IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court-II)
KOLKATA

C.P (IB) No. 204/KB/2021
In
I.A No. 390 /KB/2022

In the matter of a petition under Section 10 of the Insolvency and Bankruptcy, Code, 2016;

And

In the matter of:

Suasth Health Care Foundation (Formerly known as Suasth Health Care India Limited)

…Corporate Applicant

And

In the matter of:

An Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules (NCLT Rules);

And

In the matter of :

Hari Vitthal Mission, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 3, Middle Road, Hastings, Kolkata 700022;

.....Applicant / Petitioner

-Versus-

Ravi Sethia, Resolution Professionl of Suasth Healthcare Foundation & ors.

...Respondents

Date of hearing: 02/09/2022

Order Pronounced on : 23/09/2022

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Counsels appeared through Video Conference

Mr. Ramji Srinivasan, Sr. Adv.	:	For RP
Mr. Deep Roy, Adv.		
Mr. Rahul Auddy, Adv.		
Mr. Dhaval Sabla, Adv.		
Mr. Aditya Gooptu, Adv.		
Mr. Abhrajit Mitra, Sr. Adv.	:	For CoC (Yes Bank)
Mr. Saptarshi Saha, Adv.		
Mr. Arindam Mrinal Pal, Adv.		

Mr. Joy Saha, Sr. Adv. Mr. Shaunak Mitra, Adv. Ms. Madhuja Barman, Adv.	:	For Hari Vitthal Mission
Mr. Anirban Bhattacharya, Adv. Mr. S. Sarkar, Adv. Mr. I. Basu, Adv.	:	For Applicant in IA/260/2022

O R D E R

Per: Balraj Joshi, Member (Technical)

1. The Court convened through hybrid mode.
2. The present application is filed by one of the Financial Creditors, namely Hari Vitthal Mission, in terms of Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules (NCLT Rules). The said Financial Creditor has been declared a related party to the Corporate Debtor (Corporate applicant) and has been ousted from the CoC and the instant application is for including the Applicant back into the CoC.

Submissions on behalf of the Applicant

3. The Ld. Sr. Counsel Mr. Joy Saha appearing for the applicant states that the Corporate Debtor had approached the Applicant to raise an amount of Rs. 44,22,00,000/- vide an Agreement dated October 10, 2017. The applicant who is originally a Financial Creditor, had assisted the CD with funds totalling to Rs. 62,16,33,563/- . The claim of the Financial creditor (herein)had been accepted by the RP and accordingly the applicant was made a member of the CoC.
4. The said agreement signed between the Suasth healthcare and HVM on Oct. 10 2017 had a provision for reserving 100 beds in favour of the Applicant for the needy to be recommended by the financial creditor herein, free of charge in lieu of the Security deposit of 50 Crs , an interest free financial assistance. However, if the Corporate debtor faulted on operationalising the hospital and provide for the said facilities by December 2018, the whole of the refundable security would become payable with 10% interest thereon. the Corporate Debtor defaulted in July 2021 and due to events of default, the facility was terminated. Subsequently, the Corporate Debtor committed various other defaults and hence, the Corporate Debtor filed an application under Section 10 of the IBC and the Corporate Debtor was declared as insolvent vide order dated 31st August, 2021 and accordingly, further processes as per the established law was continued. Mr. Ravi Sethia was appointed the Resolution Professional to carry on

the CIRP. The Applicant being one of the stakeholders was included in the CoC and had also attended various CoC meetings.

5. However, on 31st December, 2021, the Applicant received a mail from the respondent asking as to why the Applicant should not be categorized as a related party, the assertion being based on a legal opinion sought by the RP. Another letter dated 11th January, 2022 was written to the Respondent reiterating its stand that the Applicant is a related party, however, the Applicant addressed a reply dated 22nd January, 2022 disputing and denying the findings of the respondent and also provided a detailed explanation as to how it is not a related party but it was shocked to receive a counter-response from the Respondent wherein it still held that the Applicant is a related party to the Corporate Debtor.
6. It is further stated by the applicant that subsequently it stopped receiving any notices for the CoC meetings and was thus, unable to attend the meetings on being adjudged by the RP as a related party to the Corporate Debtor. Thus, the present application has been filed with prayer to quash the orders of the RP, declaring the applicant herein as a related party to the Corporate applicant and other consequential orders. It is pertinent to mention here that the Corporate Applicant namely M/s Suasth Healthcare foundation is presently undergoing the CIRP, following the order of this Adjudicating Authority dated 31.08.2021.
7. The respondent had stated various reasons due to which it has concluded that the applicant is a related party, however, all the findings concluded by the respondent do not formulate a basis for the applicant to be labelled as a related party and the applicant has also stated its reasons why it should not be termed as a related party along with legal backing.
8. The applicant also stated that Resolution Professional can only formulate an opinion but does not have adjudicatory power to adjudge that the applicant is a related party. The applicant states that the Corporate Debtor is not acting on the direction of the trustee or investment manager based on whom the Resolution Professional have termed the applicant as a related party and the respondent has not even submitted any evidence as to the basis of its finding and hence, such assertions are bad in law. It is asserted by the applicant that none of the components/ingredients of Section 5(24) of the code applies to the facts of the present case which renders the applicant a related party of the Corporate debtor.

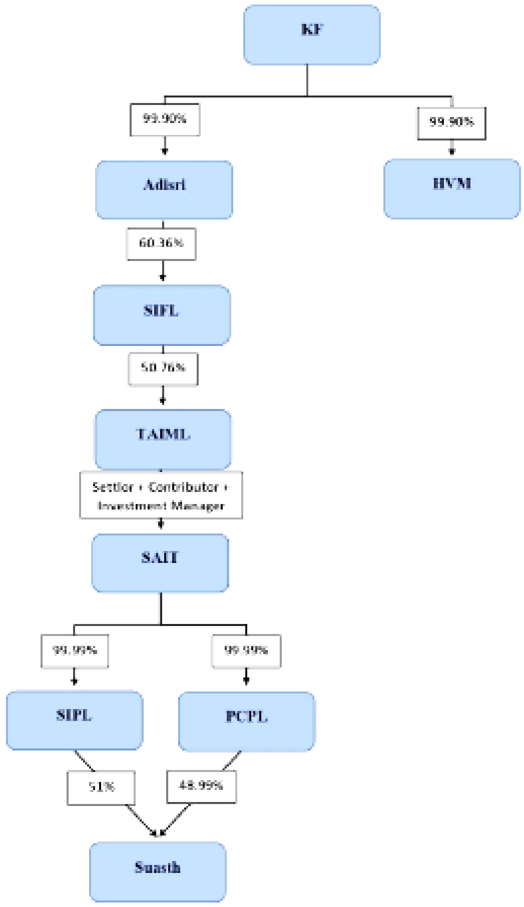
9. It has been contended that there was no definition of 'Control' under the code. The definition provided under section 2(27) of the Companies Act 2013, also does not contemplate for lifting of the Corporate veil. There are no occasions for the purpose of section 5(24) of the code. Further contentions have been included in the pleadings as to how the ingredients of section 5(24) namely, I,j and h were not attracted in the instant case.
10. It is important to mention that the present CoC comprises of the following financial creditors :
    1. YES Bank – 19.87%
    2. Axis Bank- 19.45%
    3. SREI – 51.07%
    4. Hari Vitthal Mission- 9.61%

    With the exclusion of SREI and also the H.V.M., the remainders of the CoC would then comprise of YES Bank holding a voting value of 51% and Axis Bank would hold the remaining ~49% and the applicant is, therefore, aggrieved since as a Financial Creditor which has invested a substantial amount of money (62.16 Crores) and with his exclusion from the CoC, he would be prejudiced as he shall not be a part of the decision making when it comes to examine and approval of the Resolution Plan.

    In light of the above , it is evident that the issue to be addressed in the IA is whether or not the H.V.M. is a related party to Suasth Healthcare Foundation.
11. The applicant has relied upon **Swiss Ribbons** para 58,wherein it has brought out that the RP does not have powers of adjudication. In this regard, he drew our attention to page 53 of the application which is a letter written by the RP of the Corporate Debtor, wherein the RP has given a detailed justification and analysis for his decision to declare H.V.M. as a related party. Relying on the ratio of the Swiss Ribbons, the applicant has emphatically stated that the RP has gone beyond his brief as he is not entitled to adjudicate the matters but is only supposed to collate and compile the information. The CD also contended that in case the RP faced a dilemma even though he had allowed the applicant to participate in the CoC, he could have opposed the matter before this Adjudicating Authority rather than taking the matter in his own hand.

Submissions on behalf of the respondent

12. Mr. Ramji Srinivasan Sr. Advocate appearing on behalf of the Resolution Professional presented a brief note giving various important dates and also explaining the shareholding of various entities in the organogram presented above. **This organogram was de facto a graphical reply to the one presented by the applicant.** Albeit, jump upside down, it shows the Corporate Debtor at the bottom of the rung and the KF at the top which is self-explanatory.



Referencer:
KF- Kanoria Foundation
HVM- Hari Vitthal Mission
Adisri- Adisri Commercial Private Limited
SIFL- SREI Infrastructure Finance Limited
TAIML- Trinity Alternate Investment Managers Limited
SAIT- SREI Alternative Investment Trust
SIPL- Sarvavid Investment Private Limited
PCPL- Param Capital Private Limited
Suasth- Suasth Health Care Foundation

13. Ld. Senior Counsel appearing for the applicant has elaborately explained the relationship of various entities by way of an organogram which is depicted herein. The chart is based on the submissions included in the pleadings of the Applicant on page 53 of the petition.
14. With the help of the diagram above, which shows the share holding pattern of the corporate debtor and other connected entities, the point that was made to be driven home was that Kanoria Foundation, which is holding 99.9% of the ownership in H.V.M., is also the same entity which is holding the ownership of Suasth Healthcare Foundation albeit, through various layers of subsidiary companies/entities of the Kanoria Foundation. Thereby deducing that H.V.M. i.e. Hari Vitthal Mission who is a Financial Creditor of Suasth Healthcare Foundation i.e. Corporate Debtor is a related party. It is the case of the applicant that the Resolution Professional appointed for conducting CIRP in regard to the Corporate Debtor has wrongly determined the Corporate Debtor to be a related party.
15. By way of an e-mail received on 31st of December, 2021 certain inputs were asked for by the RP to ascertain the status of each of the financial creditors. After a reminder, mail on 11th January, the RP wrote a letter to the Financial creditor (herein), wherein issue dealing with the status of the corporate debtor as a related party has been dealt with in detail. The applicant herein has replied to this letter vide his letter dated 22nd of January, 2022, disputing and denying the findings of the Resolution Professional and also provided a detailed explanation as to how it is not a related party to which a counter response by the respondent was sent challenging the contentions of the applicant i.e. H.V.M. The applicant has also contended in the pleadings and also in the hearings that he had been invited to the meetings of the CoC held as far as 4th Meeting, the last being on 27th December, 2021, where after the applicant has been ousted from the CoC.

a. <u>Current shareholding</u>

   i. TAIML, as the settlor, contributor and investment manager of SAIT exercises control and is in charge of the day to day function of the Portfolio Companies.

   ii. Thus, TAIML, through the Portfolio Companies exercises control over the Corporate Debtor.

   iii. SIFL exercises control over TAIML. Thus, SIFL through TAIML controls the Corporate Debtor.

iv. SIFL is held by Adisri, which is further held by KF. KF is also the 99.99% shareholder of the Applicant, and thereby exercises control over the Applicant.

v. Hence, KF exercises control over both the Applicant as well as the Corporate Debtor. Thereby, the Applicant is a related Party to the Corporate Debtor.

b. Previous shareholding

i. SIFL, through TAIML exercises control over the Portfolio Companies.

ii. KF, through Adisri owns and controls SIFL. Thereby, KF is the ultimate parent of the Portfolio Companies.

iii. KF controls SIDCL through ACPL. Hence, KF exercises control over SIPL, PCPL and SIDCL, i.e. all the shareholders of the Corporate Debtor. Hence, KF owns and controls the Corporate Debtor.

iv. KF owns and controls the Applicant.

v. Hence, KF exercises control over both the Applicant as well as the Corporate Debtor. Thereby, the Applicant is a related Party to the Corporate Debtor.

16. He also drew our attention to page 59 of the application at para 'e' wherein it has been determined by the RP that KF is a related party to the Corporate Debtor through the powers being exercised by TAIML and is clearly a holding company. Further, in pursuance to Section 5(24)(i) of the Code (HVM) being a subsidiary of KF is a related party to the Corporate Debtor.

17. On this contention, the Ld. Sr. Counsel for the applicant had vociferously countered that Section 5(24)(i) is applicable in the instant case as this relates to a body corporate and not to trust which is the instant case. However it was pointed out by the Counsel on the other side that HVM was not a trust but a Section 8 company as is clear from the agreement dated 10 Oct, 2017,

18. Ld. Senior Counsel appearing for the RP Mr. Ramji Srinivasan controverted the arguments made by the Ld. Sr. Counsel for the applicant in so far as the issue of authority to adjudicate on the matters by RP is concerned, he cited Section 18(c) of the Code which enjoins upon the Resolution Professional to constitute a Committee of Creditors and then he further quoted Section 21(2) which gives the postulate of the Committee of Creditors and reads as follows:

> *"The Committee of Creditors shall comprise of Financial Creditors of the Corporate Debtor;*
>
> *Provided that a Financial Creditor or the Authorized Representative of the Financial Creditor referred to sub-section 6 or sub-Section 6A or sub-Section*

5 of Section 24, ***if it is a related Party of the Corporate Debtor, shall not have any right of representation, participation or voting in a meeting of Committee of Creditors …."***

and, therefore, he deduced that:

i. The Resolution Professional is within his rights to make a determination regarding a Financial Creditor being a related Party.

ii. Under Section 5(24)(h) which stipulates that "any person of whose advise, directions or instructions a director, partner or manager of the Corporate Debtor is accustomed to act" would be termed as a related party and since H.V.M. exercises a control over the Corporate Debtor through KF which is the holding entity of the entire rung of the companies/entities decidedly a related party.

Analysis and Findings

19. We have heard both the Ld. Senior Counsels on behalf of the applicant as well as respondents as brought hereinabove and in light of the pleadings and hearing it is necessary to examine the relationship on the touch stone of postulates (h), (i), and (j) of Section 5(24) of the code. Since H.V.M. is admittedly a Section 8 Company, the provisions of Section 5(24)(i) shall be applicable

20. Section 5(24) defines the related party in relation to the Corporate Debtor as :

(h) any person on whose advice, directions or instructions, and director, partner or manager of the corporate debtor is accustomed to act;

(i) a body corporate which is a holding , subsidiary or an associate company of the corporate debtor , or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than twenty percent of voting rights on account of ownership or a voting agreement.

21. For the sake of ease of explanation, let us take the element (j) first. From the shareholding pattern presented by the financial creditor (herein) in his pleadings at page 15-17, we derive the following table which depicts the % shareholding or the voting power of Kanodia Foundation (KF) over various other entities in the lower rungs of the organogram above. Even though it was argued by the applicant that the KF of HVM does not enjoy any voting power in the board of the corporate debtor,It is

clear that the Corporate Debtor i.e. Susath Healthcare is controlled by the Kanodia foundation albeit through a layered sequencing to the extent of 31% as depicted below:

Entity	Holding	% Held by KF	Entity
KF	100%	99.9%	HVM
Adisri	99.90%	99.9%	
SIFL	60.36%	60%	
TAIML	50.76%	31%	
SAIT	100%	31%	
SIPL	99.90%	30.97%	
PCPL	99.90%	30.94%	
SUASTH	51%	16%	
SUASTH	49%	15%	

22. Thus it is clear that the relationship of the Financial creditor (herein) and the corporate debtor is that the Kanodia foundation controls 31% of voting rights or a general control over the corporate debtor and by virtue of the fact that the HVM is owned to the extent of 99.9% by KF, it also controls crosses the bar of holding more than the 20% voting rights stipulated in Section 5(24)(j). Thus KF-HVM- SUASTH are related parties.
23. We need not repeat what has already been said regarding 5(24) (i) and is appropriately depicted in the organogram to conclude that the stipulations are evidently matching the current configuration of the parties/entities. Thus, in terms of the stipulations of the code, HVM is a body corporate of a holding company (KF) to which the corporate debtor is a subsidiary (to the extent of ~ 31%) applicable and, therefore, there is no infirmity or contradiction in the letters of the RP given at page 57 of the application.
24. Examining the status of the parties on the last postulate of Section 5(24)(h), it would be naïve to think that a director or a manager of the Suasth Healthcare would not be accustomed to act on the advice, directions or instructions of Kanodia Foundation, which would be synonymous with HVM being a 99.9% ownership of KF. Thus even on this count also the present case crosses the bar of 5(24)(h).
25. In light of the above, we have no hesitation in holding that HVM is a related party of the Corporate Debtor i.e. Suasth Healthcare Foundation and that the RP has not erred in holding the same
26. This application being IA390(KB)2022 is accordingly, rejected.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this the 23rd day of September, 2022