

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2

ITEM No155

IA 296 of 2020 in CP(IB) 266 of 2019

Order under Section 60(5) IBC,2016

IN THE MATTER OF:

Bank of India Through Its Authorised Representative
Chandra Pal

.....Applicant

V/s

Naren Sheth RP For Jaybharat Textiles & Real Estate Ltd

.....Respondent

Order delivered on ..05/10/2021

Coram:

Madan B. Gosavi, Hon'ble Member(J)

Virendra Kumar Gupta, Hon'ble Member(T)

PRESENTS:

For the Applicant :

For the Respondent :

ORDER

The matter is listed today for pronouncement of the order.

The order is pronounced in the open court, vide separate sheet.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B. GOSAVI)
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2

ITEM No156

IA 522 of 2020 in CP(IB) 272 of 2019

Order under Section 60(5) IBC

IN THE MATTER OF:

Bank of India Through Its Authorised Representative
Rakesh Kumar Garg

.....Applicant

V/s

Vinodkumar P Ambavat RP of Actif Corporation Ltd

.....Respondent

Order delivered on ..05/10/2021

Coram:

Madan B. Gosavi, Hon'ble Member(J)

Virendra Kumar Gupta, Hon'ble Member(T)

PRESENTS:

For the Applicant :

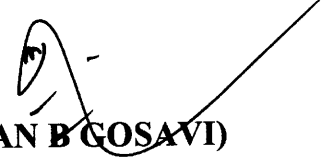
For the Respondent :

ORDER

The matter is listed today for pronouncement of the order.

The order is pronounced in the open court, vide separate sheet.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B GOSAVI)
MEMBER (JUDICIAL)

**BEFORE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-2**

IA 296 of 2020 in
CP (IB) No.266//NCLT/AHM/2019

In the matter of:

Bank of India

Through its authorized
representative
Chandra Pal
Having its registered office at
Asset Recovery Management
Branch
Bank of India Building
Ground Floor
28, S.V. Road
Andheri (West)
Mumbai-400 58

..... Applicant

Versus

Naren Sheth

Resolution Professional
Of Jaybharat Textiles and Real
Estate Limited

..... Respondent

And in the Original matter between

**Vighnaharta Corrugators Pvt. Ltd.
& Ors.**

..... Corporate Applicant

Versus

**Jaybharat Textiles and Real
Estate Limited**

..... Corporate Debtor

Appearance: Mr. Deep Roy, Advocate, along with Mr. Tarak Damani and Aditya Joshi, Advocates, for the Applicant.

Mr. Pavan Godiawala, Advocate along with
Mr. Mokshay Vyas, Advocate for the Respondent.

IA 522 of 2020 in
CP (IB) No.272//NCLT/AHM/2019

In the matter of:

Bank of India

Through its authorized
representative
Rakesh Kumar Garg
Assistant General Manager
Having its office at
Asset Recovery Management
Branch
Bank of India Building
Ground Floor
28, S.V. Road
Andheri (West)
Mumbai-400 58

..... Applicant

Versus

Vinodkumar P. Ambavat

Resolution Professional
of Actif Corporation Ltd.

..... Respondent

And in the Original matter between

**Clematis Trading Company Pvt.
Ltd. & Ors.**

..... Corporate Applicant

Versus

Actif Corporation Limited

..... Corporate Debtor

Appearance: Mr. Deep Roy, Advocate, along with Mr. Tarak Damani and Aditya Joshi, Advocates, for the Applicant.

Mr. Arjun Sheth, Advocate for the Respondent.

Order Reserved on : 28.09.2021
Order Pronounced on : 05.10.2021

Coram: Madan Bhalchandra Gosavi, Member (Judicial)
Virendra Kumar Gupta, Member (Technical)

COMMON ORDER

[Per: Virendra Kumar Gupta, Member (T)]

1. By these Applications, i.e. IA 296 of 2020 in CP (IB) No.266/NCLT/AHM/2019 and IA 522 of 2020 in CP (IB) No. 272 / NCLT/AHM/2019, the Applicant, viz., Bank of India, seeking following reliefs:-

- (a) This Tribunal may dissolve the wrongfully constituted CoC of the Corporate Debtor.
- (b) This Tribunal may remove the Resolution Professional, as the resolution professional of the Corporate Debtor.
- (c) This Tribunal may appoint Mr. Subrata Monindranath Maity (having registration no. IBBI/IPA-001/IP-P00884/2017-2018/11481) as the new resolution professional of the Corporate Debtor and grant additional time to the new

resolution professional for completion of verification of the claims of the creditors and constitute a new committee of creditors. Attached herewith and marked hereto as Annexure-J is the consent form issued by Mr. Subrata Monindranath Maity.

(d) Pending hearing and final disposal of this application, this Tribunal may direct that the first and second meeting of the CoC be held to be null and void and therefore all the decisions taken therein should be held null and void.


(e) Pending hearing and final disposal of this Application, this Tribunal may direct that no CoC meeting be conducted pending final disposal of the present Application.

2. These applications belong to different companies but the issues involved are common, hence, both the IAs were heard together and are being disposed of by this common order. For the sake of convenience, we shall deal with IA 296 of 2020 in detail as arguments were made in respect of this IA.

Brief Facts

3. The relevant facts are that the applicant is a Financial Creditor of the Corporate Debtor and one of the members of the Committee of Creditors (CoC) along with other Financial Creditors who are also public sector Banks. The Corporate Debtor, in the present case, was admitted into Corporate

Insolvency Resolution Process (CIRP) by this Adjudicating Authority vide its order dated 03.01.2020 in an application filed by various Financial Creditors. There are five (5) Secured Financial Creditors and nineteen (19) Unsecured Financial Creditors. The present Resolution Professional (RP) was appointed as IRP originally and his appointment was confirmed by the CoC as RP in the first meeting held on 07.02.2020. In the first meeting of CoC, list of Financial Creditors along with voting share of each financial creditors was presented before CoC wherein the voting share of the Secured Financial Creditors in aggregate was determined as 26.67% whereas the voting percentage of Non-Financial Institutions / Unsecured Financial Creditors was determined as 73.33%. The revised list was prepared thereafter wherein marginal change happened in the voting share of both categories of Financial Creditors happened. In this background, it is alleged by the applicant that the RP had admitted the claims of unsecured financial creditors without verifying the same and consequently, percentage of voting share of secured financial institutions was reduced. It has also been submitted that though the appointment of the present RP was

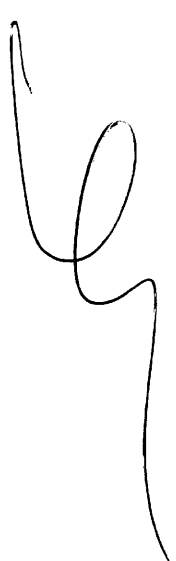



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approved by necessary vote, however, financial institutions voted against said resolution. The applicant along with other financial creditors appointed independent professional firm to carry-out due diligence as regard to the claims of 19 Unsecured Financial Creditors. In such report, it was pointed out that such non-financial institutions were either related or associated or connected with each other and the promoters of the Corporate Debtor or the Corporate Debtor itself. Thereafter, at the request of Consortium of Banks including the applicant Forensic Audit was also conducted by an Independent Forensic Auditor wherein the fact of common directorship or common shareholding between all unsecured financial creditors and / or with the Corporate Debtor emerged. This situation has resulted into minority status of secured financial creditors in CoC and because of that such secured financial creditors have not been able to work in the best interests of all stakeholders. It is also pleaded that the RP has acted in a biased manner by favouring the unsecured financial creditors who are not financial institutions.

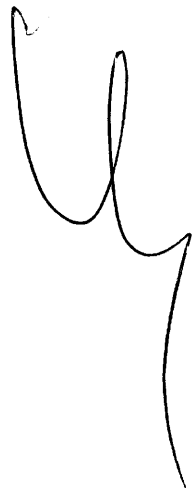


Arguments on behalf of the Applicant

4. In this background, Ld. Counsel for the applicant appeared and submitted that
- (1) The RP has admitted the claims without verifying the same and assigned voting rights on the basis of unverified amounts.
 - (2) That as against the principal amount of Rs.249.5 crores claim amount of Rs.1587 crores has been admitted which mainly comprises of amount of interest and that too when no provision has been made in the financial statement for such interest.
 - (3) That as against secured financial creditors such unsecured financial creditors are not in the business of providing financial credit.
 - (4) It is also claimed that by doing so the RP has failed to discharge its duties as RP in an independent and neutral manner for the reason that RP has allowed related parties of Corporate Debtor in CoC meetings and assigned voting rights to them on the basis of inflated claims.
5. The Ld. Counsel, thereafter, contended that the net worth and the amount given by such unsecured financial creditors do not match proportionately. Hence, the capacity to advance such loans cannot be said to exist.
6. Apart from this, the Ld. Counsel for the applicant submitted that such unsecured financial creditors are related parties of the
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Corporate Debtor in terms of provisions of Section 5(24) (m) (iii) of IBC, 2016 and for this proposition, he has placed reliance on the due diligence report conducted by one professional firm of Chartered Accountant. Thereafter, the Ld. Counsel drew our attention to various factual aspects relating to common shareholders / directors as mentioned in such report to state that no voting rights could have been given to such unsecured financial creditors for the reason that several shareholders are common amongst such unsecured financial creditors and there has been inter change of managerial personnel and shareholders between such entities. It is also claimed that some persons were also directors of the Corporate Debtor in the past.

7. The Ld. Counsel for the applicant has also pointed out that all these companies belong to Tayal group and other companies also which are also undergoing CIRP same modus operandi has been adopted whereby the voting percentage of secured financial creditors has been reduced in a substantial manner so as to dominate CoC and CIRP process. Thereafter, Ld. Counsel submitted that in such circumstances when the CoC is found to be wrongly constituted all the decisions made by such CoC needs



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to be quashed and re-constitution of CoC be done so that CIRP can be conducted in a smooth, fair and unbiased manner. The Ld. Counsel also proposed the name of Insolvency (IP) who may be appointed in place of the current RP.

Arguments on behalf of RP

8. The Ld. Counsel appearing for the RP after giving a brief background as to the manner in which the CIRP had been conducted in spite of raising objections as regard to acceptance of claims of other financial creditors no single document in support of such allegation was provided by the applicant despite the request made by the RP in this regard. It is also claimed that the RP had offered the secured financial creditors to inspect all claims and records so that their doubts could be cleared. However, no such inspection was taken by such secured financial creditors. It is also claimed that the issue of wrong admission of claims and such unsecured financial creditors, being related party, has been raised on the basis of unauthentic or irrelevant documents which have not been shared with the RP. It is also claimed that the RP has meticulously complied with all

the provisions and regulations of IBC 2016. Thereafter, issue of maintainability of this IA was raised. It is claimed that for change of RP specific provisions under Section 27 of IBC, 2016 have been made and which is not being followed. Hence, claim made by the secured financial creditors in this IA to this effect is de-horse illegal. As regard to validity of first and second meeting of CoC, it is claimed by the applicant that such meetings be declared null and void and CoC be dissolved, however, such pleas deserves to be dismissed in limine as unsecured financial creditors have not made been parties to the present application. On merit, it is claimed that claims received from the secured and unsecured financial creditors were examined, scrutinised, modified and admitted by RP strictly in accordance with the provisions and regulations 8, 13 and 14 of CIRP Regulations, 2016. Hence, allegation of wrong admission of claim is uncalled for. It is also vehemently argued that the applicant has failed to produce any document / record to show the admitted claims are in respect of related parties. As regard to claim amount i.e principal amount along with interest it is claimed that such loans were availed by the Corporate Debtor almost 10-12 years back

and interest thereon has also remained unpaid since then and such interest being an actionable claim under Section 5(8) of IBC, 2016 has been given due effect. It is also contended that principal amount is still appearing in the financial statement of the Corporate Debtor. It is also claimed that interest has been calculated at the rate of interest specified in the loan documents executed between the parties. As regard to the issue of related party, it is stated that the applicant has relied on unsigned draft report of the year 2016 as against which the RP, to redress the concern of the applicant got due diligence exercise done through another independent professional firm so as to find out the fact regarding such unsecured financial creditors, being a related party. It is, on the basis of such report of such firm, it is claimed that there is no commonality in employee, management, voting rights, shareholding pattern, etc., in respect of any financial creditor with the Corporate Debtor. It is further submitted that in the aforesaid report a categorical finding has been given that none of the unsecured financial creditors are related party to the Corporate Debtor.

The additional affidavit has also been filed on behalf of the RP wherein the Financial Statement for the year ended on 31.03.2019 has been attached. Our attention was drawn to disclosure made in the Notes to Accounts to such financial statement in Clause No.9 under the head "borrowing costs" to make a plea that interest amount had been admitted on this basis in addition to loan documents executed by and between the parties. The RP also pointed out that he acted fairly and admitted the interest claims of unsecured financial creditors as well as secured financial creditors on the basis of same methodology i.e. as against the principal amount of Rs.69 crores appearing in Balance Sheet as liability towards the secured financial creditors, their claims were admitted at Rs.608 crores considering the interest element based upon loan agreement though no provision has been made for the same in the books of account and in the financial statement, hence, the approach of the applicant is self-contradictory. The Ld. Counsel for the applicant further emphasised on the fact that in the due diligence report obtained by the RP as regard to the ascertainment of the fact that whether such unsecured financial creditors could be treated as a related

party of the Corporate Debtor, categorical findings were given this report that such parties could not be treated as the related party of the Corporate Debtor and provisions of Section 5(24) and 5(24A) were elaborately examined and dealt with whereas in the unsigned draft report relied by the applicant only vague and indecisive claims were made, hence, the report obtained by the RP had to be considered. As regard to the issue raised by the secured financial creditor that the Corporate Debtor was treated as wilful defaulter and declared as fraud, no documents / evidence has been provided by the applicant on such issue. As regard to certain actions / issues relating to purported group companies, it is submitted that the Corporate Debtor is an independent entity which is run by the directors / professionals with no interference of any other person/ group and, therefore, no linkages with any other group companies as attempted by the applicant. As regard to use of unsecured financial loans and non-repayment thereof it has been claimed that such loans have been used margin towards project cost and to meet working capital requirement there exist conditions in the sanction letters of the bank that the loans raised from such financial creditors

shall not be paid before the payment of loan given by the secured financial creditors. Hence, such loans and interest thereon have been remained unpaid. It has also been pointed out that RP has filed additional affidavit enclosing a chart containing of names of the unsecured financial creditors, principal amount, date of advance, due date, rate of interest, amount of interest from the date of advance to the date of CIRP at contracted rate of interest, amount of overdue interest from the date of default to the date of CIRP, repayment of amount, total amount claimed by the financial creditor and various documents relied on by the RP in admitting the claims of the unsecured financial creditors. The respondent / RP has relied upon the decision of Hon'ble Supreme Court in the matter of **Phoneix Arc Pvt. Ltd. Vs Spade Financial Services Ltd. and Ors.** to plead that it is not the case of the applicant also that other financial creditors are related party to the Corporate Debtor as on the date of initiation of CIRP, hence, to such financial creditors could not be considered as a related party. It is also argued that director of one such financial creditor even being director of another such financial creditor does not make such financial creditor as related party of the



Corporate Debtor unless the said director is a common director for Corporate Debtor as well as financial creditor on the date of initiation of CIRP. As regard to conduct of RP, it was submitted that from the minutes of meetings and the manner of conduct of CIRP it would clearly emerge that the secured financial creditors have not come with clean hands before this Adjudicating Authority to pray that the RP should be removed.

9. The Ld. Counsel for the applicant, in the rejoinder, contended that secured financial creditors since beginning have expressed their dissatisfaction / disagreement with the approach of RP and subsequently two reports were taken from independent agencies, Hence, claims made by the applicant needs to be considered in light of the overall facts relating to the interest element as well as related party status of unsecured financial creditors.

Our Conclusion

10. We have considered the submissions made by both sides also perused the material on record. Two issues are involved herein. The first issue pertains to amount of claim which is liable to be admitted. As regard to this aspect, we consider it proper to

reproduce Clause No.9 of Notes to Accounts as appearing in Financial Statement for Financial Year 2018-19.

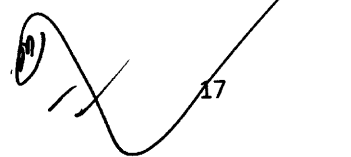
"9. Borrowing costs

Borrowing costs directly attributable to the acquisition, construction or production of an asset that necessarily takes a substantial period of time to get ready for its intended use or sale are capitalised as part of the cost of the asset. All other borrowing costs are expensed in the period in which they occur. Borrowing costs consist of interest and other costs that an entity incurs in connect with the borrowing of funds. Borrowing cost also includes exchange differences to the extent regarded as an adjustment to the borrowing costs.

The Company had taken unsecured Loans since FY 2009 for its expansion project and / or to meet its working capital requirements. The said loans were for a tenure of 5-7 years and required to be repaid along with interest at contracted rate on due dates, in the terms of demand Promissory Notes / Loan Agreements, executed by the company at the relevant time. The Company on account of poor financial could not repay, the principal sums along with interest from the date of first disbursement, at the time of maturity. The Company had given several resolutions plans and had been in continuous dialogues with the unsecured lenders, however, no amicable solution has been reached, accordingly is liable for payment of principal sum besides interest in terms of security documents and penal interest on default as per agreed terms, which needs to be provided for."

11. From the perusal of the above, it is clear that the Statutory Auditor and Management of the Corporate Debtor have disclosed the fact regarding non-provisioning of interest. It is also noted

that in the case of secured financial creditors as well the same methodology has been adopted. Further, interest element has been considered in arriving at the debt owed to secured financial creditors as well as to unsecured financial creditors. The voting rights have also been ascertained accordingly. Thus, on the basis of parity being deployed by the RP in admitting claims of both category of financial creditors, there remains no reason to be aggrieved. It is a settled principle that one cannot approbate and reprobate at the same time. Thus, in case the interest element is to be excluded in computation of the claim amount of unsecured financial creditors, the same needs to be excluded from the claim amount of secured financial creditors as well. Further, as per Rule 8(2) (b) of CIRP Regulations, 2016, amount of claim is to be ascertained on the basis of financial contract supported by the financial statement as evidence of the debt. In this regard, we may also mention that the term 'financial statement' has been defined in Section 2(40) of the Companies Act, 2013 which essentially includes annual financial statement. Thus, on the basis of loan agreements and other documents executed by the Corporate Debtor with unsecured financial



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creditors and considering the financial statements, interest element in case of unsecured financial creditors has been correctly computed. It may not out of place to mention that though secured financial creditors, on the basis of agreement include substantial amount of interest in their claims in spite of making provision for NPA and not claiming interest income in their books of account and their voting percentage is worked out accordingly and they control CIRP but in the end accept substantial haircuts and fraction of their outstanding amount and on the other hand, they do not wish to get claims of Unsecured Financial Creditors admitted in the same manner. This approach results into unfair advantage to secured financial creditors, i.e. Banks. Hence, considering the above legal position and facts of the case, we hold that the amount of claim of unsecured financial creditors has been correctly ascertained by the RP.

12. As regard to the issue of such unsecured financial creditors, being a related party of the Corporate Debtor, we have perused the report submitted by both the parties. In this regard, we agree

with the contention of the RP that the applicant has relied on Report of 2016 and in such report relevant provisions of IBC have not been dealt with specifically. Hence, such report cannot be relied upon. Further in the due diligence report of SDMA dated 12.02.2020 for which they were appointed on 08.02.2020, the reliance has been made on the basis of Data available on MCA portal. Further in such report no specific findings have given as to how such parties could be considered as related party of Corporate Debtor within the meaning of provisions of Section 5(24A) of IBC, 2016. As against this, the report obtained by RP has elaborately dealt with the aspect of the related party and taken into consideration the facts and legal provisions to hold that such financial creditors are not a related party of the Corporate Debtor. We find ourselves in agreement with such report.

13. We are further of the view that the interchange of the managerial personal between various legal entities inter-se without any association with the Corporate Debtor is not a valid basis to hold that such parties fall under the category of related party of the Corporate Debtor, though they may be belonging to the same

group. We are further of the view that the object of provisions relating to exclusion of related parties from CoC is to maintain the independence of CoC in the interest of all stakeholders but that does not mean that parties who were related at some point of time and now they are not related parties, should be excluded from CoC merely because for this reason unless it is shown they extinguished their related parties status just to dominate CIRP to gain undue advantage in CIRP. In the present, no material has been brought on record to substantiate this aspect. It has also been held by the Hon'ble Supreme Court in the case of **Phoneix Arc Pvt. Ltd.** (supra). Hence, considering the findings of the Hon'ble Supreme Court that text and context should be matched with the object of IBC, 2016 and if on that basis it is established in a given case only then parties on the basis of past relations can be treated as related party. In the interest, none of the parties has served its connection with the Corporate Debtor after filing of application for initiation of insolvency proceedings against the Corporate Debtor and they were not a related party in recent years. Hence, this reason also they cannot be treated as a related party of the Corporate Debtor.

14. Having held that action of the RP is correct in law in respect of both the issues raised by the applicant, we hold that there is no merit in the contention of the applicant for replacement of RP. Thus, this prayer is also rejected.

15. We further hold that as a consequence of our findings hereinbefore there is no occasion to reconstitute the CoC.


16. Thus, application filed by the applicant stands rejected in respect of all issues raised therein and disposed of in terms indicated above.


IA 522 of 2020

17. This application also involves the same issues. Both the parties have taken same pleas though the date of events, amount involved may differ but the genesis of controversy and nature thereof remains the same. Both the parties have made same arguments. In this case, disclosure as regard to borrowing cost has been made in similar manner in the financial statements. Thus, considering the rational and decisions of this Adjudicating

Authority in IA 296 of 2020, this application, i.e. IA 522 of 2020
also stands rejected.

18. In the result, both IAs stand rejected and disposed of.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B GOSAVI)
MEMBER (JUDICIAL)

Sudha