



IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA 895/2022 in CP (IB) 1633/MB/2019

In the matter of the Insolvency and Bankruptcy Code,
2016

Chaitanya Sevabhavi Sanstha

...Applicant

Versus

Mr. Manoj Kumar Agarwal

Resolution Professional of D.S. Kulkarni Developers
Limited

... Respondent

Order Delivered on 31.03.2023

Coram:

Hon'ble Member (Judicial) : Mr. H.V. Subba Rao
Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Applicant : Mr. Prasad S. Sapte, Advocate
For the Respondent : Mr. Shyam Kapadia, Advocate

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. The present Interlocutory Application is filed by Chaitanya Sevabhavi Sanstha ("**the Applicant**"), under Insolvency Bankruptcy Code, 2016 (hereinafter referred to as "**the Code**") seeking the following reliefs:

- a) Pass an order to condone the delay in filing claim with the Respondent;



- b) Pass an order to issue directions to Respondent to treat Applicants and its members at par with secured Financial Creditors;
 - c) Pass an order to issue directions to Respondent to consider and admit the claim of this Applicant;
 - d) Pass an order to issue directions to Respondent to take necessary steps to maximise value of assets of Corporate Debtor;
 - e) Pass an order to issue directions to Respondent to consider interests of all stakeholders of Corporate Debtor including present Applicant and its members;
 - f) Pass an order to issue directions to Respondent to lift corporate veil of Corporate Debtor and investigate/ascertain validity of money invested by members of Applicant in Corporate Debtor and its group companies/firms;
2. The members of Applicant had deposited their savings in Fixed Deposit Scheme of Corporate Debtor i.e. DSKDL. After maturity of these deposits, the then Director of Corporate Debtor Mr. D.S. Kulkarni and other members of his family, requested members of Applicant to deposit money into other concerns which are group companies/sister concerns/partnership firms.
 3. In the year 2014-2015, Corporate Debtor started to show signs of stress and entire financial position of group companies of Corporate Debtor, led by Mr. D.S. Kulkarni and his family members went into haywire.
 4. Applicant learned about CIRP proceeding against Corporate Debtor, following which this Applicant, through its members, filed its claim with the present Respondent vide email on October 28, 2019, October 16, 2019, October 14, 2019, October 9, 2019 before Respondent. However,



Respondent rejected claims vide a letter/notice released by him dated October 3, 2019.

5. Respondent's letter categorically states that only the claims of Corporate Debtor will be accepted, the Respondent totally ignored to consider the findings of Directorate of Enforcement in Order passed by Adjudicating Authority Under Prevention of Money Laundering Act dated August 5, 2019.
6. The funds which were collected from depositors/members of Applicant in the form of Fixed Deposits by DSK Group companies, partnership firms/ subsidiaries, were used to create assets of Corporate Debtor through layering in the accounts of partnership firms, Mrs. Hemanti Kulkarni and Corporate Debtor.
7. The Respondent has further failed to consider that these companies/sister concern/subsidiaries/partnership firms were formed by Mr. D.S. Kulkarni and his close relatives to siphon off funds from these companies to Corporate Debtor as enumerated in Forensic Audit Investigation Report.
8. The members of Applicant invested in D.S. Kulkarni & Associates, D.S. Kulkarni & Brothers, D.S. Kulkarni & Sons, DSK & ASSO, DSK & SONS, DSK CONSTRUCTIONS, DSK ENTERPRISES etc. The DSK Group had also common liabilities in form of corporate loans.
9. These group companies of Corporate Debtor which collected Deposits/money from depositors, were also used as corporate guarantee for loans of Corporate Debtor. Similarly, the assets created by Corporate Debtor out of layering of accounts of partnership firms, group companies and Mrs. Hemanti Kulkarni, were used to mortgage loans of group



companies such as DS Kulkarni and Company, DS Kulkarni and Associates etc.

10. DSK group formed six additional partnership firms, whose only purpose was to collect funds from public and transfer them to other group companies including to Corporate Debtor. These partnership firms did not have any business other than collecting money from public at large.
11. The annual books of accounts and nature of activity of DSK Group that these entities were formed with the sole purpose to support Corporate Debtor by infusing funds as and when required by the Corporate Debtor.
12. The members of Applicant are senior and super senior citizens. These individuals invested their hard earned life time savings and money in DSK Group.
13. The resolution plan submitted by Resolution Applicant was approved by CoC, completely overlooking worth of assets as per prevalent market value. The value of the assets of Corporate Debtor are higher than the value that has been presently accepted by CoC. The Corporate Debtor owns hundreds of acres of lands and structures thereon. However, while valuing some of Corporate Debtor's lands, Government valuation of these land banks is Rs. 1406 Crore and market valuation of land banks is Rs. 2532 crore.
14. Forensic Audit Report was made available to the members of Applicant only in September 2021 after several follow-up with Commissioner of Police, Economic Offence Pune.

Submissions of the Respondent by the way of Affidavit in Reply:



15. By the Admission Order dated September 26, 2019, this Bench admitted Company Petition no. 1633 of 2019 filed by the Bank of Maharashtra against the Corporate Debtor for initiating the Corporate Insolvency Resolution Process ("CIRP") in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 (the "IBC"). The Respondent was first appointed as the Interim Resolution Professional ("IRP") of the Corporate Debtor. The IRP was confirmed as the RP at the very first meeting of the Committee of IGNI Creditors ("COC") on October 25, 2019. A copy of the Admission Order dated September 26, 2019 and the Resolution of the First COC meeting dated October 25, 2019 whereby the Respondent was confirmed as the RP are annexed and marked as Exhibits "A" and "B" to the Reply.

16. It is submitted that the Applicant does not have locus to file the present Application and the same ought to have been preferred by those persons claiming to be creditors, if at all. The Applicant describes itself as an association of persons, some of whose members are alleged to be creditors of the Corporate Debtor. This cannot meet the test for filing an application, even under the wide scope of Section 60(5) of the Insolvency & Bankruptcy Code, 2016 (the "Code"). Admittedly, the Applicant is not even claiming to be a creditor of the Corporate Debtor and only proceeds on the basis that some of its members are. It would be these members, alleging to be creditors of the Corporate Debtor, who would have to file any application, not an alleged association of persons claiming to represent some of them. The Applicant has not even annexed the list of those alleged creditors whom it purports to represent and their alleged outstanding claim.



17. Further, the Applicant accepts the fact that the alleged creditors did not have privity of contract with the Corporate Debtor, at least directly. In order to obviate the natural and obvious conclusion that the alleged creditors would not be entitled to be treated as financial creditors of the Corporate Debtor, the Applicant makes deliberately vague references to a "Corporate Debtor Group" and even interchangeably uses Corporate Debtor for transactions which it admits were in fact made with other entities, that may or may not have been connected and/or promoted by the Corporate Debtor's erstwhile promoters. On a bare perusal of the Application, it is clear that the alleged creditors have never made any payment of monies directly to the Corporate Debtor, which may be outstanding so as to render the alleged creditors as creditors of the Corporate Debtor or entered into any Agreement with it.

18. All the fixed deposit holders of the Corporate Debtor put together had a total claim of Rs. 4,67,59,393/- (Rupees Four Crores Sixty-Seven Lakhs Fifty-Nine Thousand Three Hundred and Ninety-Three only). The claims which were admitted were supported by proof of payment made by them to the Corporate Debtor, which were verifiable with the corresponding amounts reflected in their name in the books of accounts of the Corporate Debtor. These claims of fixed deposit holders of the Corporate Debtor were all admitted. In fact, the Resolution Plan, submitted before this Tribunal for approval, also proposes to allocate funds such that the entire admitted claim amount of fixed deposit holders of the Corporate Debtor is paid in full. Since the complete list of deposit holders constituting the Applicant association are not produced in the present Application, it cannot be confirmed if the claims of any of the members of the Applicant have been accepted as against the Corporate Debtor.



19. The Applicant admits that several deposits were in fact made, not with the Corporate Debtor, but with a purported promoter-group entity, one DS Kulkarni and Company ("said Firm"). The Applicant has relied on the assurances of the erstwhile promoters of the Corporate Debtor to invest in their private entities. The Applicant admits to knowing that such related entities, including the said Firm, had no business of their own, and no trade or assets to add value to such entities. The Applicant therefore knowingly invested in such shell companies/firms/legal entities which belonged to and/or were promoted by the erstwhile promoters of the Corporate Debtor. Presumably, they were aware of the risks and arrived at a bargain accordingly with those entities and/or the erstwhile promoters accordingly. Having accepted those risks and/or believed those assurances, they cannot seek recourse against the Corporate Debtor through the back door.
20. In fact, the alleged creditors whom the Applicant claims to represent, in their respective Forms CA, as well as the present Application, have failed to annex any proof of payment of monies to the Corporate Debtor. The Applicant in the present Application by deliberately referring to the Corporate Debtor interchangeably with the related entities of the Corporate Debtor's erstwhile promoters, cannot take their case any further.
21. The Corporate Debtor has been under the management and control of the Applicant and under the guidance of the COC, since the passing of the Admission Order in September 2019. Even before the passing of the Admission Order, the erstwhile promoters and directors of the Corporate Debtor were already being prosecuted by various investigating agencies and by central and state institutions for fraudulent



activities. In fact, the Enforcement Directorate ("ED") had already seized the assets, books of accounts and data of the Corporate Debtor prior to the Admission Order. The erstwhile promoters and directors have been lodged at the Yerwada Jail, Pune, since the year 2018, which is publicly known. Furthermore, even the findings of the ED, which are relied on by the Applicant, indict the erstwhile promoters of the Corporate Debtor and cannot be the basis for affecting the interests of the legitimate creditors of the Corporate Debtor who have acted with diligence in their transactions, which, needless to say, allowing the present Application will do. In view thereof, the Respondent submits that the allegedly fraudulent transactions of the erstwhile promoters, conducted through their personal entities, cannot be honored by the Corporate Debtor during a CIRP on account of other entities being allegedly promoted by the erstwhile promoters. The Applicant and its members can prefer appropriate proceedings against the erstwhile promoters for inter alia cheating, making false promises / providing false assurances, etc. Even assuming the Applicant's allegations in this regard are true, it could not have the effect of making the Corporate Debtor liable instead of the errant erstwhile promoters. Foisting of liability on the Corporate Debtor must either be by contract or by statute - in this case it is by neither.

22. With regard to the fraudulent transactions involving the Corporate Debtor itself, an application has already been filed under Sections 45 and 66 of the IBC seeking directions from this Tribunal against the erstwhile directors and promoters of the Corporate Debtor to make contributions to the assets of the Corporate Debtor commensurate with the amounts which they defrauded the legitimate creditors of the Corporate Debtor.



23. As the RP of the Corporate Debtor, the Respondent submits that he is not empowered to accept any claims other than for monies advanced to and/or deposited with the Corporate Debtor. The Respondent cannot accept the claims of the alleged creditors who have admittedly lent to other entities on the basis of their representations that the erstwhile promoters also promoted those entities; or that the erstwhile promoters promised that the Corporate Debtor would repay them.
24. The Applicant association has prayed in prayer clause (b) that, its members be treated at par with other Financial Creditors. These members have not filed their claim through the association, but as individual creditors who claim to be deposit holders. Despite having filed their claims individually, the present Application is filed by the Applicant, which is not permissible. It appears that some of these individual creditors have formed the Applicant association simply for pursuing this Application and, at the very least, ought to have attached the complete list of members of the Applicant to the present Application.
25. Similarly, prayer clause (c) of the present Application deserves to be rejected inter alia on the grounds that the documents pertaining to these individuals' claims ought to have been attached in order to enable the Respondent to respond to the specific claims which were rejected.
26. Since the present Application is filed in the main Company Petition No. 1633 of 2019 and not in Interlocutory Application No. 1950 of 2021 (for approval of the Resolution Plan), the Applicant association has no locus to dispute the valuation offered in the Resolution Plan. Until their claims are accepted and admitted, which itself impermissible for the reasons aforesaid, they have no locus vis-à-vis the Resolution Plan.



27. The Respondent further submits that he has taken adequate steps to maximize the value of the Corporate Debtor or preserve the value of its assets. The Applicant admits to being aware that the assets of the Corporate Debtor continue to be in the possession of the ED, and the entire process of Expression of Interest was run more than once in order to invite the best possible offer.
28. The Applicant, in prayer clause (f) has sought directions against the Respondent, the RP, to lift the '*corporate veil*' of the Corporate Debtor, and accept claims against purported related parties of the erstwhile promoters of the Corporate Debtor as claims against the Corporate Debtor itself. As an officer appointed under the Code, the Respondent is not empowered to lift the corporate veil as prayed by the Applicant and/or treat alleged creditors of allegedly connected entities as creditors of the Corporate Debtor. The Respondent further submits that any consolidation of the CIRP of the various purportedly related entities could only have been done by order of this Tribunal.

Findings:

29. In the present application, the members of the Applicant association submit that they have deposited an amount in the group companies/partnership firm of the Corporate Debtor on the request of the erstwhile promoters and directors of the Corporate Debtor. The Applicant has prayed for consolidated CIRP of the 'Corporate Debtor Group Companies' and accordingly during the course of oral arguments, the Respondent has relied on the judgements of the Adjudicating Authority in the cases of Lavasa and Videocon for the same. However, in the present application, the so-called group companies in which the amount was invested are partnership firms. Hence, the question of



consolidated CIRP does not arise as partnership firms are not corporate entities and therefore the cases cited by the Applicant cannot be relied upon. Consequently, there cannot be any application of the doctrine of lifting of corporate veil in this application.

30. Apart from the above, we note that the maturity of the fixed deposits of the members of the Applicant with the Corporate Debtor was around the years 2013-2014. Hence, the period of limitation/recourse as per Article 137 of the Limitation Act, 1963, began running from the date of maturity i.e. from the years 2013-2014. However, the present claims have been filed in the year 2019. The CIRP was commenced in this case on 26.09.2019. Nothing prevented the Petitioner from taking any steps nor any steps were taken by the Petitioner against Corporate Debtor prior to commencement of CIRP against Corporate Debtor. Thus, there has been an inordinate delay in filing barred the present claims by the Applicant. Therefore, the Application is barred by limitation. We find no merits for condonation of delay. Having considered the facts stated as aforesaid and totality of the circumstances this Bench deems it fit to dismiss the present Application. As rightly contended by the RP, RP is not under any legal obligation to admit his claims of any creditors whose claims did not find place in the books of accounts of the Corporate Debtor. Even if the payments alleged to have been made by the Petitioner are true they are not binding on the Corporate Debtor as they were made into the accounts of the group company of Corporate Debtor which has separate legal existence. Therefore, this Bench did not find any illegality or irregularity in rejection of the claims of the applicant by the RP.



31. With the aforesaid observations IA No. 895 of 2022 in C.P.(IB) 1633 of 2019 stands disposed of as Rejected.
32. Ordered Accordingly.

Sd/-

SHYAM BABU GAUTAM

Member (Technical)

31.03.2023

SAM

Sd/-

H.V. SUBBA RAO

Member (Judicial)