

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

**MA/699/2018  
In  
CP/768/IB/2018**

*Application filed under section 21 of the IBC, 2016*

**In the matter of M/s. Padmaadevi Sugars Limited**

**M/s. Bank of India  
And  
M/s. Indian Overseas Bank**

---Applicants

**Vs**

**Mr. M. V. Ganagadharan, RP & 2 Ors**

--- Respondents

**Order delivered on: 30.08.2019**

**Coram:**

**B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)**

**S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)**

For the Applicants : *Shri. S. Sathiyannarayanan, Advocate*

For Respondent R1 : *Shri. M. V. Ganagadharan, RP*

For Respondents R2-R3 : *Shri. S. Vasudevan, Advocate*

*Shri. K Krishnaswamy, Advocate*

**ORDER**

**Per: B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)**

**Order dictated in Open Court on 11.07.2019**

It is an MA filed by two Financial Creditors namely, Bank of India and Indian Overseas Bank against the Resolution Professional (R1 – RP), against one Mr. E. Shanmugam (R2 –Promoter/Managing Director of the Corporate Debtor transferring his shares to the present management) and M/s. Srinidhi Finance Private Limited (R3 – the Corporate Debtor admittedly owed to repay to this Respondent) seeking reliefs as follows:

- (i) “Declare that R2 & R3 are not Financial Creditors of Corporate Debtor;
- (ii) Declare that R2 & R3 cannot be members of the Committee of Creditors of Corporate Debtor”

2. Looking at this MA, it appears that the grievances of these Financial Creditors (Applicants) is that RP showing R2 as Financial Creditor stating that since R2 discharged the Corporate Debtor from the obligation of repayment of debt owed to one Sundaram BNP Paribas Home Finance Limited (herein after called as Sundaram) by paying the same for he remained as guarantor to that debt by mortgaging his personal property as security to the loan the Corporate Debtor availed

from Sundaram and R2 stepped into the shoes of the creditor of the Corporate Debtor, declaring R2 as Financial Creditor is not correct because – one, since R2 executed loan documents in favour of one of the Applicants showing the Corporate Debtor as Co-Borrower (not as Principal Borrower), now he cannot be called as guarantor looking at R2 paying off the loan without looking into as to whether or not R2, as per records available, stood as guarantor to the Corporate Debtor, – two, since these Applicants already raised objection over the claim filed by R2 and based on such objection IRP having already rejected the claim of R2, now this RP ought not to have admitted the claim of R2 ignoring the reasoned order passed by the IRP in rejecting the claim of R2.

3. In support of the above contention of the Applicants, these Applicants have reproduced the Minutes of 1<sup>st</sup> meeting of the Committee of Creditors (CoC) held on 14.11.2018 reflecting that this Financial Creditor raising objections about considering Mr. E. Shanmugam as Member of the Committee of Creditors, and IRP rejecting R2's claim, which is as follows:

*“Discussion on admission of claim by an unsecured creditor:*

*Indian Overseas Bank and Bank of India, being the members of the Creditors of Committee, raised the objection for considering Mr. E. Shanmugam as member of Committee of Creditors as he is the Guarantor of Corporate Debtor and as per their view he is related party to the Corporate Debtor.*

*On this context, Insolvency Resolution Professional stated that he has gone through the supporting documents provided along with the claim and the Arbitration Award in his favour. After verification of documents, he has taken a view that this unsecured creditor does not fall in any of the category as defined in Section 5(24) of the Insolvency and Bankruptcy Code, 2016.*

*Further, Insolvency Resolution has intimated the Members of the Committee of Creditors that he will take the legal opinion in this regard. Both the Banks, Indian Overseas Bank and Bank of India stated that they will take appropriate steps on receiving the legal opinion from the independent advocate”.*

4. In the above paragraphs, the Applicants stated that R2 and R3 are not Financial Creditors as they did not disburse any amounts to the

Corporate Debtor which is payable with interest, hence R2 should not be made as part of this CoC.

5. As to the issue raised against R3, since an order was already passed on 04.06.2019 without any objection from these Applicants, the issue regarding the claim is set at rest, therefore admission of R3's claim has not been dealt with in this order.

To support the contention of the Applicants, R2 counsel, showing the loan documents executed by R2 on 31.03.2011, has stated that R2 executed Loan Agreement in favour of Sundaram showing him as Borrower and the Corporate Debtor as Co-Borrower on consideration of ₹ 5Crores as loan by mortgaging his personal property. The counsel has further stated that R2 availed this loan on behalf of the Corporate Debtor from Sundaram when R2 was the Managing Director. Thereafter, by virtue of change of management in furtherance to the agreement on 31.07.2010, R2 on 09.10.2013 resigned from the Board of the Corporate Debtor. As to this loan is concerned, two aspect shall be flagged, one this loan entry showing in the books of the Corporate

Debtor and the Corporate Debtor repaying ₹2.3Crores to Sundaram. As to remaining balance of ₹6.25Crores, the R2 Counsel says, R2 repaid the same to Sundaram on 28.06.2018. Besides this, R2 counsel has also stated that R2 stood as Personal Guarantor to the loans availed by the Corporate Debtor from these two Applicants/Financial Creditors namely Bank of India and Indian Overseas Bank.

6. As Against R2 counsel submissions, the Applicants' counsel has drawn the attention of us to an agreement dated 9<sup>th</sup> October, 2013 entered into in between M/s.Shinago Holdings Private Limited (new management called as Investor in the said Agreement) and Mr. M. Ethiraj, the deceased father of R2, M/s. Binny Engineering Limited and M/s. SV Sugar Mills Limited, wherein it is mentioned that the Investors M/s.Shinago Holdings Private Limited would undertake to settle the loan of ₹4.48 crores (outstanding as on 30<sup>th</sup> September, 2013) taken by the Corporate Debtor from Sundaram within a period of three months and procure the release of securities offered by R2 and Mrs. E. Vasantha towards the above loan. Thereafter, it is nowhere appearing

as to whether any payment has come from the new Investors as stated in the agreement dated on 09.10.2013 or as to whether R2 demanded the new Investors to comply with this obligation and get his property released from the mortgage. The counsel has also further stated that this transaction has not been shown in the balance sheet of the Corporate Debtor as liability under the head of 'Long Term Borrowing' as on 31st March 2017 but whereas in Notes to Financial Statements for the year 31<sup>st</sup> March, 2017, it has been shown that *"borrowings from financial institutions, represents loan amount including interest suspense from Sundaram BNP Paribas Home Finance Limited repayable in 120 monthly instalments from April, 2011 which is borrowed by the erstwhile Managing Director (R2), the Company (Corporate Debtor) as a Co-Borrower, against the mortgage of land held in the name of erstwhile Managing Director (R2). Since the Company has defaulted in repayment of the loan, the institution has demanded to repay the loan immediately with interest."*

7. In the backdrop of this factual scenario emanating from the records of the Corporate Debtor as well as the transaction documents

between the parties, we have noticed that the case of the Applicants is R2 is not a financial creditor, henceforth R2 should not be included in the CoC, as against this, now the Applicants' counsel has developed his argument beyond his pleadings saying that since R2 executed loan document in favour of Sundaram showing himself as a Borrower, and availed loan to himself showing the Corporate Debtor as a Co-Borrower, regardless of the part payment of ₹2.36Crores paid off by the Corporate Debtor, R2, for the sake of this case, R2 cannot become guarantor to the Corporate Debtor. He further says, for the record having shown R2 as Borrower and the Corporate Debtor as Co-Borrower, as per doctrine of contribution envisaged u/s 43 of the Contract Act, the part payment made by the Corporate Debtor and the balance payment made by R2 shall be aggregated and it should be divided into 50:50 and share the debt between the two, accordingly both of them shall contribute or make adjustments to ensure that it equally paid by both the parties, that is R2 and the Corporate Debtor, since the Corporate Debtor having already repaid ₹2.36Crores,



remaining balance of the debtor contribution shall be paid to R2, but not the entire amount because documents nowhere showing that R2 is the guarantor. This being the factual position, he says, the portion of payment falling by virtue of Sec.43 of Contract Act to the share of the Corporate Debtor, shall be restricted to 50% and then deduct the part payment the Corporate Debtor already made to Sundaram.

8. In addition to this point, the Applicants counsel has further stated that implied contract of contribution is independent of the contract as between the joint promisors and the promisee, therefore, in the light of ratio held in *Narendra Chandra - Vs - Kumar Pashupati Nath Malia and Others - In the High Court of Calcutta - A.F.A.D. No.1235 of 1944*, the Corporate Debtor contribution shall be restricted to 50% of the total loan amount as a joint promisor, out of that 50%, the Debtor Company, after deducting the payments already made, has to pay the balance to R2, not more than this.

9. He further says that this debt will not fall under any of the clauses mentioned in Section 5 (8) of the Insolvency and Bankruptcy

Code, whereby these Applicants have sought relief to declare them as not Financial Creditors and not to include them as Members of Committee of Creditors.

10. As against this argument, R2 counsel has replied that the applicants' case as pleaded in the application is that this application has only challenged the action of the Resolution Professional including both R2 and R3 as Members of Committee of Creditors based on the legal opinion obtained by the Resolution Professional.

11. In addition to this, as to the argument of the Applicant Counsel that R2 is a related party, R2 counsel has stated that it has not been mentioned anywhere in the pleadings of these Applicants under which clause these Respondents will be shown as "related party" to the Corporate Debtor. The R2 counsel has further stated since the application pleading is only limited to the extent saying that this debt is not a Financial Debt and R2 is a related party, he cannot be made as member of the CoC. Apart from this, no pleading is present in the MA showing that R2 is not a Financial Creditor and R2 and the Corporate

Debtor are jointly and severally liable as stated under Section 43 of the Contract Act. Therefore, R2 Counsel says that the Applicants Counsel argument shall be limited to the extent that has been mentioned in the pleadings, not beyond it.

12. It is the basic principle that whoever raises pleading before the court of law for adjudication of an issue, he has to restrict his case to the extent pleaded, not beyond it, since the subsequent contentions raised by the Applicants counsel not being made as pleading in the application, this Bench cannot go beyond the pleading mentioned in the application whereby now the issue left for determination is as to whether R2 is a Financial Creditor or not and as to whether he is a related party or not.

13. Since the Applicants have only raised that R2 cannot be treated as member of CoC on the count that R2 is not a Financial Creditor as stated u/s.5 (8) of IBC because R2 has executed personal guarantee for repayment of the dues of the Corporate Debtor.

14. Since the Members of Committee of Creditors (CoC) themselves initially restricted their objection not to admit the claim of R2 as member of the CoC because he is the Guarantor of the Corporate Debtor and related to the Corporate Debtor, that being their objection in the CoC, today it cannot be said that R2 is the principal borrower, therefore the Corporate Debtor is not obligated to repay the loan to Sundaram.

15. While dictating this order, the Applicants counsel has stated that erstwhile Resolution Professional recorded that R2 is not a Financial Creditor and that he is a related party therefore this RP should not have admitted the claim of R2, but no such pleading has been made in the application saying that these Applicants (members of CoC) have raised objection in 1<sup>st</sup> meeting of CoC that R2 is not a financial creditor. As the entire application and reliefs sought are based on the minutes, now this Applicants counsel cannot make any oral submissions beyond the objections raised in the first meeting. When R2 is agreed as guarantor to the impugned loan in the objection raised by

the applicants in the meeting, today they cannot say R2 is a guarantor, when he is a guarantor, the only point left for determination whether guarantor, who paid off to the creditor, becomes financial creditor or not.

16. If at all R2 is considered as a Guarantor as stated by these Applicants, since the loan has been discharged by R2, he is very much entitled to make a claim against the Corporate Debtor because he will step into the shoes of the Creditor as contemplated under Section 140 r/w Section 145 of the Contract Act. Since the nature of debt being a financial debt, since this claim of R2 against the Corporate Debtor being a consequential obligation, the source and nature of the debt will automatically become a debt raised by this Guarantor against the Corporate Debtor, therefore it cannot be said as debt other than 'Financial Debt'.

17. As to related party contention is concerned, since the applicants counsel has not stated that under which clause R2 has to be treated as related party and the same not being shown to this Bench at the time of

argument as well, this argument holds no merit and therefore the contention is hereby rejected.

18. Therefore basing on the objections raised by the Applicants counsel, we hereby hold that RP has rightly admitted the claims of R2 and R3 as Financial Creditors of the Corporate Debtor, R2 having continued as Managing Director until before new management come in the place of old management, for there being a possibility of conflict of interest coming in between, the RP is hereby directed not to include R2 as the member of Committee of Creditors.

19. Accordingly, this MA/699/2018 is hereby dismissed vacating the order dated 04.01.2019.

**-Sd-**  
**(S. VIJAYARAGHAVAN)**  
**Member (Technical)**

**-Sd-**  
**(B. S.V. PRAKASH KUMAR)**  
**Member (Judicial)**

KNP/TJS