2

IN THE NATIONAL COMPANY LAW TRIBUNAL, SPECIAL BENCH – I, CHENNAI

IA(IBC)/753/CHE/2021 In IBA/471/2020

In the matter of ***Harsha Exito Engineering Private Limited***

M/s. SMS Foundation & Investment LLP
Rep. by its Designated Partner Mr. Manish Kumar B.Shah
No.7, VII Cross Street, Shenoy Nagar,
Chennai – 600 030

... *Applicant*

Versus

M/s. Harsha Exito Engineering Pvt. Ltd
Rep. by Resolution Professional Mr.J. JOHN OHIL VI
No. 3/95A, East of Medical College, Asaripallam
Nagercoil, Kanyakumari District – 629 201

... *Respondent*

Order pronounced on ***8th July 2022***

CORAM:

JUSTICE (RETD.) S. RAMATHILAGAM, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

For Applicant	:	*E. Om Prakash, Senior Advocate* *Harish Chowdary, Advocate*
For Respondent	:	*S R Raghunathan, Senior Advocate*

ORDER

Per: SAMEER KAKAR, MEMBER (TECHNICAL)

This Application filed by the Applicant namely SMS Foundation & Investment LLP under Section 65 of IBC, 2016 seeking following reliefs:-

A) To set-aside the rejection passed by the resolution professional Dt.10.07.2021.

B) To direct the resolution professional to admit the claim amount of Rs.15,72,28,489/-(being the principle of Rs.12,94,04,499/- and Interest of Rs.2,78,13,989/- from 19.08.2019 and till 31.03.2021).

C) To induct the Applicant as Financial Creditor in the Committee of Creditors.

D) Pass any such order deem fit and proper in the interest of justice.

2. It is averred in the application that the Applicant is a Limited Liability Partnership Firm represented by two designated Partners Mr. Sanjay Kumar Shah & Mr. Manish Kumar Shah and they are in the business of financing and investment to Cottage and Small & Medium Scale Enterprises Company.

3. It was submitted that the Applicant got acquainted with the Promoter of the Corporate Debtor viz. Mr. P. Dhanraj and that the said Promoter Mr.P. Dhanraj had Purchase Order for the Airport Project for Airports Authority of India Ltd., for Rs.35.00 Crores and required investment for purchase execution and also to settle few Creditors who have already filed application before this Tribunal for seeking initiation of CIRP. It was submitted that believing the words of the Promoter, the Applicant has agreed to invest an amount of Rs.16.50 Crores with the Company in the capacity as shareholder.

4. It was submitted that in pursuance of the same, a Memorandum of Understanding (MOU) was signed between the parties on 02.08.2019 for transfer of shares in accordance with the

investment made by the Applicant. It was submitted that as contemplated in the MOU, the Applicant has periodically transferred a total amount of Rs.12,94,04,499/- for the period from 19.08.2019 till 31.12.2019.

5. It was submitted that on 08.01.2020 an e-mail was forwarded by the Corporate Debtor along with attachment namely Board Resolution extract along with Letter of Revocation of MOU, Ledger Statement and Confirmation of Loan to the tune of Rs.13,61,41,174/- along with interest as shown in the Books of Corporate Debtor.

6. It was submitted that as per the Board Resolution dated 27.09.2019, it is stated that MOU signed by the parties for an investment under the shares stands revoked and the said sum received shall be converted in the Loan Books of the Corporate Debtor. Further, it was submitted that pursuant to the revocation of MOU, the Board approved the erstwhile Managing Director Mr.P. Dhanraj to sign on the Loan Agreement vide Board Resolution dated 24.12.2019. It was submitted that on the said basis Mr.P.Dhanraj has signed the Loan Agreement dated 27.12.2019 in and by which, an interest @ 15% per annum is required to be paid on quarterly basis.

7. It was submitted that on 27.01.2020 the said Mr.P. Dhanraj had written a letter to the Applicant stating that the amount received was converted as Equity Shares to the name of the Applicant designated Partner's individual name. In response to the same, the Applicant has sent a letter on 29.01.2020 that upon revocation of MOU, the amount which was transferred were converted into loan as per the Loan Agreement dated 27.12.2019. However, it was submitted that Mr. P. Dhanraj has blatantly denied the same and has stated that the MoU was never revoked and he has honored the MoU by transferring the shares to individual names.

8. It was submitted that the Applicant has also raised an objection to the malicious way of transfer of shares to the designated partners of the firm vide letter dated 22.02.2020. In the meantime, it was submitted that CIRP in respect of the Corporate Debtor was initiated by this Tribunal vide its Order dated 24.03.2021 and the Applicant has filed his claim before the IRP in the capacity as unsecured Financial Creditor in Form-C on 16.04.2021. However, it was submitted that the said claim came to be rejected by IRP vide mail dated 24.05.2021 stating that the Applicants were shareholders of the Corporate Debtor. Aggrieved by the said rejection, the Applicant preferred the present application.

9. The Respondent / IRP has filed a Counter before this Tribunal and stated that the Applicant did not lend any money to the Corporate Debtor based upon the Loan Agreement and the same was disputed only based upon MOU which was entered for transfer of shares. Further, it was submitted that the Corporate Debtor in its letter dated 27.01.2020 has written to the Partners of the Applicant firm that the said MOU was never revoked. It was also submitted that the Corporate Debtor in the said letter has stated that 18,60,000 Equity Shares were transferred to the investor on 17.12.2019 and the same has also been approved by the Board of Directors at its meeting held on 24.12.2019. In support of his contention, the Learned Senior Counsel for Respondent invited attention of this Tribunal that the Balance Sheet of the Corporate Debtor for the Financial Year 31.03.2020 wherein, the details of shareholding are being reflected as follows: -

SHAREHOLDERS DETAILS	NO. OF EQUITY SHARES (31.03.2020)	AMOUNT (RS.) (31.03.2020)	AMOUNT (RS.) (31.03.2019)
Mr. Babu Raj Dhanraj	27,80,066	27,80,06,600	46,40,06,600
Mr.Sanjay Kumar P.Shah & Manish Kumar B.Shah	18,60,000	18,60,000	--
Mrs. Neeraja Dhanraj Capital	2,43,677	2,43,67,700	2,43,67,700
Mr. Arun Miranda	1,16,257	1,16,25,700	1,16,25,700
TOTAL	**50,00,000**	**50,00,00,000**	**50,00,00,000**

10. It is seen from the above table that Sanjay Kumar P. Shah and Manish Kumar P. Shah are holding 18,60,000 shares in the Corporate Debtor and hence, it was contended that the Respondent was right in rejecting the claim of the Applicant.

11. It is also averred in the reply that averments made by the Applicant that a sum of Rs.12,94,04,499/- was transferred to the Corporate Debtor is not correct, since the actual transfer of amount is only to the tune of Rs.8,19,75,000/-. Further, it was submitted that the Applicant is making contradictory statements since it was earlier submitted that the amount was brought in to invest in equity shares which was converted into loan with interest at 36% p.a. However, on the other hand, the loan agreement dated 27.12.2019 stipulates 15% rate of interest p.a. Further, it was submitted that the Applicant has relied upon the Board Resolution dated 27.09.2019 wherein it was resolved to revoke the MoU and the total outstanding amount was converted to loan with interest at the rate of 36% p.a. In this regard, it was submitted that the authenticity of the Board Resolution dated 27.09.2019 is doubtful since upon perusal of Form MGT – 7 filed by the Company shows that no Board meeting was conducted by the Company on 27.09.2019.

12. After hearing both the parties in detail, this Tribunal vide its Order dated 27.01.2022 directed the RP to file detailed "Share

Transfer Form" along with minutes of the Board Meeting, if any, on or before next date of hearing. During the hearing the Respondent has replied that the Share Certificate was handed over by the suspended Board of Directors to the Applicant herein and the original Share Certificate is in the possession of the Applicant. Further, for the first time during the course of hearing, upon a query posed by this Tribunal, the Learned Counsel for the Applicant submitted that they are in possession of the original share certificate and that it was submitted that the same was kept as security by the Applicant. It is pertinent to note here that in the original share certificate the shares are standing in the name of Mr. P. Dhanaraj and the reverse side of the share certificate was not submitted by the Applicant as well as by the RP / Respondent, which could reveal transfer, if any.

13. Subsequently, a memo was filed on behalf of Respondent stating that the list of documents which was taken possession by the IRP as on 08.04.2021. A perusal of the same would disclose the fact that the Share Transfer Form and the Register of shareholders does not form part of the documents taken over by the RP from the erstwhile management. During the course of hearing, it was also submitted by the Learned Senior Counsel for the Respondent that RP is not in possession of "Share Transfer Form" and "Register of Shareholders".

14. Now the issue is required to be adjudicated as to whether the claim of the Applicant is required to be admitted in the capacity as a Financial Creditor. After perusing the pleadings and documents filed along with the application, it could be seen that the Loan Agreement was executed between the parties on 27.12.2019 in and by which the amount of Rs.16.00 Crores was converted into loan to be paid with 15% interest per annum.

15. Further, it is also seen from the Bank Statement that the Applicant has disbursed a sum of Rs.12,94,04,499/- to the account of Corporate Debtor and the same is also not disputed. However, it could be seen from the Balance Sheet that the name of the Applicant's Partner namely Sanjay Kumar P.Shah and Manish Kumar P.Shah is reflected in the Shareholder in the Books of Corporate Debtor and the said fact is also intimated to the Applicant as early as on 27.01.2020.

16. While this being the fact that if the Applicant's real intention was not to hold any shares in the Corporate Debtor Company, the Applicant ought to have taken steps under section 59 of the Company's Act 2013 for rectification of his name in the Registrar of Company. However, it could be seen that no steps taken by the Applicant in this regard.

17. The Applicant was silent on this issue and continued to be Shareholder in the Corporate Debtor Company. It could also be seen that from the Ledger Extract of the Applicant maintained in the books of the Corporate Debtor the balance payable is shown as 'NIL' as on 31.03.2020. Hence, we come to the irresistible conclusion that the Applicant is one of the Shareholder of the Corporate Debtor and the Respondent was right in rejecting the claim of the Applicant.

18. Accordingly, the Application stands **dismissed**.

- Sd -

SAMEER KAKAR
MEMBER (TECHNICAL)

Justice (Retd.) S. RAMATHILAGAM
MEMBER (JUDICIAL)

Raymond