



NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

IA. NO. 5645/ND/2022

IN

Company Petition No. (IB)-228(ND)/2018

IN THE MATTER OF:

Relan Buildwell Private Limited

... Applicant/Financial Creditor

Versus

Kaliber Associates Private Limited

... Respondent

AND IN THE MATTER OF IA. NO. 5645/ND/2022:

1. BDR Builders and Developers Limited

Office at:
21, Ringh Road, Third Floor,
Front Portion, Lajpat Nagar,
New Delhi – 110024

... Applicant No. 1

2. Columbia Buildtech Private Limited

Office at:
65/2, Masjid Road, Bhogal,
New Delhi – 110014

... Applicant No. 2

3. Paradise Systems Private Limited

Office at:
106 Samman Bazar,
Bhogal, New Delhi – 110014

... Applicant No. 3

VERSUS

1. Mr. Mohan Lal Jain

Liquidator, Kaliber Associates Private Limited
Registered Office at:
B-1/12, Safdarjung Enclave,
2nd Floor, New Delhi – 110029

... Respondent No. 1

2. Mr. Rahul Kumar Sharma

R/o House No. C-44,
Sector-20, Noida,
Uttar Pradesh - 201301

... Respondent No. 2



3. M/s Energy Saving India Private Limited

Having Registered office at:
301, Welfare Society Comm Complex,
Karam Pura, New Delhi – 110015

... Respondent No. 3

Order Delivered on: 09.05.2023

SECTION: Section 60(5) of IBC 2016

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant

: Adv. Rakesh Kumar, Adv. Ankit Sharma

For the Liquidator

: Adv. Anirban Bhattacharya, Adv. Dhruv
Sachdeva

ORDER

PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)

The present application has been preferred by the Financial Creditors namely, BDR Builders and Development Ltd., Columbia Buildtech Pvt. Ltd., Paradise Systems Pvt. Ltd., against Mr. Mohan Lal Jain, Liquidator for Kaliber Associates Private Limited, Mr. Rahul Kumar Sharma and M/s Energy Saving India Private Limited. The prayer made in the IA reads thus: -

“a) To declare the inclusion of Respondent No. 2 and 3 as the member of SCC of the CD vide 10th SCC meeting dated 15.06.2022



by the Respondent No. 1 to be illegal in terms of the application filed by the Liquidator bearing IA. No. 3312/2022 the 10th progress report, as the claims of the Respondent No. 2 and 3 are derived report from the assignment of debt by the related party of the CD, Mr. Lalit Modi (Ex-Promoter), against whom, the application for fraudulent transactions is also pending before the Hon'ble Tribunal.

b) To declare that the distribution of the liquidation proceeds to Respondent No. 2 to the tune of Rs.91,94,137.41/- (Rupees Ninety-One Lakhs Ninety-Four Thousand One Hundred Thirty-Seven and Forty-One Paise) and to the Respondent No. 3 to the tune of Rs. 7,62.09,573.71/- (Rupees Seven Crores Sixty-Two Lakhs Nine Thousand Five Hundred Seventy-Three and Seventy-One Paise Only) by the Respondent No. 1 was wrong; illegal and unlawful and the Respondent No. 1 may be directed to take appropriate steps to recover the said amount and the IA bearing no. 4101/2022 for Distribution of Unsold Assets may not be Disposed off till the adjudication of the present application;

c) To direct the Respondent No. 1 to eliminate the Respondent No. 2 and 3 from the SCC being disqualified to act as members of the SCC and file the amended list of SCC with the Hon'ble Tribunal in terms of the provisions of the IBBI (Liquidation) Regulations, 2016;

d) To declare the Respondent No.1/Liquidator has not followed the process of law and procedure as contained in I & B Code, 2016 for the admission of Respondent No. 2 and 3 as the member of SCC;

e) To pass any other directions as the Hon'ble Tribunal may deems fit.”

2. As has been narrated in the captioned application, the CIRP in the present matter commenced on 18.01.2019 and the CD was ordered to be liquidated on 02.01.2022. The Applicants herein are the stakeholders and members of the Stakeholders Consultation Committee



(SCC) constituted on 04.06.2021 by Respondent No. 1 (Liquidator). The stake of the Applicants qua the assets of CD is nearly 45% (actually 70.42%). The details of SCC members as mentioned in the application reads thus: -

Sl. No.	Class of Stakeholders	Name of the Representative
1.	Secured Financial Creditors, who have relinquished their security under Section 52 of the Code.	NA
2.	Unsecured Financial Creditor	M/s Paradise Systems Private Limited M/s Aadhar Infraholding Limited
3.	Government	Income Tax Department
4.	Shareholders of partners, if any	M/s Lalit Modi HUF

3. During the liquidation process, two more claimants namely, Mr. Rahul Sharma and M/s Energy Saving India Private Limited, who are impleaded as Respondent Nos. 2 and 3 herein, filed their claims before the Liquidator on 22.04.2022 and 07.05.2022 respectively. The Liquidator nixed the claims being belated and time-barred. Being aggrieved by the decision of the Liquidator, the Respondent Nos. 2 and 3 preferred appeals i.e., CA. No. 18 of 2022 and CA. No. 21 of 2022 respectively. The appeals were disposed of in terms of the orders dated 26.05.2022 and 08.06.2022. As can be seen from the order dated 08.06.2022 passed in CA. No. 21 of 2022, the Liquidator gave his consent to consider the claim of the Appellant before it i.e., the Applicant No. 3 on merits. Similar was the stand of the Liquidator qua the CA No. 18 of 2022 decided in terms of the order dated 26.05.2022. Resultantly, the



claims of Respondent Nos. 2 and 3 for the amounts of Rs.2,67,11,845/- and Rs.22,14,12,650/- were admitted by the Liquidator as Financial Creditors on 10.06.2022 and 13.06.2022 respectively. The claims were admitted by the Liquidator without any prior intimation to the members of SCC. Subsequently, the Applicants received an email dated 04.06.2022 from the Liquidator, in terms of which they were apprised that more claimants i.e., Respondent Nos. 2 and 3 were admitted to the SCC and the SCC was re-constituted. Such inclusion could reduce the stake of the Applicants qua the assets of CD from 70.42% to 45% and their vote shares in SCC could also reduce accordingly. In the 11th meeting of SCC dated 27.07.2022, the Liquidator distributed the proceeds of the 9th E-auction dated 12.05.2022 amongst the Respondent No. 2 and 3 inter alia to the extent of Rs.8,85,620/- and Rs.73,40,843/- respectively. Similarly, out of the proceeds of the 10th E-auction dated 19.07.2022, the Liquidator gave Rs.10,87,909.50/- and Rs.90,17,607.20/- to Respondent Nos. 2 and 3 respectively. Even subsequently also, the Respondent No. 1 i.e., Liquidator distributed the proceeds of the assets amongst Respondent Nos. 2 and 3 inter alia. In total, Respondent No. 1 paid Rs.91,94,137.41/- and Rs.7,62,09,573.71/- to Respondent Nos. 2 and 3 out of the assets of CD. The total amount paid by the Liquidator to Respondent Nos. 2 and 3 is as under: -

Respondent No.	Amount (in INR)
Respondent No. 2	91,94,137.41
Respondent No. 3	7,62,09,573.71



Total	8,54,03,711.12
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4. The grievance raised by the Applicants here in the present application is: - (i) During the Liquidation process, the Liquidator re-constituted the SCC and the 15th meeting of the SCC was attended by the members of re-constituted committee including the Respondent Nos. 2 and 3; (ii) the Liquidator was not fair in conceding the plea of the Respondent Nos. 2 and 3 for admission of their belated claims in the liquidation process; (iii) Being assignee of Mr. Lalit Modi i.e. ex-promoter of CD, the Respondent Nos. 2 and 3 could not have become member of SCC; (iv) These were the actionable claims of Mr. Lalit Modi for Rs.2,67,11,845/- and M/s Lotus Valley Pvt. Ltd for Rs.22,14,12,650/-, which were assigned to the Respondent Nos. 2 and 3 for the meagre amounts of Rs.2,00,000/- and Rs. 5,00,000/- respectively i.e., at through away price, which resulted in loss to other members of SCC including the Applicants; (v) the assignment of substantial debt by the related party i.e., Mr. Lalit Modi to Respondent Nos. 2 and 3 at throw away price amounts to playing fraud on the Applicants herein; (vi) There are PUFÉ applications pending against Mr. Lalit Modi and M/s Lotus Valley Pvt. Ltd for siphoning off the funds of the CD and playing fraud with the Creditors; (vii) the Respondent No. 1 i.e. the Liquidator who is not maintaining any transparency has played fraud qua the assets of CD and its Creditors; (ix) the Liquidator could not have admitted the claims of the Respondent Nos. 2 and 3 without circulating the same to other members of SCC to enable them to make their comments qua the same;



(x) the conduct of Respondent No.1 is such that the disciplinary committee of IBBI has already taken note of the same and has imposed heavy penalty upon him in terms of the order dated 18.01.2022. Even, Hon'ble NCLAT has also taken note of the dubious conduct of Respondent No.1 i.e., the Liquidator.

5. The salient contention put forth on behalf of the Applicants is that being a related party (related to CD/Promoters of CD), the Respondent Nos. 2 and 3 could not have been included in SCC. Rejoining the submissions made by the Ld. Counsel appearing for the Applicant, the Ld. Counsel appearing for the Liquidator and Mr. Salman Khurshid, Learned Senior Advocate submitted that even if the Respondent Nos. 2 and 3 are related parties, they are disqualified from being Resolution Applicants and members of CoC but cannot be deprived of being members of SCC. However, both Mr. Salman Khurshid, Learned Senior Advocate and the counsel for the Liquidator jointly submitted that Respondent Nos. 2 and 3 are not made members of SCC with any voting rights whatsoever and they are only allowed to remain present in the meeting of SCC having no right to participate in voting.

6. We heard the counsels for the parties and perused the records. In view of the submissions made by the Ld. Counsels for the Respondents, the plea espoused by the Applicant that Respondent Nos. 2 and 3 should have no voting right in SCC stands conceded. As far as the plea regarding participation in the meeting of SCC, without having any voting rights is concerned, as can be seen from Regulations 31A, the



shareholders or partners can be represented in SCC, nevertheless, their representative has to be restricted to one only. There is no provision in Regulation 31(A) regarding the participation of an individual in SCC otherwise than as per the provisions contained in Regulation 31A(2). In terms of the said provisions, the SCC can comprise the representatives of Secured Financial Creditors, who relinquish their security interest under Section 52 to the extent of four in numbers depending upon the amount of claim admitted in the liquidation process, the representative of Unsecured Creditors to the extent of two in numbers, again depending upon the amount of claim admitted in the liquidation. The Workmen and Employees, Government and Shareholders or Partners of CD are entitled to have one representative each in the SCC. As far as the Operational Creditors are concerned, again depending upon the amount of their claim admitted by Liquidator, they can have their representatives in the SCC, to the extent of two in number. From the aforementioned, it is clear that Respondent Nos. 2 and 3 can participate in the meeting of SCC, either as Financial Creditors or they will have no right to participate in the same. It can also be seen from Regulation 31A(9) of Regulation 31A (Liquidation Process) Regulation 2016, the consultation committee advised the Liquidator by a vote of not less than 66% of the representatives of the consultation committee (voting). Thus, apparently, unlike CoC, where a member of the committee has a voting share proportionate to the extent of the financial debt owed to it (the creditor), in SCC, the number of representatives of a class of creditors/shareholders/partners depends upon the percentage of the



claim of the class admitted by the Liquidator, but each representative has one vote. The position is also clear from Regulation 31A (6) of the IBBI (Liquidation Process) Regulations, 2016. Thus, the participation of Respondent Nos. 2 and 3 in SCC can either be as representatives of the Financial Creditors or cannot be there at all. The provision for consultation by Liquidator with stakeholders is there in Section 35(2) of the IBC, 2016. Nevertheless, the consultation is not binding on the Liquidator. Regulation 31A provides for the constitution of a consultation committee by Liquidator within 60 days from the liquidation commencement date, based on the list of stakeholders prepared under Regulation 31, to advise him. When Regulation 31 of IBBI (Liquidation Process) Regulation, 2016 provides for modification of entry in the list of stakeholders, filed with the Adjudicating Authority, it is nowhere provided in Regulation 31A that the Liquidator could re-constitute the SCC, on modification qua the entries made in the list of stakeholders filed with the Adjudicating Authority. Besides, even the Respondents also did not stick to their plea that Respondents Nos. 2 and 3 or their representatives should have any voting right in SCC. In the written submissions filed by him, even Respondent No. 1 i.e., the Liquidator also stated categorically that the Regulation 31A of IBBI (Liquidation Process) Regulation, 2016 debars a related party from being a member of SCC with voting right. As has been noted hereinabove, the SCC comprises only the representatives from different classes/stakeholders with voting rights. It is only the Liquidator, who participates in the proceedings of SCC without voting right. In view of the categorical stand taken by



Respondent No. 1 i.e., the Liquidator as also by Ld. Counsel appearing for Respondent Nos. 2 and 3 that Respondent Nos. 2 and 3 have no claim for remaining present in SCC with voting right, the plea raised by the Applicants regarding re-constitution of SCC has become infructuous and need not be delved into the present application. Even otherwise also as per Section 35(2) of IBC, 2016, the Liquidator can consult any stakeholder. Neither the advice of a stakeholder nor that of SCC is binding on the Liquidator. However, when Liquidator refuses to accept the advice of SCC, it has to record the reasons for doing so. We may not be oblivious of the plea espoused by the Learned Counsel for the Applicant that against Mr. Lalit Modi and M/s Lotus Valley Pvt. Ltd., the IA. No. 1342 of 2019 filed by the Respondent No. 1 is pending. In view of the plea raised in the application, they may be liable to contribute to the assets of CD. Thus, any actionable claim by Mr. Lalit Modi and M/s Lotus Valley Pvt. Ltd. against the CD is adjustable against the amount if any found contributable by them to the CD. It is stair decides that what is not achievable directly cannot be allowed to be achieved indirectly. The law is not ignorant of devices which can be evolved by the Suspended Directors/Promoters from avoiding the claim of the creditors against the assets of the CD, by resorting to preferential, undervalued, extortionate, and fraudulent transactions. In such transactions, the Suspended Directors/Promoters collude with third parties to enter into such transactions which cause loss to the assets of CD, to the detriment of the Creditors.



7. In the present case, the act of assigning the claims for Rs. 2,67,11,845/- and Rs. 22,14,12,650/- for the amounts of Rs. 2,00,000/- and Rs. 5,00,000/- are in no way different from undervalued transactions. We are not ignorant of the fact that these are the claims of Mr. Lalit Modi and M/s Lotus Valley Pvt. Ltd. in their own capacity and are not transactions related to the assets of the CD. Nevertheless, it would not be gainsaid that Mr. Lalit Modi and M/s Lotus Valley Pvt. Ltd. are aware about the avoidance application pending against them, thus they have assigned their actionable claims to Respondent Nos. 2 and 3 at throw away price.

8. In view of the aforementioned analysis, discussions and findings:

(a) the prayer made in the application regarding the challenge to re-constitution of CoC is disposed of in view of the stand taken by the Respondents viz. the Respondent Nos. 2 and 3 would not participate in voting by members of SCC.

(b) Regarding the proceeds of assets already distributed/actionable claim of CD to Respondent Nos. 2 and 3, it is directed that except to the extent of Rs.2,00,000/- and Rs. 5,00,000/- respectively, for which amount, the said Respondents purchased the actionable claims of Mr. Lalit Modi and M/s Lotus Valley Pvt. Ltd., the remaining amount paid, shall be deposited by R-2 and R-3 in liquidation account of CD within 30 days subject to outcome of IA. No. 1342 of 2019. If as an outcome of said IA, any amount of money is found contributable by Mr. Lalit



Modi and M/s Lotus Valley Pvt. Ltd. to the assets of CD, the amount paid to Respondent Nos. 2 and 3 in excess of the aforementioned amounts shall be retained by the Liquidator as an amount contributable to CD. The balance amount if any would be paid back to the Respondent Nos. 2 and 3.

(c) No further amount of sale proceeds of assets of CD shall be payable to Respondent Nos. 2 and 3 till disposal of IA. No. 1342 of 2019. Any amount if found distributable would be kept in the escrow/liquidation account of CD subject to the outcome of the IA. No. 1342 of 2019.

9. IA stands disposed of accordingly. No cost.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)