

National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 587 of 2021

(Arising out of Order dated 03rd December, 2020 passed by National Company Law Tribunal, Court No. 5, Mumbai Bench, in IA 1148/2020 in C.P. No. 2995/I&B/MB/2019).

IN THE MATTER OF:

**1. G.S. Constro & Infra Pvt. Ltd.
Through Director/Authorised Signatory
Mr. Sushil Govindrao Uttarwar,
R/o A-664, APMC Shopping Centre,
2nd Floor, Dindori Road, Panchvati,
Nasik, Maharashtra - 422005**

...Appellant No. 1

**2. Mr. Sushil Govindrao Uttarwar,
Residing at 11/A Wing, Priyanka Hill,
Near Water Tank, Mahatma Nagar,
Nasik Maharashtra - 422007.**

...Appellant No. 2

**3. Mrs. Kalpana Sushil Uttarwar,
Residing at 11/A Wing, Priyanka Hill,
Near Water Tank, Mahatma Nagar,
Nasik Maharashtra - 422007.**

...Appellant No. 3

Versus

**1. Mr. Gajesh Labhchand Jain,
Resolution Professional of
M/s. E&G Global Estates Limited.
IP Regn No. IBBI/IPA-001/IP-P01697/2019-
2020/12588.
D-501, Clifton Soc. Raviraj Oberoi Marg,
Shastri Nagar, Andheri (W), Mumbai 400053
(Address registered with Board)
502, Brookfield Society, Old Lokhandwala
Complex Road, Opp. Ashok Academy, Andheri
West, Mumbai - 400053. (Address for
correspondence).**

...Respondent No. 1

**2. Small Industrial Development Bank of
India,
R/o. Specialized Asset Recovery,**

**Branch (SARB), Samrudhi Venture Park,
Upper Ground Floor, MIDC Road, MIDC,
Marol, Andheri (E), Mumbai – 400093.**

...Respondent No. 2

**For Appellants: Mr. Ranit Basu, Ms. Maitri Male, Advocates.
For Respondent No.1: Ms. Khushboo Shah Rajani, Advocate for RP/R-1.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. This Appeal is preferred under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code'), against the Impugned Order dated 03/12/2020 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Court No. 5, Mumbai Bench), in I.A.1148 of 2020 in C.P. No. 2995 of 2019, by which Order, the Adjudicating Authority has dismissed the Application filed by the Appellants/Applicants on the ground that the Appellants were 'Related Parties' and cannot be treated as 'Financial Creditors' within the meaning of Section 5(7) of the Code.

2. Facts in brief are that the Appellants are the Investors and Shareholders of '*M/s. E&G Global Estates Limited*' (hereinafter referred to as the 'Corporate Debtor') having 48% of the shareholding of the Company. It is stated that the 'Corporate Debtor' was in dire need of funds to complete the construction of the 'Resort Project' and therefore the Appellants have infused funds into the Company on the understanding that 100% shares would be transferred to them. Accordingly, an MoU dated 10/12/2018 was entered into between the parties, whereby the Appellants paid Rs.75 Lakhs/- to SIDBI towards part payment of the loan amount, thereby saving the Company from becoming an NPA. A Loan Agreement dated 12/02/2019 was also executed

between the 'Corporate Debtor' and the Appellants, whereunder it was agreed that out of the total loan amount of Rs.1,60,00,000/-, Rs.1,00,00,000 would be utilised for repayment of overdue instalments of SIDBI. It was also decided by the Directors of the 'Corporate Debtor Company' that a further loan of Rs.25,00,00,000/- would be borrowed from the Appellants with interest @ 12% per annum and likewise a Resolution dated 18/01/2020 was passed to facilitate borrowings of Rs.5,00,00,000/- from the Appellants, to discharge the loan taken from SIDBI. Subsequently, the Appellants were inducted as the Additional Directors of the 'Corporate Debtor' in February, 2019 and were made signatory to operating the Bank Accounts of the 'Corporate Debtor'. It was averred that the Appellants had vacated the posts of 'Additional Director' since an AGM was never conducted inducting them as a Director, but the RoC portal was not updated and they continued to remain as Additional Directors. It was stated that the Appellants had followed up with the Directors of the 'Corporate Debtor' regarding the acquisition of 100% shares as they had infused huge amounts towards construction activity, but there was no response. It was further averred that the Appellants came to know about some transactions entered into by the Directors of the 'Corporate Debtor' in September, 2019 and also came to know about the filing of the C.P. (IB) No. 2995 of 2019 by SIDBI against the 'Corporate Debtor'. At this juncture, the Appellants had filed a Miscellaneous Application No. 3182 of 2019 seeking to intervene on the ground that they are the owners of the Company and have entered into an MoU for purchasing 40% shares of the 'Corporate Debtor' and that they are in possession of the property and looking after all the day-to-day expense of the 'Corporate Debtor' Company. The Adjudicating Authority

dismissed this M.A. giving the Appellants herein ample time to settle the dues of SIDBI as was agreed by them during the hearing.

3. Submissions of the Learned Counsel appearing on behalf of the Appellants:

- Learned Counsel appearing for the Appellants submitted that they have deposited Rs.50 Lakhs/- with SIDBI without prejudice to their rights and contentions and pending settlement talks with the Directors and SIDBI; but despite all efforts, the Adjudicating Authority has admitted the said Company Petition and dismissed the M.A. filed by them opposing the 'Admission' of the Company Petition.
- It is submitted that the issue raised by SIDBI regarding 'Related Party' is factually incorrect; that as per the provision of Section 161(1) of the Companies Act, 2013, (hereinafter referred to as 'The Act'), the post of the Additional Director would be automatically vacated if the AGM of the Company is not conducted within six months from the end of the respective Financial Year; that Section 96 of the Act compels any Company to hold an AGM within six months from the date of closing of the Financial Year and the said fact was also confirmed by way of a Notice dated 10/12/2019 and therefore it cannot be said that they are 'Related Parties' as the AGM never took place and hence they were never made Directors of the Company.
- The shareholding of two of the Appellants is only 4.09% and 7.48% which is below 20% and therefore the bar provided by the Code under Section 5(24)(j) does not apply.

- It was strenuously contended that as substantial sum of money was infused by the Appellants amounting to Rs.8,00,00,000/-, not giving them an opportunity to file their 'Claim' vitiates the process of law.
- I.A.1148 of 2020 was preferred by the Appellants seeking following reliefs:-

(a) That they have not been made part of the COC as they have been considered as a 'Related Party' nor was their amount invested, considered as 'Financial Debt' and therefore they have been denied proportionate Voting Share in the Company.

(b) The Minutes of the COC Meeting held on 24/07/2020 be quashed and the existing COC be set aside.

(c) Demanding for a Forensic Audit for a 'Corporate Debtor' Company.

- Learned Counsel further submitted that the Learned Adjudicating Authority has erroneously construed the amount of Rs.50 Lakhs/- paid directly to SIDBI as an amount paid on behalf of the 'Corporate Debtor', in return for which, the Appellants would have got acquisition of further shares in the Companies, and therefore the amount is not a 'Financial Debt'.

4. Submissions of the Learned Counsel appearing on behalf of the Respondent/Resolution Professional:

- Learned Counsel appearing for the Respondent submitted that the Resolution Plan was already approved by a majority of the Members of the CoC on 11/03/2022 and an Application was preferred under

Section 30 by the RP before the Adjudicating Authority, which Application has been heard and reserved for Orders.

- It is submitted that being the Shareholders, the Appellants are 'Related Parties' of the 'Corporate Debtor' and have previously filed an M.A. 3182 of 2019 with similar prayers, arraying themselves as Directors of the 'Corporate Debtor Company', which Application was dismissed by the Adjudicating Authority.
- They were not only the Directors but were also controlling the affairs of the Company and are squarely covered under Section 5(24)(a) of the Code.
- The claim amount which the Appellant wants to be treated as 'Financial Debt' was paid by them on behalf of the 'Corporate Debtor' to SIDBI towards settlement of dues of the 'Corporate Debtor Company' for furthering their own interest of acquiring more shares in the Company and therefore have to necessarily be treated as 'Related Parties'.

Assessments/Findings:

5. The main issue which arises for consideration in this Appeal is whether the Appellants herein fall within the definition of 'Related Parties' and whether their 'Claims' can be considered as 'Financial Debt' as defined under Section 5(8) of the Code.

6. It is an undisputed fact that the Appellants together hold about 48% of the shareholding of the Company. It is the main contention of the Appellants that the Master Data of the 'Corporate Debtor' was not updated in the Ministry of Corporate Affairs 'MCA' Website and that they were never Directors of the

Company and were only Additional Directors, which designation, also ceased as the Annual General Meeting contemplated under Section 161(1) of the Act was never conducted inducting them as Directors. The Hon'ble Apex Court in '*Phoenix Arc Private Limited*' Vs. '*Spade Financial Services Limited and Ors.*', (2021) 3 SCC 475, has described the term 'Related Party' in detail in paras 62 & 63 as hereunder:

“62. The definition describes a commutative relationship, meaning that X can be a related party of Y, if either X is related to Y, or Y is related to X. The definition of ‘related party’ under the IBC is significantly broad. The intention of the legislature in adopting such a broad definition was to capture all kinds of inter-relationships between the financial creditor and the corporate debtor.

63. The term ‘related party’ has also been defined by Parliament in the Companies Act, 2013 for all corporations. The definition of the expression has also been expanded for listed entities by the Securities Exchange Board of India by amendment to the Equity Listing Agreement to include elements mentioned under applicable accounting standards. However, in the present case, we are assessing its definition only under the IBC, which is exhaustive. The purpose of defining the term separately under different statutes is not to avoid inconsistency but because the purpose of each of them is different. Hence, while understanding the meaning of ‘related party’ in the context of the IBC, it is important to keep in mind that it was defined to ensure that those entities which are related to the Corporate Debtor can be identified clearly, since their presence can often negatively affect the insolvency process.”

7. A brief perusal of the Master Data of the 'Corporate Debtor' reflects the fact that Appellants 2 & 3 continue to be Directors. It is also seen that the second Appellant Mr. Sushil Govindrao Uttarwar is the common Director of

the 'Corporate Debtor' as well as the present Appellant No. 1 Company. Further in the Application M.A. No. 3182 of 2019 filed by the Appellants herein seeking intervention in the Section 7 Petition filed by SIDBI, it is submitted that they have acquired 44% shareholding of the 'Corporate Debtor Company' in November 2018 and arrayed themselves as 'Directors'. It is significant to mention that a copy of the Master Data of the 'Corporate Debtor Company' as per the records of the MCA Website was annexed to the said Application M.A. 3162/2019, in support of their 'locus standi' for intervening in the matter. Therefore, the contention of the Appellants herein that they were not Directors of the 'Corporate Debtor Company', is untenable.

8. This Tribunal is of the considered view that the Appellants herein are the 'Related Parties' of the 'Corporate Debtor Company' as defined under Section 5(24) of the Code for the following reasons:-

"5(24) "related party", in relation to a corporate debtor, means—

(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

(b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;

(c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;

(d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;

(e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;

(f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than twenty per cent of voting rights in the corporate debtor on account of ownership or a voting agreement;

(k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(m) any person who is associated with the corporate debtor on account of—

(i) participation in policy making processes of the corporate debtor; or

(ii) having more than two directors in common between the corporate debtor and such person; or

(iii) interchange of managerial personnel between the corporate debtor and such person; or

(iv) provision of essential technical information to, or from, the corporate debtor;”

- The Appellants were Directors of the Company and were also managing the day-to-day affairs of the Company as per their own submissions in M.A. 3182 of 2019, which is part of the record.
- It is significant to mention that the second Appellant in his capacity as the ‘Suspended Directors’ has accepted the Notices, Agenda and the Minutes of the CoC Meetings which is against the provisions of Section 21(1) of the Code:

“Section 21(1) of the IBC requires the IRP to form the CoC for the CIRP of the Corporate Debtor. The membership of the CoC is determined in accordance with Section 21(2), which reads thus:

“(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6-A) or sub-section (5) of Section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.”

- Therefore, any financial creditor, shall not have any right of representation, participation and voting in the meeting of the CoC, if it is a related party of the Corporate Debtor.

- It is not in dispute that Rs.50 Lakhs/- was directly paid by the Appellant herein to SIDBI to discharge the loan seeking to enhance their equity in the 'Corporate Debtor Company'. This establishes that the amount infused was not in the nature of financial disbursement with 'Time Value of Money' which is a pre-requisite for a 'Debt' to be covered under Section 5(8) of the Code.
- The Appellants being Shareholders of the Company chose to file an Application before the Adjudicating Authority claiming to be 'Directors' and now again preferred this I.A.1148 of 2020 stating that they are 'not Directors' which is completely contrary to their own stand taken in the earlier MA.
- The documentary evidence on record shows that on 22/02/2019, a Board Resolution was passed approving the conversion of loan to equity. A Notice for holding an AGM and Board Resolution dated 11/02/2019 was also annexed. It is evident from these documents that the loan amount for Rs.1.6Cr./- was actually 'equity' and hence the claim for the amount be treated as a 'Financial Debt' does not survive.
- It is not denied that the Appellants have attended the first CoC Meeting held on 24/06/2020 in their capacity as 'Suspended Directors' and have even annexed the Minutes of the CoC Meetings which shows that they had access to the Minutes of the CoC Meetings.
- It is their own case that the Appellants agreed and entered into an MoU for acquiring 100% equity of the 'Corporate Debtor' and are incurring expenses towards construction activity and the daily wages which

establishes their role in managing the day-to-day affairs of the Company.

9. For all the aforementioned reasons, this Tribunal is of the considered view that the documentary evidence on record clearly establishes that the entire loan was converted into equity and hence no claim is maintainable under the guise that this amount be treated as a 'Financial Debt'.

10. For the foregoing reasons, this Tribunal holds that the Appellants are 'Related Parties' and there are no substantial grounds to interfere with the well-reasoned Order of the Adjudicating Authority. Hence this Appeal fails and is accordingly dismissed. No Order as to costs.

**[Justice Ashok Bhushan]
(Chairperson)**

**[Ms. Shreesha Merla]
(Member Technical)**

**NEW DELHI
18th May, 2022**

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