‘shall’ in the otherwise almost identical provision of Section 9(5)(a) shows that ‘may’ and ‘shall’ in the two provisions are intended to convey a different meaning. It is apparent that Legislature intended Section 9(5)(a) of the IBC to be mandatory and Section 7(5)(a) of the IBC to be discretionary. An application of an Operational Creditor for initiation of CIRP under Section 9(2) of the IBC is mandatorily required to be admitted if the application is complete in all respects and in*



compliance of the 28 requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice has been delivered to the Corporate Debtor by the Operational Creditor and no notice of dispute has been received by the Operational Creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.

“77. On the other hand, in the case of an application by a Financial Creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the Adjudicating Authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor.

It has further held that “ Even though Section 7(5) (a) of the IBC may confer discretionary power on the Adjudicating authority, such discretionary power cannot be exercised arbitrarily and capriciously. If the facts and circumstances warrant exercise discretion in a particular manner, discretion would have to be exercised in that manner.

88. The Adjudicating Authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits....”

The view taken by the Hon’ble Apex Court in the abovestated judgement has been followed by this Hon’ble Tribunal in the judgement of **IL& FS Financial Services Ltd vs. Empower India Ltd. C.P.(IB) – 541 (MB)/ 2020**. Hence, it was pleaded that the Company Petition No. 492 of 2021 should be dismissed.



Findings:

13. Heard the Ld. Counsels appearing for the Petitioners and the Corporate Debtor and after perusing the records, the Bench is of the considered opinion that the Petition is not maintainable and should be dismissed.
14. Upon perusal of the record it can be seen that with regard to FC-1, the date of default is mentioned as 14.07.2012, and the present Petition having being filed in the year 2022, therefore the said debt is barred by laws of limitation and the same is not pressed by the Petitioner. In this regard the Ld. Counsel for the Financial Creditors has stated that the date of default with respect to FC-2, FC-3, FC-4 and FC-5 are not hit by limitation and the same should be considered while ascertaining the date of default in the present case. The request of the Ld. Counsel for the Petitioners is accepted. One of the plea taken by the Corporate Debtor in its defence is that the debt owed to Kishor Lunawat is barred by the Limitation, it is now settled law that in a Section 7 Petition filed by multiple parties, even if claims of some parties are barred by limitation, as long as default greater than Rs. 1 crores is established, the Petition is maintainable. Hence, we hold that the Petition is maintainable.
15. The Ld. Counsel for the Petitioner has relied upon a Memorandum of Understanding (MoU) dated 04.01.2019 (Annexure-8), whereunder Clause 1 i.e. **LOAN TO THE COMPANY and Credit Balances of related firms of THE PARTY OF THE SECOND PART** states that the Party under second part (i.e. Mr. Shivaji Ramling Sakhare and Mrs. Sharmila Shivaji Sakhare being FC 2 and FC 3), have given unsecured loans to the Corporate Debtor. The Ld. Counsel for the Corporate Debtor has also raised a contention that there is no loan agreement or any transaction document executed by the parties and the FC-2 and FC-3 are claiming the said debt by the virtue of the abovementioned MoU. It is further argued by the Ld. Counsel for the Corporate Debtor that the said MoU does not specify any schedule of repayment of the unsecured loan provided by the FC-2 and FC-3 and, thus, the date of default mentioned by the Petitioner is an afterthought.



Responding to the said contention, the Ld. Counsel for the Petitioner has relied upon the Clause 6 of the said MoU wherein it is stated that all the parties should clear their respective dues on or before 30.06.2019 and therefore the date of default with respect to the FC 2 and FC 3 ought to be considered as 30.06.2019. With regard to the above and upon careful perusal of the MoU it can be seen that there is a clause relating to the accountability of the parties to the MoU which states **that the Respondent Company is liable towards making payments towards the unsecured loans provided by the FC 2 and FC 3 in a manner as prescribed by the schedule of payments under the MoU,** here, it is pertinent to note as has been rightly pointed out by the Ld. Counsel for the Corporate Debtor, **-that the MoU is completely silent about the schedule of payment.** Furthermore, the Petition does not mention about the manner in which the default has occurred as the Petitioner has not placed on record, any document/ agreement showing the transaction between the parties of advancing any loan to the Corporate Debtor. The FC Nos. 2 and 3 have claimed to be the Financial Creditors on basis of the MOU executed between the FC Nos. 2 and 3 and the Corporate Debtor and on the basis of the alleged monies advanced by them to the Corporate Debtor. However, it was submitted to this Bench that the FC Nos. 2 and 3 have not produced any document or agreement at the time sums were advanced. From the submissions, it appears that entire claim of the Financial Creditor nos. 2 and 3 is based on a Memorandum of Understanding dated 4th January, 2019 (MOU) executed between Corporate Debtor and the FC Nos. 2 and 3 which purports that Mr. Gurmail singh and Mr. Raj Chaddha would pay to the FC Nos. 2 and 3 an amount of Rs. 2,30,00,000/- in lieu of the shares held by them i.e. 22800 shares by Mr. Shivaji Ramling Sakhare and 78375 shares of Ms. Sharmila Shivaji Sakhare. Further, the MOU also contemplates that the Corporate Debtor shall allot to the FC Nos. 2 and 3 plot No. A/7/H in the project “Capital Square” and for execution of a separate sale agreement and some properties that are set out in the MOU. Further, as stated by the Petitioner



in para 22 of the Petition, clearly, it appears to be a case of noncompliance of the MOU, which is a subsequent document allegedly executed in the year 2019. It was submitted on behalf of the Corporate Debtor that as per the documents annexed by the Petitioner themselves, the MOU appears to be fabricated as the Petitioners have relied upon a document being a Complaint to the Police Commissioner and in para 8 thereof have sought to rely upon Page 13 of the Agreement. However, perusal of the MOU attached to the present petition would show that the total number of pages of the MOU is only 11 pages. Thus, it appears that the MOU being referred to in the Complaint is fabricated and not the same as the MOU annexed to the present petition.

16. In addition to this the Respondent has stated that the debt claimed by the FC-2 and FC-3 is not a Financial Debt due to malicious conduct of the FC 2, whilst he was the Director of the Respondent Company. In this regard an Investigation report by the Economic Offences Wing is annexed by the Respondent, wherein, it has been stated:

“

- a. *the FC 2 has illegally sold the Plots for development without consent of the other directors and has registered documents on a lower price than the market price and has siphoned off the monies that have been received over and above the agreement values.*
- b. *between 01.02.2016 to 30.03.2016, an amount of around Rs1,15,00,000/- and Rs. 2,50,00,000/- has been remitted in the account of Eros Industries wherein FC 2 is a partner.*
- c. *on 30.03.2016, the FC 2 has embezzled an amount of around Rs. 3,52,00,000/- in cash in form of bearer cheque in favour of different names.”*



In furtherance a Remand Order dated 03.11.2021 was passed against the FC-2 wherein it is recorded that FC-2 during his tenure as the Director of the Respondent Company have acted in a suspicious manner and for the same purpose he is liable to be remanded to P.C.R.

17. After hearing the submissions and upon pursuing the material available on record, we are of the considered view that this is a fit case for dismissal of the above Company Petition. It is a settled position that the right to initiate CIRP process against the Corporate Debtor occurs only when a default occurs. However, in the present case the Petitioners have infact failed to show that there was any default or that there was any financial debt owned by the Corporate Debtor much less their claim of being Financial Creditors. Thus, perusal of all the averments and documents on record would show the FC Nos. 2 and 3 have also not produced any agreement/ document to show that there was a financial debt.
18. The entire Petition is silent about the date on which the alleged default occurred or the manner in which the alleged default has occurred as the Petitioner has not placed on record any document/ agreement showing the understanding or the alleged transaction between the parties of advancing any loan to the Corporate Debtor. Thus, in the absence of the same, there is no cause giving rise to any cause of action and thus the Petition is not maintainable and deserves to be dismissed.
19. Accordingly, the above Company Petition is **'Dismissed'**

SD/-

ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

SD/-

KULDIP KUMAR KAREER
MEMBER (JUDICIAL)