

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

**Company Appeal (AT) (CH) (Ins) No. 364/2022
(Filed Under Section 61 of the Insolvency and Bankruptcy Code, 2016)**

**Arising out of the Impugned Order dated 08/07/2022 in
IA(IBC)/753/CHE/2021 in IBA/471/2020, passed by the ‘Adjudicating
Authority’, (National Company Law Tribunal, Chennai Bench)**

In the matter of:

M/s SMS Foundation & Investment LLP

Having office at:

No. 7, VII Cross Street, Shenoy Nagar, Chennai- 600030,
Tamil Nadu, India.

Represented by:

CS K. Gaurav Kumar/ CS Alpa Jain

Practicing Company Secretaries

Address for Communication:

New No. 151, Old No. 68, First Floor,
T.T.K. Road, Alwarpet, Chennai – 600018
Tamil Nadu, India

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...Appellant

Versus

M/s. Harsha Exito Engineering Private Limited

Rep. by Resolution Professional Mr. J. John Ohilvi

Address: No.3/95A, East of Medical College, Asaripallam
Nagercoil, Kanyakumari District – 629 201.

...Respondent

Present:

For Appellant	:	Mr. Gaurav Kumar, PCS
For Respondent	:	Mr. S.R. Rajagopal, Sr. Advocate For Mr. T. Dhanasekar, Advocate Mr. P. Shiva, Advocate

J U D G M E N T
(Physical Mode)

[Per: Shreesha Merla, Member (Technical)]

1. Aggrieved by the Impugned Order dated 08/07/2022, passed by the National Company Law Tribunal, Chennai Bench in IA(IBC)/753/2021 in IBA/471/2020, the Applicant, M/s SMS Foundation and Investment LLP has preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'the Code'). By the Impugned Order, the 'Adjudicating Authority' has dismissed the Application preferred by the Appellant herein observing as follows:

“14. Now the issue is required to be adjudicated as to whether the claim of the Applicant is required to be admitted in the capacity as a Financial Creditor. After perusing the pleadings and documents filed along with the application, it could be seen that the Loan Agreement was executed between the parties on 27.12.2019 in and by which the amount of Rs.16.00 Crores was converted into loan to be paid with 15% Interest per annum.

15. Further, it is also seen from the Bank Statement that the Applicant has disbursed a sum of Rs. 12,94,04,499/- to the account of Corporate Debtor and the same is also not disputed. However, it could be seen from the Balance Sheet that the name of the Applicant's Partner namely Sanjay Kumar P.Shah and Manish Kumar P.Shah is reflected in the Shareholder in the Books of Corporate Debtor and the said fact is also intimated to the Applicant as early as on 27.01.2020.

16. While this being the fact that if the Applicant's real intention was not to hold any shares in the Corporate Debtor Company, the Applicant ought to have taken steps under section 59 of the Company's Act 2013 for rectification of his name in the Registrar of Company. However, it could be seen that no steps taken by the Applicant in this regard.

17. The Applicant was silent on this issue and continued to be Shareholder in the Corporate Debtor Company. It could also be seen that from the Ledger Extract of the Applicant maintained in the books of the Corporate Debtor the balance payable is shown as 'NIL' as on 31.03.2020. Hence, we come to the irresistible conclusion that the Applicant is one of the Shareholder of the Corporate Debtor and the Respondent was right in rejecting the claim of the Applicant.”

2. The Learned Company Secretary Mr. Gaurav Kumar appearing for the Appellant submitted that the shares were never duly transferred under the eyes of Law and therefore, the Appellants are not Shareholders of the Corporate Debtor; that the Shares alleged to be transferred under the Memorandum of Understanding (MOU) dated 02/08/2019 was never transferred to the Appellant in accordance with Section 56 of the Companies Act, 2013. In support of this contention, the Learned Company Secretary submitted that there were no signed Share Transfer Deeds in Form SH-4, there was no Stamp Duty paid and further that there was no Transfer entry on the reverse side of the Share Certificate. As per Section 88 of Companies Act, 2013 ('the Act'), the transfer of shares ought to be mentioned in the 'Register of Members' maintained by the Company which was not done in this case and therefore, this Transfer carries no legal enforceability and is null and

void. The Learned Company Secretary placed reliance on the Judgment of this Tribunal in the matter of '*M/s Vintage Hotels Private Limited Vs. Ahamed Nizar Moideen Kunhi Kunhimahin*' in CA (AT) No. 408 of 2018, wherein it was held as follows:

“the Court held that transferring a share involves series of steps (i) an Agreement to sell (ii) Execution of Deed and Transfer and (iii) registration of transfer.

“Shares are ‘Goods’ as defined in ‘Sale of Goods Act’ and can be transferred like any other movable property subject to the provisions contained in the ‘Articles of Association’ and the Companies Act.....Only when the ‘transferee’s’ name is registered in the Company’s register, right to property is perfected.”

“29. At this stage, the Tribunal worth recalls and recollects the decision ‘Colonial Bank V. Hepworth (1887) 36 ChD 36 at p 54 wherein it is observed that till the transfer of shares is actually registered, transferee’s title of share is actually inchoate and the legal title remains vested in the transferor.”

“31. Till the stage of execution of ‘transfer’ all that is made is to pass an equitable interest in the shares to the ‘Transferee’. *In reality, there is no completion of legal assignment. Even when the ‘Board of Directors’ accepts the transfer and passes it for registration of transfers in records, the ‘transfer’ is not completed. Until the actual entry of transferee’s name was effected in the Company’s register, the transferor remains the legal holder of shares.....”*

3. The Learned Counsel also placed reliance on the Judgment of the Hon’ble Supreme Court in the matter of '*Messrs Howrah Trading Co. Ltd. Vs. The*

Commissioner of Income-Tax', Calcutta 1959 AIR 775 wherein it was held that 'a Shareholder shall only constitute those whose names are inscribed in the Register of Members'

4. It is submitted that the Annual Documents depicting the Appellants as a Shareholder are manipulated and filed to create a 'Shareholder Status', a few weeks before the commencement of the CIRP. It is submitted that the MGT-7 and the balance sheet are documents under the control of the Promoter and the Annual Documents pertaining to the FY 2019-20 was filed by the Management of the Corporate Debtor, only on 22/02/2021, a month before the CIRP commenced. The Promoter was very well aware that the CIRP would commence in a month's time and to ensure that the Appellant does not find a seat in the CoC, the documents were made up to ensure that the 'colour' of the 'Shareholder' is given. The Appellant's claim is around 40 % of the entire claims and if the same is disallowed, then only the Banks and the small Creditors were to be satisfied in order to take this Company out of CIRP and therefore the Promotor has clandestinely manipulated these documents. It is submitted that on receiving the letter dated, 27/01/2020, sent by the Corporate Debtor, demanding the Appellant to release an amount to Rs. 16,00,00,000/- (Rupees Sixteen Crores Only), the Appellant had requested the Promoters to give a reasonable justification. It is also recorded by the 'Adjudicating Authority' that the Respondents did not produce Register of Members of the Company and therefore the Appellant could

not have taken recourse to Section 59 of the Act as the Register itself was kept in the dark.

5. It is submitted by the Learned Company Secretary that the only Agreement subsisting between the Appellant and the Corporate Debtor is the Loan Agreement subsequent to the cancellation of the MoU. The Loan Agreement dated 27/12/2019 bears the signatory of the Corporate Debtor; and that the Board Resolution dated 27/09/2019 is signed by the Director and is executed on the letterhead of the Corporate Debtor.

6. It is submitted that the Resolution Professional (RP) of the Corporate Debtor acted 'ultra vires' to his duties and had indulged in adjudicating the claims of the Appellant. The Hon'ble Supreme Court in the matter of '*Swiss Ribbons Pvt. Ltd. Vs. UOI & Ors.*' in Writ Petition (Civil) No. 99 of 2018 has observed that '*Resolution Professional has no Adjudicatory Powers*'. It is submitted that in this case, the RP had overstepped his duties and jeopardized the valid Claims of the Appellant and had made various attempts to prove that the Appellant is actively participating in the day-to-day affairs of the Corporate Debtor. It is submitted that the 'Adjudicating Authority' has erroneously recorded in the Impugned Order that the Applicant is one of the Shareholders of the Corporate Debtor Company and failed to record any legal reasoning while arriving at that finding.

7. The Learned Senior Counsel appearing for the 'Respondent'/'Resolution Professional (RP) submitted that the Appellant was involved in the Management

of the Company, post his investment; that the Loan Agreement dated 27/12/2019 is for a future transaction; that the Board Resolution dated 27/09/2019 alleged to have revoked the MoU dated 02/08/2019 is not reflected in the 'Number of Board Meetings' recorded in the statements submitted to the 'Registrar of Companies' (RoC); that the MoU was never revoked as the Board Resolution had never taken place; when the Appellant had filed their Claim, the Copy of this Board Resolution was never filed and that though the original MoU had five Signatories, the alleged revoked MoU dated 27/11/2019 had only four signatories. It is submitted by the Learned Senior Counsel that prior to the RP verifying the Claims, the MoU was never revoked. The Appellant also had the email ID of the Company which only a Shareholder would have access to.

8. It is submitted by the Learned Senior Counsel for the RP that the Share Certificate in respect of 18,60,000 shares of Rs. 100/- (Rupees Hundred Only) each with distinctive No. (s) 1291744 to 3151744 in Certificate No. 36 has been duly received by Manish Kumar B Shah on 17/12/2019. An endorsement regarding the Share Transfer was made at the back side of the Share Certificate and the same was handed over to the Partners of the Appellant. During the course of 'Hearing', it was also submitted by the Appellant that he was in possession of the Share Certificate. As regards the Loan Agreement dated 27/12/2019, it is submitted that the said Agreement was entered into for the purpose of availing a loan in future for a sum of Rs. 16,00,00,000/- (Rupees Sixteen Crores Only) and not for a sum already transferred to the Corporate Debtor Company. The

Appellant had infused a sum of Rs. 15,47,23,307/- (Rupees Fifteen Crores Forty Seven Lakhs Twenty Three Thousand Three Hundred and Seven Only) in the Corporate Debtor Company over a period of five months from August 2019 to December 2019 as per the terms of the MoU dated 02/08/2019. It is submitted that the records of the 'Registrar of Companies' (RoC), Chennai evidence that the Shares have been transferred in the names of the Partners of the Appellant. Having participated actively in the day to day functioning of the decision-making process of the Company and being a Shareholder, any transaction between the Appellant and the Corporate Debtor cannot qualify as 'Financial Debt' as defined under Section 5(8) of the Code.

9. As against this argument, the Learned Company Secretary in his rebuttal drew our attention to the Ledger extract dated 30/12/2019 in support of his argument that interest has been paid on the amounts lent to the Company and therefore the amount ought to be construed only as a Loan and not as Equity. As regarding the argument that the cancelled MoU was never furnished to the RP, the Learned Senior Counsel drew our attention to Form C wherein in the list of documents, the cancelled MoU is enclosed.

Appraisal:

10. The brief point that falls for consideration in this Appeal is whether the 'Adjudicating Authority' was justified in observing that the Appellant herein is a 'Shareholder' of the Corporate Debtor Company. It is an admitted fact that the partners of the Appellant namely Mr. Sanjay Kumar P Shah and Mr. Manish

Kumar B Shah had entered into an MoU dated 02/08/2019 with Mr. B. Dhanaraj and Mrs. Neeraja Dhanaraj, the Shareholders of the Corporate Debtor for infusion of funds in the Corporate Debtor Company. It is seen from the MoU that the existing promoters of the Company had agreed to sell 46.5% of the total issued Equity Shares of the Capital as on date, from existing Equity shares held by them in the Company for a total consideration of Rs. 15,00,00,000/- (Rupees Fifteen Crores Only) to be paid by the investors in a phased manner by way of infusion of funds into the Company. It is the case of the Appellant that this MoU is only an interregnum arrangement to be replaced or added by a full-fledged Shareholders Agreement and Investment Agreement between the Parties to be entered into, on or before 31/01/2020. The Learned Company Secretary drew our attention to the Clause 6 of the MoU which is vehemently contended by the Learned Company Secretary that this MoU was later revoked and drew our attention to the MoU which is said to have been revoked on 27/11/2019. A mere perusal of this MoU shows that there are four signatories on the first page who have signed that '*this Agreement will be withdrawn or cancelled/terminated by all the Partners*'. It is the case of the Respondent that the Board Resolution dated 27/09/2019 which the Appellant has referred to has never taken place and it is seen from the record that seven Board Meetings were conducted during the Financial Year along with two General Meetings and this date i.e., 27/09/2019 does not figure and 'the number of Board Meetings conducted during that year'. Form MGT-7 filed by the Company with the RoC, read with the Auditor's Report

establishes that no such Board Meeting had taken place on 27/09/2019. Therefore, this Tribunal is of the considered view that there is no documentary evidence to establish that a Board Meeting had taken place on 27/09/2019 and consequently the MoU was revoked on 27/11/2019.

11. Now this 'Tribunal' addresses to the contention of the Learned Company Secretary that the shares were never transferred to the Appellant herein and that the prerequisites for effective transfer of shares as held by this Tribunal in '*M/s Vintage Hotels Private Limited Vs. Ahamed Nizar Moideen Kunhi Kunhimahin*' (Supra) has not been adhered to. At the outset, the Appellant has admitted that the original Share Certificates are in his possession. A perusal of the Share Certificate No. 36, whereby 18,60,000 shares of Rs. 100/- (Rupees Hundred only) is figured, shows that the Share Certificate was received by Mr. Manish Shah and there is a clear endorsement dated 17/12/2019. As the receipt of the Share Transfer Certificate itself is endorsed by the Appellant and duly dated, this 'Tribunal' do not see any grounds to go into the aspects of whether the prerequisites of the Share Transfer have been fulfilled or not, specifically keeping in view that these shares are reflected in MGT-7 filed with the RoC. MGT-7 for the Financial Year 2019-20 confirms that 18,60,000 Equity shares of the Corporate Debtor have been transferred in the names of the Partners of the Appellant. The Corporate Debtor vide letter dated 27/01/2020 had intimated the partners of the Appellant that they are Shareholders of the Company. The CIRP commenced on 24/03/2021, no steps were taken by the Appellant in this interim

period as against any of the grievances raised with respect to their status as 'shareholders'. The Learned Company Secretary argued that the date of transfer of Shares is reflected as 24/12/2019 in MGT-7, and drew our attention to the letter dated 22/02/2020 in which it is recorded that the letter dated 27/01/2019 asking them to confirm the share transfer, came as a surprise. It is submitted in the letter that they had never signed any Transfer deed and that it was handed over to them only for 'safety and security purpose'. This letter refers to the cancelled MoU. At the cost of Repetition, this Tribunal has observed that there is no evidence brought on record to establish that there was a Board Meeting which was held cancelling the MoU dated 02/08/2019 and therefore, the question of the amount infused into the Company by the Appellant being converted into Loan in the absence of any Books of Accounts of the Corporate Debtor reflecting the same as an 'outstanding loan amount' either in the 'long term' or in the 'short term borrowings' or in the 'Auditor's Report', does not arise.

12. This Tribunal is of the view that the ledger account is to be read with the statements in the balance sheets and the Financial Statements, together with the Auditor's Report filed with the RoC. It is settled Law that these aforementioned Financial Statements filed with the RoC have greater evidentiary value than that of a 'ledger statement' which is an 'internal document'.

13. As regarding the Submission of the Learned Company Secretary that the RP had 'adjudicated' the 'Claim', this 'Tribunal' is of the considered view that in the facts of the present case, the RP has rightly rejected the claim of the

Appellant based on the documentary evidence on hand. The duty of the RP is to collect and collate the claims and a mere rejection of the Claim by the RP cannot be construed to be an ‘Adjudicatory function’, keeping in view Regulation 13 of the CIRP Regulations 2016, which reads as follows:

13. Verification of claims:-

- (1) The interim resolution professional or the liquidation professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.*
- (2) The list of creditors shall be-*
 - (a) available for inspection by the persons who submitted proofs of claim;*
 - (b) available for inspection by members, partners, directors and guarantors of the corporate debtor [or their authorised representatives];*
 - (c) displayed on the website, if any, of the corporate debtor,*
 - (d) filed with the Adjudicating Authority; and*
 - (e) presented at the first meeting of the committee.*

14. The Loan Agreement dated 27/12/2019 is also on the same date as that of the MoU which is said to have been revoked/cancelled by the Appellant. It is significant to mention that this Loan Agreement is silent about the MoU dated 02/08/2019. There is no evidence on record in terms of Statements of Accounts or Auditor’s Report that the claim amount of Rs. 15,72,18,489/- (Rupees Fifteen

Crores Seventy Two Lakhs Eighteen Thousand Four Hundred and Eighty Nine Only) has been disbursed pursuant to this Loan Agreement. The argument of the Learned Company Secretary that these documents are manipulated by the Promoter one month prior to the date of CIRP, cannot be sustained in the light of the fact that MoU dated 02/08/2019 specifies that the amounts infused between August 2019 to December 2019 is in the form of Investment to be converted into Equity.

15. The contention of the Learned Company Secretary appearing for the Appellant that the Register of Members was never produced before the Adjudicating Authority and therefore no steps could have been taken under Section 59 of the Act, is untenable as they themselves are relying on the letter dated 22/02/2020 in support of their argument that they had come to know that their amount was converted into Equity despite not having signed any Share Transfer Deed, then there are no substantial reasons for not having taken any effective steps under Section 59 of the Act. A physical perusal of the Register of Members cannot be said to be a mandatory prerequisite for taking recourse under Section 59 of the Act. Be that as it may, this Tribunal is of the considered view that the documentary evidence on record establishes that the money was infused by the Appellant, vide the terms in the MoU dated 02/08/2019 as an 'Investment' to be converted into 'Equity'. MGT-7 available from the MCA Portal read together with the Auditor's Report and the endorsement of the Appellant on the Share Transfer Certificate, all clearly establish that the Shares were indeed

transferred in the name of the partners of the Appellant and therefore, this Tribunal is of the earnest view that there are no substantial grounds to interfere with the order of the 'Adjudicating Authority'.

16. For all the foregoing reasons, this Company Appeal (AT) (CH) (Ins) No. 364/2022 is 'dismissed' accordingly. No Costs. Connected pending Interlocutory Applications, if any, are 'closed'.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

04/07/2023
SPR/NG