

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-V

I.A. 533 OF 2022

IN

C.P.(IB) No. 3169/MB/2019

Under Section 60(5) of the Insolvency &
Bankruptcy Code, 2016

Sabari Reality Private Limited,

101, Sabari Prasad, 11th Road,
Chembur, Mumbai – 400 071

...Applicant

Vs

Sivana Reality Private Limited,

Through its Resolution Professional

Mr. Manish Jaju

Samriddhi Garden, CTS No. 403/C,

LBS Road, Opp. Eshwar Nagar,

Bhandup (west), Mumbai – 400 078

...Corporate Debtor

In the matter of

Spartan Engineering Industries

Private Limited,

...Original Petitioner

Vs

Sivana Reality Private Limited

**...Original Respondent/
Corporate Debtor**

Order Pronounced on:- 19.07.2023

Coram:

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

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

Appearances (via Videoconferencing)

For the Applicant: Mr. Ranjeev Carvalho a/w Adv. Rupesh Geete i/b
Satyaki Law Associates

For the Respondent: Mr. Amir Arsiwala, Advocate a/w Ms. Nidhi shah and
Ms. Nupur Shah (R1)

Per: Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The present Application has been filed by the Applicant seeking compliance of the Order dated December 3, 2021, passed by the Hon'ble Supreme Court in Civil Appeal No. 4247 of 2018 ("SC Order"), inter-alia by rectification of the register of members of the Corporate Debtor, on account of the failure of the Corporate Debtor/ Resolution Professional of the Corporate Debtor, to keep and maintain the same. The SC Order is a binding decree and order of the Hon'ble Supreme Court under Article 142 of the Constitution of India, and all parties are mandated to act in accordance with the same.

Facts of the Case:-

2. On September 1, 2006, the Corporate Debtor was incorporated under the name 'Sunshine Housing Private Limited'. The first directors and subscribers to the MOA were: (i) Kashyap Kanaiyalal Mehta; and (ii) Atul Shamji Bharani.

3. In or around the year 2008, the Applicant, along with one of its sister concern Sabari Developers LLP acquired 11.31% and 26.38%, respectively in the Corporate Debtor.
4. in the year 2017, certain disputes arose between the minority shareholders, namely, (i) Pratik Jayesh Vira; (ii) Jayesh Vira; and (iii) Kalpataru Advisory Services Pvt. Ltd. ("Vira Group") and Sunshine Housing & Infrastructure Private Limited ("SHIPL"). At that time, SHIPL was the majority shareholder of the Corporate Debtor.
5. The Vira Group preferred a petition under section 241-242 of the Companies Act, 2013, against SHIPL before the National Company Law Tribunal, Mumbai Bench, and the said litigation was carried up to the Hon'ble Supreme Court, in Civil Appeal No. 4247 of 2018 ("Appeal").
6. By an order dated August 6, 2018, the Supreme Court directed the parties to go to the Mediation Centre of the Bombay High Court to settle the pending disputes between them.
7. Pursuant thereto, a mediator was appointed, and a Memorandum of Settlement dated October 31, 2018 was entered into between the parties whereby the shareholders of the Corporate Debtor, including the Applicant, as part of a larger settlement, transferred their entire shareholding in favour of the Vira Group ("Memorandum of Settlement"). While the Applicant was not a party to the Appeal before the Hon'ble Supreme Court and/ or the proceedings before the NCLT, Mumbai Bench, which culminated in the filing of the Appeal, the Applicant was a party to the Memorandum of Settlement and sold its shareholding, as part of a larger restructuring and settlement arrived at between the parties, whereby the entire shareholding of the Corporate Debtor was to be transferred to the Vira Group to amicably resolve the disputes between the parties.
8. To give effect to the same, a Share Purchase Agreement (SPA) dated October 31, 2018, was entered into between the Applicant, Mr. Jayesh

Vira, and the Corporate Debtor. Applicable stamp duty on the SPA was paid, Form No. SH-4 was duly executed as well as the said transfer was duly authorised by the Board of the Corporate Debtor and the Applicant.

9. Similar share purchase agreements were also entered into between the other shareholders of the Corporate Debtor, namely Kashyap Mehta, and Sunshine Infra Housing Pvt. Ltd. and their entire holding was transferred to Vira Group. The same was also authorized by the Board and the Corporate Debtor also effected the same in their records.
10. Accordingly, on November 26, 2018, a joint application was preferred by all the parties in the Appeal before the Hon'ble Supreme Court ("Settlement Application") to dispose of the Appeal in terms of the Memorandum of Settlement.
11. By an order dated December 3, 2018, the Appeal before the Hon'ble Supreme Court was disposed of in terms of the Settlement Application ("SC Order"). It is pertinent to note that the terms of the Memorandum of Settlement entered into between the parties form a part of the said SC Order. The Joint Application contains the Memorandum of Settlement as well as SPA entered into between the Vira Group, Corporate Debtor and the Applicant, which are binding on all parties and form part of the SC Order. Copy of the SC Order and the Joint Application are annexed hereto and marked as "EXHIBIT-A" and "EXHIBIT-B" respectively.
12. Paragraph 7 of the Settlement Application categorically records that the Memorandum of Settlement shall become effective from November 30, 2018. Thus, since November 30, 2018, the Applicant is not a shareholder of the Corporate Debtor and has ceased to be a member of the Corporate Debtor.
13. However, despite the aforesaid order, the register of members of the Corporate Debtor does not reflect Vira Group as 100% shareholders of the Corporate Debtor.

14. By an order dated August 11, 2020, this Hon'ble Tribunal has admitted the Corporate Debtor into CIRP under IBC, pursuant to default on payment of certain operational debts. Consequently, on August 17, 2020, the Resolution Professional issued a public notice inviting claims from the creditors of the Corporate Debtor. Accordingly, the Committee of Creditors of the Corporate Debtor ("CoC") was also constituted, and requisite steps/ actions were undertaken under IBC for revival of the business of the Corporate Debtor. It is pertinent to note that the aforesaid factual narration pertaining to the exit of the Applicant from the Corporate Debtor, pursuant to the SC Order, is mentioned in the Information Memorandum. Copy of the Information Memorandum is annexed hereto and marked as "EXHIBIT — C".
15. The Corporate Debtor was a party before the Hon'ble Supreme Court and had duly executed all these documents. Stamp duty has been paid, SH-4 Transfer Form has been executed as well as board resolutions were passed by both parties to take the same on record. The onus of approving and registering the transfer of the shares under the Share Purchase Agreement (SPA) and entering the name of the Vira Group in the register of members was cast upon the Corporate Debtor. This is also recorded in the Board Resolution. Any stand taken contrary to the same would be in breach of the SC Order. The only step which was to be undertaken in furtherance thereto, was to affect the transfer in the register of members of the Corporate Debtor, which is an administrative act.
16. However, despite the aforesaid, the Resolution Professional has failed to rectify the register of members in this regard, so as to reflect the name of Vira Group as shareholders of the Corporate Debtor. Upon admission of the Corporate Debtor into CIRP, the Resolution Professional came to be vested with management of the affairs of the Corporate Debtor, in accordance with all applicable laws. The powers, duties and functions of the Resolution Professional are laid down under IBC. The Resolution Professional had the authority to access the books of accounts, records

and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants, etc. In fact, the Resolution Professional was aware of the SC Order and the Memorandum of Settlement and the SPA, which is evident from the Information Memorandum. However, despite all this, the Resolution Professional has failed to affect the transfer in the register of members of the Corporate Debtor.

17. Section 88 of the Companies Act mandates that the company shall keep and maintain the register of members in such manner which reflects reality at any particular point of time. According to Rule 3(1) of the Management Administration Rules, 2014, every Company limited by shares shall, from the date of registration, maintain a register of its members in Form No. MGT-1. The compliance sought under the aforesaid provisions are mandatory in nature and the Resolution Professional has, therefore, failed to effectively perform his duties and functions, while managing the affairs of the Corporate Debtor.
18. For the sake of completeness, the Consideration Amount under the SPA has not been paid by Vira Group till date. By a notice dated October 16, 2019, the Applicant called upon Vira Group to pay the Consideration Amount under the SPA and sought specific performance of the SC Order. In response to the said notice, the Advocate for the Vira Group vide their reply dated November 28, 2019, categorically stated that the said demand is bad in law, has no effect and is inconsequential. The Reply further called upon the Applicant to withdraw the notice. Both parties did not take any steps in furtherance thereof and the communications exchanged in this regard stand withdrawn. Copies of the notice dated October 16, 2019, and November 28, 2019, are annexed hereto and marked as “EXHIBIT — D” and “EXHIBIT — E” respectively.
19. However, in the midst of the CIRP, on August 3, 2021, Vira Group has addressed an email purportedly cancelling the SPA, in so far as the Applicant is concerned (“SPA Cancellation E-mail”). In response thereto,

by an email dated August 16, 2021, the Applicant called upon Vira Group to withdraw the SPA Cancellation E-mail, being in contempt of the SC Order. The SPA Cancellation E-mail is in breach of the SC Order read with Memorandum of Settlement and the SPA. Vira Group has assumed control of the Corporate Debtor post SC Order, managing it the day-to-day affairs and has since driven the company into CIRP. The said email is illegal, void ab initio and non est. It is not anyone's case that the Applicant interfered with the day to-day management and affairs of the Corporate Debtor, post the SC Order. The Respondent is put to strict proof to prove that the Applicant was engaged in any capacity whatsoever with the Corporate Debtor, post SC Order. Vira Group has knowingly accepted the benefit of the SC Order and is estopped from denying the validity of, or the binding effect of the SC Order, upon themselves. In fact, in lieu of the SPA Cancellation E-mail, the Applicant filed Contempt Petition (Diary) No. 20334 of 2021 against the Vira Group before the Hon'ble Supreme Court. By an order dated November 13, 2021, the Hon'ble Supreme Court recognized the rights of the Applicant under the SC Order read with Memorandum of Settlement and the SPA and granted liberty to the Applicant to take appropriate steps in accordance with law. The Contempt was accordingly withdrawn by the Applicant. Copy of the communications exchanged between the Applicant and Vira Group as annexed hereto and marked as "Exhibit- F (Colly)". Copy of the order dated November 13, 2021, passed by the Hon'ble Supreme Court in the Contempt Petition is annexed hereto and marked as "EXHIBIT -G".

20. The Applicant has, therefore, accordingly, preferred the present Application before this Hon'ble Tribunal.

REPLY FILED BY THE RESPONDENT

21. At the very outset, the respondent submits that the present application is thoroughly misconceived and cannot be sustained. The relief which is sought is essentially a relief under section 59 of the Companies Act, 2013, for rectification of the register of members of the Corporate Debtor.

In fact, the Applicant is seeking to invoke section 59 of the Companies Act, 2013.

22. It is further stated that the Applicant would not have been able to prosecute a separate application under section 59 of the Companies Act, 2013, as the same would be covered by the moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016. The non-obstante clause contained in section 238 of the Insolvency and Bankruptcy Code, 2016, is sufficiently wide to cover the Companies Act, 2013, also. Therefore, the Applicant clearly would not be able to maintain a separate application under section 59 of the Companies Act, 2013 against the Corporate Debtor seeking the relief of rectification of the register of members. It would, therefore, follow that the present application is also not maintainable, as it is a settled principle of law that “what cannot be done directly can also not be done indirectly”.
23. Even otherwise, what the Applicant is seeking is essentially specific ‘performance of “Memorandum of Settlement” and the “Share Purchase Agreement”’. This is clear from paragraph 7 of the present Application, which records that the Applicant had, on the 16th of October 2019, called upon the “Vira Group™ to pay the consideration amount and sought specific performance of the Memorandum of ‘Settlement and the Share Purchase Agreement. Therefore, it is clear that as on that date, the transfer of shares was not complete. Had the transfer of shares been complete, there would have been no occasion for the Applicant to send the letter dated 16th October 2019. Further, the Vira Group also addressed a communication dated the 3rd of August 2021, terminating the Share Purchase Agreement. This communication was responded to by the Applicant. Therefore, it is clear that there were disputes between the parties and that the Share Purchase Agreement had not been implemented or given effect to.
24. Without going into the various allegations and counter allegations which have been levelled in the present Application, it may only be noted that

no formal transfer of the shares held by the Applicant and its sister concern in the Corporate Debtor was ever registered with the Registrar of Companies or the Corporate Debtor. It is for this reason that the name of the Applicant still appears as a major shareholder of the Corporate Debtor not only in its own books of accounts but also in the records available with the Registrar of Companies. Moreover, the Applicant's books of accounts / financial statements filed before -the Registrar of Companies, subsequent to the Share Purchase Agreements still depicts the Applicant as a shareholder of the Corporate Debtor. While the Applicant has produced certain share 'transfer forms' which have been executed between the counterparties to the aforesaid agreements, it is an admitted position that the share transfer forms were not submitted to the jurisdictional Registrar of Companies and, therefore, the transfer of the shares has not yet taken place. In fact, the Applicant itself admits in the present Application that the requisite consideration for transfer of the shares has not been received by it due to which it did not transfer the shares.

25. The Respondent submits that the facts set out in the Application itself make it clear that the transfer of shares from the Applicant to the Vira Group had not fructified by the Insolvency Commencement Date (11" August 2020). Mere execution of an agreement contemplating future sale of shares cannot operate to create any right, title, or interest in those shares. Paragraph 2.1 (c) of the Memorandum of Settlement clearly records that the parties "shall" enter into appropriate agreements to effectuate the share transfer. An executed Share Purchase Agreement is also annexed to the joint application filed before the Hon'ble Supreme Court of India. However, the correspondence on record makes it clear that the said -Share Purchase Agreement has not been implemented as on the Insolvency Commencement Date.
26. The Applicant has sought to contend that the Memorandum of Settlement and the Share Purchase Agreement have 'been implemented

as the details of the order of the Hon'ble Supreme Court of India have been incorporated into the Information Memorandum. In this regard, it is submitted that this contention cannot be sustained in light of the legal position of an "Information Memorandum". As this Hon'ble Tribunal is aware, a 'Resolution Professional is obligated to prepare an Information Memorandum in accordance with section 29 of the Insolvency and Bankruptcy Code, 2016, which is to contain the particulars set out therein as well as the applicable regulations.

27. Therefore, it is the duty of the Resolution Professional to include in the Information Memorandum all documents and information pertaining to "disputes" by or against the Corporate Debtor. Thus, for the 'sake of compliance of the aforesaid regulations, it was imperative to include all the facts in the Information Memorandum. However, the mere inclusion of these details in the Information Memorandum does not mean that the Respondent has admitted the transfer of shareholding of the Applicant to the Vira Group. In fact, the same would be contrary to the established law on the subject.
28. For the above reason, it is not possible to state that the Applicant herein is not related party of the Corporate Debtor. The Applicant by itself and along with its sister concern holds 37.69% of the total equity share capital of the Corporate Debtor and is, therefore, a related party in terms of section 5 (24) of the IBC.

FINDINGS: -

29. We have heard the Counsel for the parties and have gone through the record.
30. This IA has been filed by the Applicant i.e. Sabari Reality Pvt. Ltd. through Hiren Bharani, who is supposed to be one of the Directors of the Applicant Company, though it is not specifically mentioned anywhere in the IA as to in what capacity the instant application has been filed by Hiren Bharani. It has also not been specified anywhere in the application

whether the Board of Directors of the Applicant Company at any time authorized Hiren Bharani to file the instant application on behalf of the Applicant Company. Therefore, on the face of it, the instant application seems to have been filed without an appropriate Authority by the Board of Directors of the Applicant Company.

31. By way of this IA, the Applicant is seeking compliance of the order of the Hon'ble Supreme Court passed on 03.12.2021 in Civil Appeal No. 4247 of 2018. It has been claimed that joint applications for settlement were filed before the Hon'ble Supreme Court on 30.11.2018 which contained the terms of settlement, as referred to in the order dated 03.12.2021, which were made part of the order passed by the Hon'ble Supreme Court. It has also been claimed that all the parties were mandated to act in accordance the settlement terms filed before the Hon'ble Supreme Court and according to the said terms, the Applicant ceased to be a member/shareholder of the Corporate Debtor with effect from 30.11.2018. In accordance with the settlement terms, the applicant Company transferred its entire shareholding in favour of Vira Group and in this regard, a share purchase agreement dated 31.10.2018 was entered into between the Applicant Company, Jayesh Vira and the Corporate Debtor. However, despite that the register of members of the Corporate Debtor does not reflect the Vira Group as 100% shareholders of the Corporate Debtor.
32. Strangely enough, the Applicant itself has claimed in Para No. 7 of the application that consideration amount under the share purchase agreement has not been paid by the Vira Group till date. It has also been claimed that a notice dated 16.10.2010 was also issued upon Vira Group to pay the consideration amount under the Share Purchase Agreement by specific performance of the Hon'ble Supreme Court order and the Vira Group in its reply dated 28.11.2019 stated that the said demand was bad in law. From whatever has been stated in the Application, it is clear

that the share purchase agreement was not acted upon as admittedly the sale consideration was not paid by the Vira Group.

33. The Applicant has further stated that in Para No. 8 of the Application that in its order dated 13.11.2021 passed in contempt petition (diary) No. 20334 of 2021, the Hon'ble Supreme Court recognize the rights of the applicant Company under the memorandum of settlement and the share purchase agreement and granted liberty to the applicant to take appropriate steps in accordance with law. This further indicates that the Applicant Company was to take appropriate legal recourse to get the terms of the Settlement as well as the Share Purchase Agreement implemented. However, no such steps are shown to have been taken by the Applicant Company in this regard nor any such record has been placed on the file.
34. Strangely enough, the applicant Company has not impleaded in this Application any other party with whom the terms of settlement or the share purchase agreement was executed. The applicant Company has simply sought a direction to the Respondent/Resolution Professional to carry out the change in the register of members of Company on the basis of aforesaid settlement document/share purchase agreement on its own. Since admittedly there has been dispute between the parties with regard to the settlement terms and even the sale consideration in respect of the transfer of shares has not been exchanged, the Resolution Professional cannot be expected to effect any change in the register of members on the basis of the documents with regard to which a dispute continues to exist between the relevant parties. It has been rightly pointed out by the RP in the reply that the appropriate remedy available with the Applicant under the circumstances was to seek rectification of the register of members of the Corporate Debtor under Section 59 of the Companies Act, 2013. However, the said remedy was not availed by the Applicant prior to the initiation of the CIRP on 11.08.2020. Therefore, under the circumstances, the prayer with regard to the register of members by the

Resolution Professional is not as per law and the same cannot be granted.

35. In the light of the above discussion, the above IA 533 of 2022 is **dismissed** being devoid of merit.

Sd/-
Anuradha Sanjay Bhatia
Member (Technical)

Sd/-
Kuldip Kumar Kareer
Member (Judicial)