BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

IVN.P (IBC)/19(MB)2023
IVN.P (IBC)/23(MB)2023
IVN.P (IBC)/41(MB)2023
IN
C.P (IB) NO. 539/2021

Under Section 65 of Insolvency & Bankruptcy Code, 2016, Read with Section 60(5) Read with Rule 11 of the NCLT Rules,2016 and Under Section 7 of Insolvency & Bankruptcy Code, 2016.

IVN.P (IBC)/19(MB)2023

In the Intervention Petition of

Shankar Deep Co-operative Housing Society Limited
…Intervener/Applicant

Vs.

1. *Shrenik Dhirajmal Siroya*
2. *Siroya Fm Constructions Pvt. Ltd.*

…Respondents

IVN.P (IBC)/23(MB)2023

In the Intervention Petition of

Anil Gulabdas Shah
…. Petitioner/ Intervener/Applicant No. 1

Sunil Krishnan Anand
…. Petitioner/ Intervener/Applicant No. 2

Vs.

1.Shrenik Dhirajmal Siroya

2.Siroya Fm Constructions Pvt. Ltd.

…Respondents

IVN.P (IBC)/41(MB)2023

In the Intervention Petition of

Mr. Brij Ballabh Chandak

…. Intervener/Applicant

Vs.

1.Shrenik Dhirajmal Siroya

2.Siroya Fm Constructions Pvt. Ltd.

...Respondents

In the matter of

CP (IB) No.539/MB/C-IV/2021

Mr. Shrenik Dhirajmal Siroya

…Financial Creditor

Vs.

Siroya Fm Constructions Private Limited

…Corporate Debtor

Order Pronounced on: 27.02.2024

Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Applicant/Intervener/Petitioner: Mr. Dev Upadhyay a/w Mr. Omkar Ld. Counsel for the INV. P. No. 19/2023 present. Mr. Anil G. Shah a/w Mr. Darshan in INV. P. No. 23/2023.

For the Financial Creditor : Mr. Amit Tungare, Ld. Counsel for Petitioner Present.

For the Corporate Debtor : None Present.

ORDER

1. This Company Petition is filed under section 7 (“**the Petition”**) of the Insolvency and Bankruptcy Code, 2016 **(IBC)** by **Mr. Shrenik Dheerajmal Siroya** ("the Financial Creditor") herein the “Applicant”, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Siroya FM Constructions Private Limited** ("the Corporate Debtor").

2. The Corporate Debtor is a private company limited by shares incorporated on 23.03.2005 under the Companies Act, 1956, with the Registrar of Companies, Maharashtra, Mumbai. Its registered office is 102-103, Mangalik CHS Ltd, Vidya Niketan Marg, Siddharth Nagar.Goregaon (west), Mumbai-400062. Therefore, this Bench has jurisdiction to deal with this petition.

3. The present Petition was filed on 28.05.2021 before this Tribunal for claiming an Amount for a sum of INR 33,53,70,739.90/- (Rupees Thirty-Three Crores Fifty-Three Lakh Seventy Thousand Seven Hundred Thirty-Nine and Ninety Paise Only) as on 10.01.2020 including the outstanding principal and interest. The Date of Default was on 18.01.2020.

Submissions made by the Financial Creditor:

a. The Financial Creditor submits that the Petitioner is an individual. He is also a promoter, director and shareholder of the Corporate Debtor holding 50% of shares issued by the Corporate Debtor as on date. The Corporate Debtor is a Company engaged into business of developing and constructing buildings and real estate projects.

b. The Financial Creditor submits that the Corporate Debtor was unable to procure credit facility initially due to lack of credit history and therefore, was facing financial crunch and was in an ominous need of financial assistance for developing business of the Company.

c. It was further submitted that the Petitioner, being a director and 50% shareholder of the Corporate Debtor, decided to provide financial credit in order to protect his interest as a shareholder. Moreover, it was decided that if both parties agree, the loan can carry interest @12% p.a. basis.

d. The Financial Creditor submits that in the interest of the well-being of the Corporate Debtor and the shareholding he held in it, decided to provide financial assistance from time to time as the need may arise in the form of unsecured promoter's loans.

e. The Financial Creditor submits that as on 31st December 2019, the loan outstanding as per the books of the Corporate Debtor was Rs. 33,51,05,739.90/- (including Rs. 9,07,65,978/- being interest charged as per mutual agreement for FY 2011-12, 2012-13, 2013-14 and FY 2015-16 at 12% p.a. basis).

f. The Financial Creditor submits that on 10-01-2020, the Petitioner issued a Call Notice calling the outstanding amount within 7 days as per the mutual understanding of the parties. The Corporate debtor failed to make repayment of outstanding and thus committed a default in repayment of financial debt on 18th January 2020.

g. The Financial Creditor submits that on account of the aforesaid default, a Default Notice was issued to the Corporate Debtor on 27th January 2020. As on 31st March 2021, the amount outstanding is Rs. 33,85,36,421.90/- (including Rs. 9,07,65,978/- being interest charged as per mutual agreement for FY 2011-12, 2012-13, 2013-14 and FY 2015-16 at 12% p.a. basis).

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The Intervention Petition filed by Shankerdeep Co-operative Housing Society Limited i.e. the Applicant being the Society/Intervener which is an entity with whom Corporate Debtor has entered into development Agreement for re-construction of their Society Building and for allotment of Flats and that all the members of the society (who have been promised to get flats) are collectively meeting the threshold for filing this application.

Brief Facts of Intervention Petition:

1. The Applicant submits that the Present Company Petition is filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") by Mr. Shrenik Dheerajmal Siroya, Director of Corporate Debtor having 50% shareholding (i.e. Petitioner herein claiming to be a Financial Creditor). That the other 50% shareholding is of Late Mr. Fatesh Kishanchand Mirchandani. Accordingly, the Petitioner/Financial Creditor is the only person managing the Company i.e., the Respondent/Corporate Debtor.

2. The Applicant submits that demand and acceptance of balance confirmation is by one and the same person i.e. Mr. Shrenik Siroya. Alleged Loan Advanced by Mr. Shrenik Siroya in the year 2005 and had confirmed by himself the balance confirmation on 8th January, 2020.

3. The Applicant submits that there is no written loan agreement for the transaction. The Applicant submits that the alleged debt is of the year 2005, is not reflected in the Audited Balance Sheet of the Company and the last balance sheet filed by the Company is of the year 2012.Claim if any, beyond limitation.

4. The Applicant submits that there are various matter pending before different forums i.e. Hon’ble Bombay High Court, Maharashtra Real Estate Regulatory Authority and Economic Offences Wing. That Hon’ble High Court has observed various adverse remarks against Corporate Debtor and

Financial Creditor in Suit (L) No. 537 of 2018.That the Insolvency & Bankruptcy Code,2016 is now being used to defraud shareholders.

5. The Intervenor prays that the section 7 petition be dismissed.

<u>IVN.P (IBC)/23(MB)2023</u>

The Intervention Petition filed by the Anil Gulabdas Shah (Applicant No. 1) and Sunil Krishnan Anand (Applicant No. 2) who has invested the monies in the said project being constructed by the Respondents.

<u>Brief Facts of Intervention Petition:</u>

1. The Petitioner No. 1 paid a total sum of Rs.4,37,24,008 towards the flat consideration in the accounts of three Accounts the Respondent No.1 (i) Siroya FM Construction Pvt Ltd and the Respondent No. 2 (ii) Shrenik D Siroya (iii) Sunita Fatesh Mirchandani.

2. The Applicant submits that the Applicant on numerous occasions requested the Respondents to enter into an agreement for sale but the Respondent No. 2 due to malafide intentions kept delaying the said execution process. The Applicant submits that the Applicant state that they later on learnt that there are several proceedings going on against the Respondents.

3. The Applicant submits that Applicant lodged and FIR against the Respondent No. 2 in the Juhu Police Station. The said FIR is being investigated by the Economic Offence Wing (EOW) and the Respondent No. 2 has served a two months jail term in the said matter and that there are various litigations against the Respondent under Arbitration Commercial Suit, Income Tax Authorities for non-filing the Tax returns, etc.

4. The Intervenor prays that the section 7 petition be dismissed.

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The Intervention Petition filed by Mr. Brij Ballabh Chandak who is the buyer of Flat No. 501 in the Building known as Orchid constructed by Respondent No. 2 at Juhu, Mumbai.

Brief Facts of Intervention Petition:

1. The Applicant submits that the CD has not filed its annual returns and other documents with the ROC as by its own admission the CD has not compiled its accounts and financial statements after March 2016. The Applicant states that as the accounts are not audited, financial debt cannot be established merely on the basis of the oral statements and assertions of Respondent No. 1.

2. The Applicant submits that as admitted by the CD in COMM. ARBITRATION PETITION (L) NO. 43 OF 2016 in clause 14 on page 9 of the said Arbitration petition funds from the business of the Respondent No. 2 was being received and disbursed from the directors account since the business accounts of Respondent No. 2 has been frozen by the Income Tax department since 2012- 13.

3. The Applicant submits and states that the amount of Rs. 33,53,70,739.90 (Rupees Thirty-Three Crores Fifty-Three Lakhs Seventy Thousand Seven Hundred Thirty-Nine and paise Ninety only) is not a financial debt as defined u/s 5(8) as it was not disbursed against the consideration for the time value of money.

4. The Applicant states that the entire application u/s 7 and the annexed documents have been manufactured by Respondent No. I as an after-thought for the ulterior motive of escaping various legal proceedings already incurred and the ones that he will be exposed to in future.
5. The Intervenor prays that the section 7 petition be dismissed.

<u>FINDINGS</u>

1. This bench has gone through the documents and pleadings available on record and considered the arguments of the Financial Creditor and the Interveners. There was no representation on behalf of the Corporate Debtor.

2. This Bench observes that the Financial Creditor is the 50% shareholder of the Corporate Debtor and the other 50% shareholding is of Mr. Fatesh Kishanchand Mirchandani who has long since expired. The Financial Creditor is therefore the sole Director and the only Shareholder of the Corporate Debtor and hence is directly in control of the affairs of the Corporate Debtor. The Bench observes that throughout the proceedings there was no representation of the Corporate Debtor which can be attributable to the fact that apart from Financial Creditor as sole Director there is no other person as Director or in the management of the Corporate Debtor and that the Financial Creditor is in full control of the management of the Corporate Debtor.

3. It is the claim of the Financial Creditor that he has advanced money to the Corporate Debtor from 2007 to 2015.

4. As per material on record, this Bench finds that there are no documents/agreements supporting the loan or interest thereon in support of his claim, the Financial Creditor has only filed financials of the Corporate Debtor as on 31.03.2016 which shows unsecured loan from the Financial Creditor. No financials statement has been produced subsequent to 31.03.2016.

5. The Bench notes that the last financial transaction was in the year 2015 and the petition is filed in 2021 after a duration of 6 years. In the absence of any Financial Statements of Corporate Debtor evidencing the outstanding debt beyond 31.03.2016, the Financial Creditor has relied solely on a confirmation of account by the Corporate Debtor in April,2021 and a partial ledger extract in the books of the Corporate Debtor and based on these two documents submits that petition is filed within time.

6. The Bench observes that since audited accounts of Corporate Debtor have not been produced beyond 31.03.2016 reliance cannot be placed on a unsigned & partial unaudited & incomplete Ledger extract. Moreover, a perusal of the entries reflects that it is more in the nature of a running business account over a long period rather than a financial loan account.

7. This bench takes a note of the order of Hon'ble Bombay High Court in the matter of ***"Ashoak Shah and another Vs. Siroya FM constructions Private Limited"*** (Corporate Debtor in the present Petition) wherein, the Hon'ble High Court has held that

"The Respondent's Advocate submitted that the funds from the business of the Respondent were being received and disbursed from their Directors Accounts since the business account of the Respondents had been frozen since 2012-13".

7.1. The observation of the Bench at para 6 that the ledger entries are more in the nature of the running business account and not a financial loan get further corroborated by the statement of the Corporate Debtor (Respondent in the petition before the Hon'ble Hight Court) that because of the attachment of the account all monies relating to the Corporate Debtor were being **received and disbursed** by the Directors of the Company. The recording of the statement by the Hon'ble High Court leads to the conclusion that the disbursements which have been allegedly claimed to have given by the Financial Creditor (Director of the Corporate Debtor) as a financial loan are in affect only payments made in the natural course of business of the Corporate Debtor out of the receipts of the Corporate Debtor taken into account of the Directors (as the account of the Corporate Debtor was frozen). Hence, this bench is of the opinion that such transaction cannot come under the definition of Financial Debt.

8. The Bench also notes that the Financial Creditor is the sole Director and totally in control of the affairs of the Corporate Debtor (the other 50% Director & Shareholder being no more) and hence efficacy of the alleged "Confirmation Letter" of the of the Corporate Debtor is also in doubt and raises serious question on the reliability of such a document specially since there is no other corroborative evidence/documents like loan agreement, audited financials or any other documents showing the outstanding debt or liability.

9. The Bench also takes note of the pleadings in the Intervention Petition filed by some Home Buyers wherein it is alleged that:

a. There are number of cases pending before the Hon'ble High Court of Bombay, Maharashtra Real Estate Regulatory Authority and Economic Offences Wing of the Corporate Debtor filed by Home Buyers wherein the Interveners have alleged that the Financial Creditor has filed this collusive and misleading petition for initiation of the insolvency and resolution process on the Corporate Debtor and that the present petition filed by the Financial Creditor is merely to evade from all the dues and liabilities which he is directed by the Hon'ble High Court.

b. There are no Audited Financial Statement of the Corporate Debtor since 2016.

c. The Corporate Debtor has not filed annual return with ROC (Registrar of Companies) since 2016.

d. As Admitted by the Corporate Debtor in COMM. ARBITRATION PETITION (L) NO. 43 OF 2016 in clause 14 on page 9 of the said Arbitration petition funds from the business of the Respondent No. 2 was being received and disbursed from the directors account since the business accounts of Respondent No. 2 has been frozen by the Income Tax Department since 2012-13.

e. The Financial Creditor in his application in clause 8 on page 24 states that he sent demand notice dated 10.01.2020. The Intervener states that from the ledger annexed it can be seen that the Financial Creditor continued to advance amounts to the Corporate Debtor till March,2021 which is highly questionable as to why did the Financial

Creditor continue to advance amount to Corporate Debtor after it defaulted to the first demand notice dated 10.01.2020.

10. In view of the facts and circumstances stated supra, this bench is of the opinion that the present petition is filed with a purpose other than resolution of insolvency and deserves to be dismissed.

11. Without prejudice to the above observation, as discussed in the Para's above that the documents relied upon by the FC to save limitation cannot be relied upon and hence, the petition cannot be proceeded with as it falls beyond the limitation period.

12. Accordingly, CP No. 539/2021 is Dismissed and IVN.P (IBC)/19(MB)2023 IVN.P (IBC)/23(MB)2023 IVN.P (IBC)/41(MB)2023 stands Infructuous.

Sd/-

ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)

27.02.2024