

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH-II, CHENNAI**

IA/344/2020 in IBA/967/2019 filed
under Section 60(5) of the Insolvency
and Bankruptcy Code, 2016

In the matter of *M/s. Bhadreshwar Vidyut Private Limited*

Radha Industries Private Limited

Represented by its Director Mr. Yashpal Sharma
Old No. 18, New No. 39, Sembudoss Street,
Chennai-600001

... Applicant

Vs.

Ms. Jayashree S Iyer

Interim Resolution Professional for
Bhadreshwar Vidyut Private Limited
New No. 10, Old No. 41, Kirubansankari Street
West Mambalam, Chennai-600033

...Respondent/IRP

CORAM:

R. SUCHARITHA, MEMBER (JUDICIAL)

S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

For Applicant : *Shri. Nithyaesh Natraj, Advocate*
For Respondent : *Shri. N. P Vijay Kumar, Advocate*
For Ms. Jayashree S Iyer, IRP

ORDER

Per: R. SUCHARITHA, MEMBER (JUDICIAL)

Order Pronounced on: 24.07.2020

The instant Application has been filed by one M/s. Radha
Industries Private Limited (hereinafter referred to as the

"Applicant") against the Respondent/IRP of Corporate Debtor under section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016") with a prayer to:

"Set aside the Minutes of the Committee of Creditors dated 26.02.2020 and further direct the Respondent/IRP to include the Applicant herein in the Committee of Creditors meeting as a Financial Creditor and thus render justice".

2. The counsel for the Applicant submits that the Applicant is one of the Financial Creditor of the Corporate Debtor under CIRP process. The Applicant gets it's right under the Deed of Assignment Cum Novation dated 02.04.2019.
3. The counsel for the Applicant states that the Corporate Debtor and M/s. OPG Power Generation Private Limited (hereinafter referred to as "OPG") had a Loan Agreement dated 03.04.2017. Further states that the Corporate Debtor purchased coal from the "OPG". The Corporate Debtor was unable to repay the amount towards supply of coal and hence this loan agreement was executed between OPGS Power Gujarat Private Limited and OPG Power Generation Private Limited. The Operational Creditor owed a sum



of Rs.10,29,55,242/-which was converted into a financial loan. Thereafter from the records, it appears that the Corporate Debtor did not repay the loan. Hence this debt was assigned to the Applicant herein under the Deed of Assignment Cum Novation dated 02.04.2019 for a consideration of Rs.13,61,07,978/-.

4. The Applicant states that the CIRP of the Corporate Debtor commenced vide Order dated 27.01.2020. Pursuant to that, public announcement was made by the Respondent/IRP dated 29.01.2020.

5. The counsel for the Applicant states that the Applicant submitted its claim application to the IRP for the outstanding dues. The Respondent/IRP had accepted the claim and vide notice dated 22.01.2020, invited the Applicant to participate in the first meeting of the CoC. The meeting was held on 26.02.2020. The Applicant participated in the CoC meeting held on 26.02.2020. There were totally 10 Financial Creditors, out of that, five Financial Creditors are Nationalized Bank Creditors, one (REC Limited) is a public sector Infrastructure Finance Company and other four are Financial Creditors and the details are as under:



S. No.	Name of the Financial Creditor	Amount Claimed	Amount Admitted	Voting %
1	REC Ltd	12,77,29,97,091.00	12,77,29,97,091.00	53.39
2	Punjab National Bank	3,73,03,08,082.00	3,37,97,94,238.00	14.13
3	State Bank of India	3,11,28,96,180.00	3,02,28,96,180.00	12.63
4	Indian Bank	92,68,00,742.00	73,15,99,853.00	3.06
5	Syndicate Bank	34,23,34,826.00	34,23,34,826.00	1.43
6	Bank of Baroda	15,99,49,686.00	6,99,49,686.00	0.29
7	Garg Iron and Energy Pvt Ltd	73,24,88,381.00	73,24,88,381.00	3.06
8	OPG Power Generation P Ltd	1,65,69,95,921.00	1,65,69,95,921.00	6.93
9	Shoka Tradelink Pvt Ltd.	1,06,47,18,157.00	1,06,47,18,157.00	4.45
10	Radha Industries Pvt Ltd.	15,14,20,126.00	15,14,20,126.00	0.63
	TOTAL	24,65,09,09,192.00	23,92,51,94,459.00	100.00

6. The Minutes of the Meeting it was recorded as follows:-

“During the course of the meeting, the Respondent/IRP informed that she carried out preliminary verification of claims including status of relationship of Creditors with Corporate Debtor based on information furnished to her by the Creditors along with claim form and the documents available with Corporate Debtor and in public domain. All four Financial Creditors listed in serial no. 7 to 10 have furnished affidavits declaring that they are not related to Corporate Debtor, M/s. Bhadreshwar Vidyut Private Limited, which was confirmed by the Corporate Debtor as well.

However, to the surprise of the IRP, at the start of the first agenda item itself, all the Creditors listed in serial no. 1 to 6 have raised objection to the inclusion of Creditors listed in serial no.7 to 10 claiming that as per information furnished to them at the time of availing credit facility and subsequent renewal, OPG Power Generation Private Limited (“OPGPG”) and Gita Power & Infrastructure Private Limited (“GPIPL”) are related parties of the Corporate Debtor and the assignment transactions made by them in

favour of Financial Creditors listed in serial no.7, 9 and 10 during the past one year required detailed due diligence. Banks informed that they have enough documents to prove that OPGPG and GPIPL are Related Parties. IRP requested the Bankers to provide documentary evidence available with them in this regard. The CoC requested the IRP to carry out detailed due diligence of the claim filed by Financial Creditor at serial no.7 to 10 and their inclusion in the Committee of Creditors be kept in abeyance till it is established that they are not related parties. When the objections were raised by the Financial Creditors 1 to 6, the four Financial Creditors listed in 7 to 10 could not defy the objections or provide any evidence to disprove the above statement made by Financial Creditors during the Meeting.

In view of the above facts brought to the notice of the IRP by Financial Creditors listed in 1 to 6 who stated that as per records of the Consortium Bankers they are related parties and considering that the assignment transactions were recent, effected in April – May 2019, the IRP declared that the claims of four Financial Creditors listed in serial no. 7 to 10 will be kept in abeyance and they will not form part of Committee of Creditors till verification is completed.

The above four Creditors requested the IRP that they be allowed to attend the proceedings of First CoC pending due diligence to be carried out by the IRP. However, CoC Members objected to this. IRP informed them that their claims were not declined but only kept in abeyance for consideration on merits of facts.

Financial Creditors listed in serial no. 7 to 10 vacated the Meeting room. After ensuring that only authorized persons were inside the meeting room, the IRP proceeded with other agenda items."

7. The Applicant has filed the following documents:

- i) Copy of Loan Agreement dated 03.04.2017
- ii) Copy of the Deed of Assignment Cum Novation dated 02.04.2019



- iii) Minutes of the CoC dated 26.02.2020
- iv) Copy of Notice dated 13.03.2020 sent by Applicant to the Respondent along with acknowledgement
- v) Reply dated 27.04.2020 sent by the Respondent

8. The Respondent/IRP filed counter and also filed the following documents:

- a) Note sent by Respondent along with annexure
- b) Articles of Association of Corporate Debtor
- c) Articles of Association of OPG Power Generation Private Limited.
- d) Chart representing holding structure of OPG Group vis-à-vis Corporate Debtor and OPGPPL

9. The Respondent/IRP states that the Public Sector Banks as Financial Creditors strongly opposed the participation of this Applicant in the CoC on the basis that the Applicant is a "Related Party". However, the Respondent did not have all the documents to conclude that the Applicant is a "Related Party". Therefore, the Respondent/IRP requested the Applicant to be out of the CoC Meeting till the verification of the documents are completed.



10. The Respondent/IRP collected all the relevant documents and sent e-mails dated 02.03.2020, 12.03.2020 and 24.03.2020 and also reply dated 01.04.2020 was received from the Applicant.

11. An opportunity was given to the Applicant to make relevant documents and make the submissions before the Respondent. However, since the supporting documents filed by the Applicant were not adequate, the Respondent concluded that the Applicant is a "Related Party", hence they are not entitled to participate in the proceedings of the CoC.

12. The Respondent has narrated in detail at Para 6 to 23 of the counter affidavit, the nexus between the Corporate Debtor/Assignor and Assignee/Applicant. The Respondent has listed the findings that led to conclude that Applicant is "Related Party".

13. The Respondent also communicated the same vide letter dated 27.04.2020 to the Applicant.

14. We have heard both the counsels and gone through the typed sets of documents and written submissions made by both the parties.



15. The Original Application IBA/967/2019 was filed by the Syndicate Bank on 30.07.2019 against the Corporate Debtor for initiation of Corporate Insolvency and Resolution Process (CIRP). Thereafter, CIRP was commenced against the Corporate Debtor vide Order dated 27.01.2020. This Application is filed to set aside the Minutes of the Meeting held on 26.02.2020 and a direction to include the Applicant to participate in the CoC meeting.

16. From the counter filed by the Respondent/IRP, it is clear that the Respondent did not pass any quasi-judicial order on 26.02.2020. However, the Financial Creditors based on the documents submitted by the Corporate Debtor, strongly opposed to them at the time of availing financial facility, the participation of the Applicant on the ground that it is clearly a "Related Party". After the meeting, the Respondent/IRP sent e-mails dated 02.03.2020, 12.03.2020 and 24.03.2020 and a reasonable opportunity was given to the Applicant to produce documents to negate the fact that the Applicant is not a "Related Party". The Applicant had also replied to the Respondent/IRP vide letter dated 01.04.2020. Based on all these



documents and the submissions, the IRP vide letter dated 27.04.2020 has conveyed the findings that the Applicant is a "Related Party" and hence debarred from participating in any of the CoC meeting of the Corporate Debtor.

17. Surprisingly, this entire fact has been suppressed by the Applicant. This application dated 15.05.2020 was filed before this Tribunal vide e-mail dated 17.05.2020.

18. The Applicant has also not brought to our notice the subsequent findings of the IRP correspondence between them and the letter dated 27.04.2020. However, the Applicant is harping on the point that the stand of the IRP to suspend this Applicant during the course of the meeting is unwarranted and beyond the powers of the IRP. We are of the opinion that the IRP has not passed any orders beyond the powers nor the IRP has arrived at any conclusion in the meeting dated 26.02.2020. Hence the IRP only sought time to verify the same after giving an opportunity to the Applicant, thereafter has concluded that Applicant is a "Related Party".



19. The Applicant has not challenged the letter dated 27.04.2020 and has also not questioned the conclusion of the IRP that it is a "Related Party". No arguments or documents were filed by the Applicant to satisfy that it is not a "Related Party" to the Corporate Debtor.

20. The Application dated 15.05.2020 was sent by an e-mail dated 17.05.2020 with an urgent application to hear the matter during the lock down period. Immediately the matter was listed for hearing on 22.05.2020. However, this matter was listed before Court-1 of NCLT, Chennai. The Hon'ble Judicial Member recused from hearing this matter. Hence the matter was placed before Hon'ble President for necessary order. By order dated 01.06.2020, the matter was transferred to this Bench.

21. In the meanwhile, the Applicant had initiated Civil Revision Petition (CRP) No.1123/2020 before the Hon'ble High Court of Judicature at Madras. We do not have the details of the CRP proceedings, neither any orders nor the status of the CRP proceedings, were placed before us.

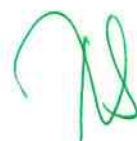


22. The Corporate Debtor as already under severe financial crisis. Hence one of the Financial Creditor namely Syndicate Bank has initiated proceedings by filing an application on 30.07.2019 u/s 7 of IBC, 2016.

23. This Applicant by a Deed of Assignment dated 02.04.2019 has taken over the debt. The Applicant is neither a Stressed Asset Company nor a Debt Collector. The reason for the Applicant for taking over this bad loan of the Corporate Debtor and become a "Debt Collector" of OPG Power Generation Limited is not clear, but rather surprising.

24. It is surprising by the very reading of the Balance Sheet of the Company that the Applicant would have known the status of the Corporate Debtor, Banks have declared the loan account of the company as "NPA" on 30.06.2018.

25. Therefore, the question arises that whether this Deed of Assignment was entered to keep bunch of their men in the CoC? The Corporate Debtor was already a sinking ship in a very deep financial crisis. At that point of time, the loan was assigned to the



Applicant may be with an idea to put their men in the CoC. However, the decision of the Respondent/IRP that Applicant is a "Related Party" is not challenged in this application.

26. The Applicant states that during the meeting of committee of creditors a biased opinion was formed by financial creditors that the Respondent and OPG Power Generation Private Limited are is a "Related Parties" of the Corporate Debtor. Therefore, the Respondent acted on a most erroneous presumption that as the applicant was the assignee of the OPGGPL.

27. At this juncture, it is significant to refer to the decision of the Hon'ble NCLAT in the matter of **Pankaj Yadav & Anr. -Vs- State Bank of India & Anr.** in Company Appeal (AT)(Insolvency) No.28 of 2018, wherein at para 7 and 8 it has held as follows;

"7. It is not in dispute that the assignor Mr. Sudhakar Mulay was the Director/promoter of the 'Corporate Debtor'. Therefore, he is 'related party' within the meaning of Section 5(24). A legal transfer of 'debt' account from a 'creditor' (assignor) to a third party (assignee) provides the rightful ownership to the assignee. The 'debt assignment' is a transfer of debt with all the rights and obligations



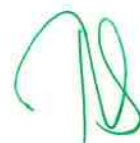
associated with it from a creditor to a third party, who is 'assignee'. The 'debt' is in the form of loan from a 'financial institution', the debtor is referred as a 'borrower' and if the debt is in the form of securities, such as bonds, the debtor is referred to as an 'issuer'. Undisputedly, the assignment is the transfer of one's right to recover the debt of another person as a contractual right. Rights of an 'assignee' are no better than those of the 'assignor'. It can be, therefore, held that 'assignor' assigns its debt in favour of the 'assignee' and 'assignee' steps in the shoes of the 'assignor'. The 'assignee' thereby takes over the right as it actually did and also takes over all the disadvantages by virtue of such assignment.

8. What cannot be achieved directly by Mr. Sudhakar Mulay, he did it indirectly assigning his debt in favour of the 1st appellant. Mr. Sudhakar Mulay being the 'related party', with the assignment of 'debt', the disadvantage also goes to the 1st appellant. For the reasons aforesaid, we hold that the issue has been rightly decided by the Adjudicating Authority and no ground has been made out to interfere with the impugned order. In absence of any merit, the appeal is dismissed. No cost".

28. As to the present case, it is seen that the Applicant was the Assignee of a loan from the Related Party of the Corporate Debtor and by following the principles laid down in the Judgment of the Hon'ble NCLAT, in **Pankaj Yadav & Anr.** (supra) as enumerated in

para 7, the rights of the 'Assignee' are no better than those of the 'Assignor', the Applicant is stepping into the shoes of the Assignor and thereby takes over the right of the Assignor with the onerous crown, which also includes the disadvantage as found in the Assignment Agreement. Thus, if the Assignor of a debt is a Related Party of the Corporate Debtor, as per the ratio laid down by the Hon'ble NCLAT, the Assignee, who is a third party, is also liable to be held as a Related Party of the Corporate Debtor.

29. Interestingly, this Tribunal was confronted with the decision of the Hon'ble NCLAT in the matter of **Edelweiss Asset Reconstruction Company Ltd. -Vs- Synergies Dooray Automotive Ltd. & Ors.** in Company Appeal (AT)(Insolvency) No. 169 of 2017, wherein the Hon'ble NCLAT, seems to have taken a different view from its earlier decision rendered in **Pankaj Yadav (supra)**. However, the view taken by the Hon'ble NCLAT in the matter of **Edelweiss Asset Reconstruction (supra)** is justified on the basis of the specific facts arising in that particular case. The facts of the case in **Edelweiss Asset Reconstruction (supra)** can be discerned from



that on the **Pankaj Yadav (supra)**, so as to say, that in the former case, the Loan was originally granted by a Bank which was later on assigned to a Related Party, however in the latter case, the original loan itself was granted by the Related party of the Corporate Debtor. It is a settled law, that that whatever the rights the original assignor got from the original lender will automatically accrue to subsequent assignees based on executing appropriate legal documents in accordance with law. Thus, as to the case of Assignment of debt to a Related / Non – Related Party, there can be no straight-jacket formula which can be applied to ascertain whether an assignee of a debt owed to a related party financial creditor of the corporate debtor, be subject to same disqualifications that the related party assignor would be subject to.

30. It is also worthwhile to refer to the decision of the Hon'ble Supreme Court in the matter of **Arcelormittal India Private Limited –Vs- Satish Kumar Gupta & Ors.; (2019) 2 SCC 1**, wherein the Hon'ble Apex Court while dealing with the Related party issue in relation to the submission of a Resolution Plan, has held that



provisions of Related Party in IBC, 2016 is a typical instance of a see through provision and stated as follows;

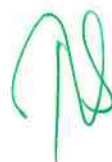
“29. The opening lines of Section 29A of the Amendment Act refer to a de facto as opposed to a de jure position of the persons mentioned therein. This is a typical instance of a “see through provision”, so that one is able to arrive at persons who are actually in “control”, whether jointly, or in concert, with other persons. A wooden, literal, interpretation would obviously not permit a tearing of the corporate veil when it comes to the “person” whose eligibility is to be gone into. However, a purposeful and contextual interpretation, such as is the felt necessity of interpretation of such a provision as Section 29A, alone governs. For example, it is well settled that a shareholder is a separate legal entity from the company in which he holds shares. This may be true generally speaking, but when it comes to a corporate vehicle that is set up for the purpose of submission of a resolution plan, it is not only permissible but imperative for the competent authority to find out as to who are the constituent elements that make up such a company. In such cases, the principle laid down in Salomon v. A Salomon and Co. Ltd. [1897] AC 22 will not apply. For it is important to discover in such cases as to who are the real individuals or entities who are acting jointly or in concert, and who have set up such a corporate vehicle for the purpose of submission of a resolution plan.

Further, it has held as follows;

57. It is important for the competent authority to see that persons, who are otherwise ineligible and hit by sub-clause (c), do not wriggle out of the proviso to sub-clause (c) by other means, so as to

avoid the consequences of the proviso. For this purpose, despite the fact that the relevant time for the ineligibility under subclause (c) to attach is the time of submission of the resolution plan, antecedent facts reasonably proximate to this point of time can always be seen, to determine whether the persons referred to in Section 29A are, in substance, seeking to avoid the consequences of the proviso to subclause (c) before submitting a resolution plan. If it is shown, on facts, that, at a reasonably proximate point of time before the submission of the resolution plan, the affairs of the persons referred to in Section 29A are so arranged, as to avoid paying off the debts of the non-performing asset concerned, such persons must be held to be ineligible to submit a resolution plan, or otherwise both the purpose of the first proviso to sub-section (c) of Section 29A, as well as the larger objective sought to be achieved by the said subclause in public interest, will be defeated”.

31. However, as to the facts of the present case, the same is squarely covered by the decision of the Hon'ble NCLAT in the matter of **Pankaj Yadav (supra)**. Thus, in view of the dispositive reasoning that have been set out supra, this Tribunal is of the considered view that the Applicant being Assignee of the Loan from the Assignor, is also a Related Party of the Corporate Debtor and as such the Application as filed by the Applicant is liable to the **dismissed**. However, the findings of the IRP vide letter dated 27.04.2020, this prayer of the Applicant has become infructuous and



we are not inclined to go into the merits of the letter dated 27.04.2020 since it is not challenged before Tribunal. Accordingly, this IA/344/2020 stands **dismissed**. without costs.

-sd-

[S. VIJAYARAGHAVAN]
Member (Technical)

-sd-

[R. SUCHARITHA]
Member (Judicial)

TJS