

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT III, NEW DELHI

Company Appeal (IBC)/05/2022
In
(IB) – 1443/(ND)/2019

Under Section 42 of the Insolvency and Bankruptcy Code, 2016

IN THE MATTER OF (IB) – 1443/(ND)/2019:

M/s. ELITE STEELS PVT. LTD. Financial Creditor

Versus

M/s. GROWTHWAYS TRADING PRIVATE LIMITED

.... Corporate Debtor

AND IN THE MATTER OF Company Appeal (IBC)/05/2022:

Mrs. NIDHI LAMBA

Proprietor of M/s. Elite Enterprises

.... Appellant

Versus

MR. SUNIL KUMAR AGRAWAL

Liquidator of the Corporate Debtor

.... Respondent

Order Pronounced on: 05.02.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Appellant : Mr. A.K. Babbar, Adv.

For the Liquidator : Mr. Manoj Kumar Garg and Mr. Sachin
Kaushik, Advs.

ORDER

PER- BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. This Company Appeal has been filed under Section 42 of the Insolvency and Bankruptcy Code, 2016 by Mrs. Nidhi Lamba, Proprietor of M/s. Elite Enterprises against the impugned order dated 30.12.2021 passed by the Liquidator wherein Appellant has been treated as “Operational Creditor” instead of “Financial Creditor”. The Appellant in the present Appeal has prayed for the following reliefs:

- a. *“To set aside the order dated 30.12.2021 qua the status of petitioner from Operational Creditor passed by Respondent herein refusing to place Appellant at par with Financial Creditor, hold Petitioner in category of "Financial Creditor" instead of 'Operational Creditor' as held by Respondent wherein claim amount of Rs.1,39,54,974/- as claimed had been accepted by Respondent and there is no dispute in regard to the amount claimed which had been admitted by Respondent.*
- b. *Direct the Respondent to treat Petitioner as a Financial Creditor and treat Petitioner's claim as 'Financial Debt'.*
- c. *Or grant any other relief which Hon'ble Court deem fit in the facts and circumstances of the case including directing Respondent to amend the list of Stake Holder Consultation Committee in which Petitioner name is shown as “Operational Creditor” and includes Petitioner name in “Financial Creditor” as per law.”*

2. **Submissions of the Appellant:**

- i. The Adjudicating Authority vide its Order dated 17.12.2019 was pleased to admit the Insolvency Application filed by the Financial Creditor i.e. M/s. Elite Steels Private Limited against the Corporate Debtor i.e. M/s. Growthways Trading Private Limited, and appointed Mr. Sunil Kumar Agrawal (Registration Number: BBVIPA-002/1P-N00081/2017-18/10222)

as the Interim Resolution Professional, who took charge of the Corporate Insolvency Resolution Process as on 17.12.2019.

ii. Thereafter, this Adjudicating Authority vide its Order dated 02.11.2021 issued directions for Liquidation of the Corporate Debtor viz. M/s. Growthways Trading Private Limited, and appointed Mr. Sunil Kumar Agrawal as the Liquidator of the Corporate Debtor.

iii. The Appellant filed its claim under the provision of Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person Regulation, 2016), vide letter dated 18.03.2020 along with Form "C" and proof of claim with IRP as Financial Creditor for Rs. 10,89,33,796/-.

iv. By virtue of the agreement dated 01.03.2016 w.e.f 01.02.2016 herein, the present Appellant had only advanced the amount at an agreed rate of interest alone as an investment to said agreement. According to which the capex amount is shown as Rs.57,66,010/- and agreed rate of interest is @ 24%. The monthly instalment is Rs.5,45,232/- which includes (interest as Rs.1,15,320/- + Principal amount of Rs.4,29,911/-) and in subsequent instalment, the amount of interest stands reduced as per schedule. The investment of Rs.57,66,010/- was paid to M/s. Growthways Trading Pvt. Ltd. and similarly detail of investment in M/s. Growthway Trading Pvt. Ltd. Yepme Store is Rs.60,88,026/-.

a. The disbursement of the amount was as per instruction of the Corporate Debtor which was communicated by e-mail addressed to the Appellant from time to time and the total investment made is Rs.1,18,54,036/- (Rs.57,66,010/- + Rs.60,88,026/-) out of this, total payment received is Rs.51,98,388/-. The balance amount recoverable was Rs. 66,55,648/- plus interest @24%. Thus it can be seen from the documents that all

transaction is financial payment in which interest at the agreed rate of 24% is payable by the Corporate Debtor itself.

- v. The Appellant had performed her part and fulfilled its obligation, however the Corporate Debtor failed to fulfil its commitment. The detailed calculation of the amount due is Rs. 66,55,648/- plus interest of Rs. 72,99,326/-, totaling to Rs. 1,39,54,974/- which is placed in Form "C". However, necessary evidence was submitted to IRP as well as to the Liquidator.
- vi. Thereafter, the Appellant received a letter dated 12.11.2021 in the name of M/s. Elite Enterprises, by post wherein intimation of liquidation and appointment of Liquidator under IBC, 2016 in the matter of M/s. Growth ways Trading Pvt. Ltd. with copy of order passed by the Adjudicating Authority in IA No. 4304/2021 in CP/IB/1443/ND/2019 filed under Section 33(2) of the Insolvency and Bankruptcy Code, 2016 and with copy of Notice dated 09.11.2021 published in Newspaper was issued by Respondent and same was published in Newspaper Jansata dated 10.11.2021 and Financial Express dated 10.11.2021. Vide publications dated 10.11.2021 stakeholders of M/s. Growthways Trading Pvt. Ltd. were called upon to submit their claim by 07.12.2021.
- vii. The Appellant vide email dated 0 1.12.2021 submitted again its claim to Liquidator (Respondent) which was the same as was submitted to the IRP, and the claim was submitted as Financial Creditor. Thereafter the Appellant received reply from Respondent vide e-mail dated 01.12.2021 asking to submit claim as per attached Form with Affidavit. The Appellant following Respondent's advice made compliance of Respondent's e-mail by submitting claim on annexed Form "C" on 01.12.2021, but still claimed amount as Financial Creditor.

- viii.** Being ignorant of technicalities of law, the Appellant had submitted claim on the referred Form wherein the Appellant made a claim of Rs. 1,39,54,974/-, but clearly mentioning against column No. 6 of attached form (details of how and where Debt is incurred).
- ix.** Thereafter the Appellant received the communication vide email dated 30.12.2021 from Respondent treating Appellant as "Operational Creditor" instead of "Financial Creditor" wherein claim of Rs.1,39,54,974/- had been admitted.

3. Submissions of the Respondent:

- i.** The Respondent has filed a reply affidavit denying the allegations made by the Appellant and stated that the Appellant has misconstrued the meaning of "Financial Creditor" and "Operational Creditor" by reading the same in isolation and out of context. The Appellant herein in the present Appeal has attempted to take undue advantage of the provisions of the Insolvency and Bankruptcy Code, 2016, along with the Regulations. The Appellant claim herself as a Financial Creditor despite of having conducted business operations with the Corporate Debtor
- ii.** In order to substantiate the same, it is pertinent to place reliance on the Agreement dated 01.03.2016 which was executed between the Appellant and Corporate Debtor. In view of Clause 2 of the Agreement, the proprietary concern of the present Appellant is *inter-alia engaged in the business of providing complete structuring solutions which includes setting up of retail stores, including but not limited to structuring the store interiors and managing the operations of the Retail store for and on behalf of Clients. Therefore, the above mentioned self-declaratory business of the Proprietary concern is contrasting with the definition of the "Financial Creditor" as Financial Creditors are those who have a strictly financial contract with the*

company, such as a loan or debt security and on the other hand, the Operational Creditors are those that owe the firm money as a result of a business transaction. However, the Corporate Debtor never opted for loan services or borrowed money from the Proprietary concern.

- iii.** Further, as per clause 4 of the Agreement entered upon by the Proprietary concern and the Corporate Debtor, the Proprietary concern offered to provide the facility to the Corporate Debtor and the Corporate Debtor had agreed to obtain such facility. No advance loans were given to the Corporate Debtor and it was only services which were provided to the Corporate Debtor.
- iv.** The terms and conditions of the business covenant between the Proprietary concern and Corporate Debtor is the debt arising out of it and does not come under the ambit of “Financial Debt” as per the aforesaid Statutory meaning of “Financial Debt” under Section 5(8) of IBC, 2016.
- v.** The Proprietary concern of the present Appellant and the Corporate Debtor was for providing a BOT (Build Operate Transfer) facility to the Corporate Debtor by the Proprietary concern of the present Appellant, and as per clause 3.1 of the Agreement Covenant, it was expressed that the BOT Facility will include structuring the store interiors and managing the same at the Retail Stores of the Corporate Debtor in accordance with the Work Order.
- vi.** Further as per clause 3.5 of the aforesaid Agreement entered upon by the Proprietary concern of the present Appellant and the Corporate Debtor, the Proprietary concern of the present Appellant shall provide the BOT Facility in accordance with the Work order provided to the Proprietary concern of the present Appellant, the said clause in itself comprehensible enough to characterize the business conduct between the Proprietary concern of the present Appellant and the Corporate Debtor and further treating the

Proprietary concern of the present Appellant as "Operational Creditor" and not the "Financial Creditor".

- vii. It is the case of the Respondent that the Appellant has submitted claim in the CIRP process of the Corporate Debtor and the Respondent has treated their claim as Operational Creditor. Further, it is imperative to note that the Appellant had been participating in the SCC (Stakeholder Consultation Committee) as "Operational Creditor".

4. **Analysis and Findings**

- i. We have heard the Ld. Counsel appearing for both parties and also perused the records.
- ii. Admittedly, the agreement dated 01.3.2016 was executed between the present Appellant and the Corporate Debtor. The relevant clauses of the agreement are extracted below:

*“**Clause 2** of the Agreement, the Proprietary concern is inter-alia engaged in the business of providing complete structuring solutions which includes setting up of retail stores, including but not limited to structuring the store interiors and managing the operations of the Retail store for and on behalf of Clients.*

***Clause 3.1** of the Agreement, the Sponsor shall provide the Build Operate Transfer (BOT) facility to GTPL including structuring the Store interiors and managing the same ("BOT Facility") at the Retail Stores as instructed by GTPL in accordance with the Work Order.*

***Clause 3.5** of the Agreement, the Sponsor shall provide the BOT Facility in accordance with the Work Order provided to the Sponsor by GTPL and any deviation shall not be permissible except with the prior written consent of GTPL”.*

- iii. Further on perusal of the said clauses of the Agreement dated 01.3.2016, it is evident that the Appellant has provided certain services to the Corporate

Debtor. Therefore, by any stretch of imagination, it cannot be said that any loan advance has been provided to the Corporate Debtor and should be treated as a Financial Creditor.

- iv.** The Appellant is silent about the reason why the Appellant is unable to produce the loan document. Hence, we see no reason to interfere with the decision taken by the liquidator to treat the Appellant as “Operational Creditor” and not “Financial Creditor” and the claim filed as “Operational Debt” instead of “Financial Debt”. Hence, we are of the considered view that the Appellant has been rightly treated as the “Operational Creditor” and the claim as “Operational debt” by the Liquidator/Respondent.
- v.** We are of the considered view that if such claims are allowed, then this Adjudicating Authority will continue to receive further such claims and the case will never reach resolution.

5. Order

- i.** The present Appeal bearing **Company Appeal (IBC)/05/2022** filed by the Appellant stands **dismissed**.
- ii.** The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.
No order as to costs.

Sd/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**