

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III**

IA-6032/2023
In
IB-1348(ND)/2019

IN THE MATTER OF IB-1348(ND)/2019:

M/s. NISUS FINANCE & INVESTMENT MANAGERS LLP & Anr.

..... **Financial Creditors**

Versus

M/s. EARTHCON UNIVERSAL INFRATECH PRIVATE LIMITED

..... **Corporate Debtor**

AND IN THE MATTER OF IA-6032/2023:

Mr. PANKAJ THAKUR

..... **Applicant**

Versus

Mr. GAURAV KATIYAR & 6 Ors.

..... **Respondents**

Order Pronounced On: 09.04.2024

CORAM:

**SHRI ATUL CHATURVEDI
MEMBER (TECHNICAL)**

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

PRESENT:

For the Applicant : Mr. Najaf Hussain, Ms. Shreya Kumar, Adv.
For the Respondents : Mr. Rishabh Jain, Adv. for RP and Mr. Gaurav
Katiyar, RP in person

ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. The present Application has been filed by Mr. Pankaj Thakur, the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 for bringing on record the Illegal and Fraudulent acts done by Mr. Shashank Gupta, Director of Resolution Applicant (M/s. D. S. Infraheights Pvt. Ltd.). The Applicant seeks the following reliefs:

*“a. Take cognizance of the illegal acts committed by Respondent No. 2
(Shashank Gupta, Director of D. S. Infraheights Pvt. Ltd.);*

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- b. Take cognizance of the ignorance played by the resolution professional upon the CoC and this Hon'ble Tribunal;*
- c. Reject the resolution plan as the approval of the same from the CoC has been given on illegal actions, misconceived facts and notions;*
- d. Pass any such other/further order(s) which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present matter.”*

2. Brief Background of the Case:

The facts that are relevant for the determination of the issues involved in this application are stated as under:

- i.** An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") was filed by the Financial Creditors i.e. M/s. Nisus Finance & Investment Managers LLP & Anr., against the Corporate Debtor i.e. M/s. Earthcon Universal Infratech Private Limited and the said application was admitted by this Adjudicating Authority vide order dated 08.11.2020 and a moratorium was declared including the appointment of Mr. Jitendra Arora as an Interim Resolution Professional. Subsequently, the present Respondent namely Mr. Gaurav Katiyar was confirmed as Resolution Professional.
- ii.** The Resolution Plan was submitted by the Successful Resolution Applicant namely Consortium of M/s. D. S. Infraheights Private Limited and M/s. Anand Buildtech Private Limited which was approved by the CoC in its 26th meeting dated 19.08.2023 by 70.18% voting share in respect of the CIRP of the Corporate Debtor after considering its feasibility and viability. Thereafter, Mr. Gaurav Katiyar, the Resolution Professional of M/s. Earthcon Universal Infratech Private Limited filed IA-4466/2023 for seeking approval of the Resolution Plan under Section 30(6) read with Section 31 of IBC, 2016 on 22.08.2023, which is pending adjudication before this Adjudicating Authority.

3. Submissions of the Applicant:

- i.** The Applicant herein was one of the Directors of the Resolution Applicant i.e. M/s. D. S. Infraheights Pvt. Ltd., the Respondent No. 3, which is part of the consortium of the Successful Resolution Applicants for M/s. Earthcon Universal Infratech Pvt. Ltd. It is submitted that the Resolution Applicant Company was instituted with two Directors and during the time that the resolution plan was being submitted there were only two Directors i.e. the Applicant herein and the Respondent, No. 2.
- ii.** It is submitted by the Applicant that Respondent No. 3 has defrauded the Applicant and misled CoC and RP during the CIRP of M/s. Earthcon Universal Infratech Pvt. Ltd. The Respondent No. 2 has cheated and defrauded the Applicant by submitting a Resolution Plan on behalf of the M/s. D. S. Infraheights Pvt. Ltd. without the consent and knowledge of the Applicant who was the only other director of M/s. D. S. Infraheights Pvt. Ltd.
- iii.** The Respondent No. 2 has presented a forged Board meeting Resolution of M/s. D. S. Infraheights Pvt. Ltd. dated 05.05.2023 where he has shown himself as being appointed as representative of the Company for submitting a Resolution Plan to the Resolution Professional of M/s. Earthcon Universal Infratech Pvt. Ltd. and representing the Company throughout the Resolution Plan of Corporate Debtor (M/s. Earthcon Universal Infratech Pvt. Ltd).
- iv.** It is further submitted that these meetings never took place in reality, the Respondent No. 2 made forged resolutions for these meetings. On top of that, Respondent No. 2 has also forged the Applicant's signature on this fake resolution. From the bare perusal of the resolution plan placed on record hereinabove, it is clear that in the place of the signature, they have affixed the stamp of the company so

that the purported signature of the Applicant herein is not visible. The applicant herein did not sign any board resolution dated 05.05.2023.

- v. As soon as the Applicant received the information about the forgery and fraud committed by Respondent No. 2 and 3, he sent a letter via email to the Resolution Professional for M/s. Earthcon Universal Infratech Pvt. Ltd. informing the same so that further damage can be controlled. In the letter, the Applicant has also urged the Resolution Professional to inform this Adjudicating Authority and also to the members of CoC about the fraud committed by Respondent No. 2 & 3.
- vi. It is submitted by the Applicant that this act of Respondent No. 2 and 3 makes the entire process of participating in the Resolution Plan illegal ab initio and disentitles Respondent No. 3 from any consideration whatsoever to be the Resolution Applicant for the Resolution Plan in ongoing CIRP of Corporate Debtor (M/s. Earthcon Universal Infratech Pvt. Ltd). The said act is illegal and they could not have participated in the Resolution Plan in the absence of the board resolution or consent of the Applicant herein.

4. Submissions of the Respondent No. 1:

- i. The Respondent No. 1 has filed a reply affidavit denying the allegations made by the Applicant and stated that the Applicant herein is merely an employee director and the Applicant herein did not hold any equity shares in the Respondent No. 3 Company. It is submitted that the Applicant herein did not have any interest in Respondent No. 3 Company and cannot stop the majority from taking its decision.
- ii. Considering the deep involvement of the Applicant in the earlier round of negotiation of the Resolution Plan, the Resolution Professional did not have to assume/ascertain that the proceedings of the board meeting dated 05.05.2023 which were suffering from any infirmity nor

there were any compelling circumstances before the Resolution Professional to cross verify the authenticity of proceedings of board meeting dated 05.05.2023. Moreover, the Applicant himself had also failed to inform the Resolution Professional anything about this alleged act.

iii. The Resolution Professional is entitled to presume that the board meeting was conducted properly and the board resolution is perfectly valid. The Resolution Professional is protected by the doctrine of “indoor management”.

iv. The Respondent No. 1 has relied on the Article of Association and Memorandum of Association of the Respondent Company which are as follows:

a) As per Regulation 47 of the Articles of Association of Respondent No. 3 Company:

“A Director shall not be required to hold any qualification shares in the Company and also not required to retire by rotation”.

b) As per clause III(B)(19) of the Memorandum of Association of Respondent No. 3 Company:

The Company is authorized “to enter into partnership or into any arrangements for sharing profits, union of interest, co-operation, joint adventure, reciprocal concession or otherwise with any person or company carrying on or engaged in any business which the company is authorised to carry on”.

5. Submissions of the Respondent No. 2 & 3:

i. The Respondent No. 2 & 3 have filed a reply affidavit denying the allegations made by the Applicant and stated that the Applicant was merely a Director in the Company, who was employed against salary by Respondent No. 3. Since Respondent No. 2 had frequent travelling schedules, therefore, the Applicant being a trusted employee, was

inducted as Director on the Board of Respondent No. 2. At no point of time, the Applicant had any shareholding, whatsoever, in Respondent No. 3 or in any other sister concerns thereof. The last monthly salary which Applicant has drawn from Respondent No. 3 was Rs. 70,000/- p.m.

- ii.** The Applicant's performance was not up to the mark, therefore, Respondent No. 2 asked him to leave the Company. The Applicant requested Respondent No. 2 not to fire him and further pleaded about his precarious financial conditions.
- iii.** It is also mentioned that in addition to the monthly salary, which the Applicant has drawn from Respondent No. 3, as of date, there is an outstanding of more than Rs. 20,00,000/-, which Applicant needs to repay to Respondent No. 3. The said monies have been taken by Applicant from Respondent No.3 from time to time on various pretexts like his personal needs, sister's wedding, child admission, house renovation, etc.

6. Analysis and Findings:

- i.** We have heard the submissions of Ld. Counsel appearing for the Applicant as well as Ld. Counsel appearing for the Respondents. We have also perused the records.
- ii.** After perusing Regulation 47 of the Articles of Association of Respondent No. 3 Company and clause III(B)(19) of the Memorandum of Association of Respondent No. 3 Company, we find that the execution of the consortium agreement by Respondent No. 3 with M/s. Anand Buildtech Private Limited is well within the powers of the Respondent No. 3 Company.
- iii.** Further, we find force in the submissions made by the Resolution Professional that non-service of notice of Board meeting dated 05.05.2023 is merely an irregularity which can be subsequently cured

by calling a fresh board meeting as the Applicant did not hold any share in the Respondent No. 3 Company, he cannot stop the majority in taking the decision.

- iv.** The Hon'ble Supreme Court in the matter of **K. Sashidhar Versus Indian Overseas Bank & Ors.** reported in (2019) 12 SCC 150 has held that the commercial decision of CoC is non-justiciable.
 - v.** In light of the above-quoted judgement, it is clear that the "Commercial wisdom of CoC" is given paramount status. This Adjudicating Authority is not endowed with the powers of jurisdiction or authority to analyse or evaluate the commercial decision of the CoC.
 - vi.** The members of the CoC are the best judges of their interest, fully conversant with market trends, and therefore, their decision should not be interfered with by this Adjudicating Authority for the reason that it is not a part of the judicial function to examine their commercial decisions.
- 7.** In view of the above facts and circumstances and the foregoing discussion. It is accordingly ordered as follows:
- i.** The Application bearing **IA-6032/2023** filed by the Applicant is **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)