NATIONAL COMPANY LAW TRIBUNAL, BENCH-1

HYDERABAD

Intervention Application No. 6/2022

In IA (IBC) 1209/2022,
499/2022

In Company Petition (IB) No. 225/7/2021

Application filed under Section 60 (5) read with
Rule 32 of NCLT Rules, 2016

In the matter of **Hindustan Magnesium Products Private Limited**

Between

Y. Vijay Kumar,
Plot No. 90, Surya Enclave,
Thirumlagiri,
Secunderabad- 500 015,
Mobile: 88972 78343,
E-mail: vandrapatvik@gmail.com ... Financial Creditor/ Applicant

VS

Hindustan Magnesium Products Private Limited
Having its registered office at
Plot No. 98/1, Phase-II, IDA Charlapally
Hyderabad, Ranga Reddy District,
Telangana 500051. …1st Respondent

K. Venkata Ratna Prasad
H. No. 50-52-12/7
NE Layout, Near Shirdi Sai Temple
Seethammadhara, Ward No. 9
Vishakapatnam (Urban)
P & T Colony (VM)
Vishakapatnam Andhra Pradesh

Email: konudulaprasad@gmail.com …2nd Respondent

Bala Anand Jeldi
Promoter & Chairman cum Managing Director
H. No. 46, 1st Lane
Madhavapuri Colony, Near China Sai Baba Temple
Sainikpuri, Hyderabad- 500094
Telangana State
Mobile: 95158 55717
Email: bala@hindustanmegnesium.com …3rd Respondent

V. Shankar
Interim Resolution Professional
303, Block-A, Legend Commercial Comples
3-4-770 and 136, Opp. ICICI Bank
Above Keshav Medicals
Bharkatpura
Hyderabad- 500 027 …4th Respondent

Date of Order: 17.02.2023

Coram

Dr. Venkata Ramakrishna Badarinath Nandula, Hon'ble Member (Judicial)

Shri. Charan Singh, Hon'ble Member (Technical)

Parties/ Counsels present:

For the Applicant:	Shri Samuel Nagadesai, PCS
For the Respondents:	Shri S.Ravi, Senior Advocate for Resolution Professional (R-4) Shri Santosh Jadav, Advocate for Successful Resolution Applicant (R-2)

PER: BENCH

ORDER

1. This is an Application filed by the Applicant/Financial Creditor under section 60(5) of Insolvency and Bankruptcy Code, 2013, seeking recall of the orders passed by this Tribunal in IA (IBC) 499/2022 dated 07.07.2022 and admission order dated 19.04.2022 in Company Petition (IB) 225/7/HDB/2021

2. The gist of the application in brief:-

2.1 That the 1st Respondent Company was incorporated with an authorized share capital of Rs.8,00,00,000/-. A Memorandum of Understanding (annexed at Pg. Nos. 77 to 83 of the Company Petition) was entered into between the Applicant herein and Respondent No.2. It is stated that as per the Agreement, Respondent No.2 agreed to provide a "Seed Investment" of Rs.2,00,00,000/- in lieu of an 18% equity in Hindustan Magnesium Products Private Limited (herein after to referred as "HM") and to take board seat in HM which does not retire.

2.2 That according to MoU a Joint Venture ought to have been established with 2nd Respondent (76% shareholding) and R-1 Company (having 24% shareholding). However, there is no resolution of the shareholders or the

Board to accept the seed investment and incorporate the JV or authorizing the Managing Director to negotiate such deal and accept the same on behalf of the alleged Corporate Debtor Company (CDC). Further, as per the MoU, the Registered Office shall be situated in Visakhapatnam and its business offices anywhere in India and abroad with the prior approval of Board of Directors and in accordance with law. It is stated that though it is a matter of Indoor Management no information was placed before this Adjudicating Authority.

2.3 It is contended that 2nd Respondent or Corporate Debtor (Respondent No.1 herein) failed to follow the provisions of Section 81 of Companies Act, 1956 or Section 62 of the Companies Act, 2013 with regard to further issue of share capital resulting in increase in the subscribed share capital and that they failed to furnish any information regarding further issue of share capital before this Tribunal. It is further averred that if the Agreement is a private share purchase agreement between 2nd and 3rd Respondent, then the CDC is not bound by the same due to lapses in "Doctrine of Indoor Management".

2.4 It is averred that in clause 4 of the “Subscription and Shareholders Agreement dated 26.12.2018, the Respondent No.2 had agreed to invest Rs. 5,00,00,000/- for subscribing to 32% shareholding in the Corporate Debtor and extending an unsecured loan for Rs. 2,00,00,000/- . But the statement that Respondent No.2 has invested an amount of Rs.5,00,00,000/- in the form of unsecured loan to be converted subsequently into equity shares to Respondent No.2 is false.

2.5 The Applicant further allege that when the investor had become a shareholder by virtue of MoU dated 23.08.2017, he ought to be a director of the board. The 7th annual report of the CDC indicates that R-2 was Additional Director till 31.032013 and submitted only Financial Statements for year 31.03.2018 and didn’t provide Financial Statements for 2019-20. The authorized capital of Rs.7,00,00,000/- which is shown as per financial statements as of 31.03.2018 is incorrect as the MCA website shows Rs.5,00,00,000/-.

2.6 It is stated that Respondent No.3/Bala Anand Jeldi had approached the Applicant for working capital needs of CDC and the Applicant had pooled a sum of Rs.1,35,00,000/- and the CDC had entered into loan agreement dated 06.11.2019 and the Applicant further lent Rs.78,00,000/- and the CDC entered into MoU in the nature of loan agreement dated 06.03.2020.

2.7 It is alleged that the 2nd Respondent who is the additional director in the Corporate Debtor and who is also aware of the fact that the authorised share capital of CDC is Rs. 5,00,00,000/- as on the date of MoU dated 23.08.2017 out of which Respondent No.2 claims Rs. 1,97,64,700/- as his investment as per subscription and shareholders agreement dated 26.12.2016, has failed to get record of the same in Register of Members despite being in control and management of CDC and has filed application under Section 7 of IBC designating himself as Financial Creditor by concealing all material facts before this Tribunal.

2.8 The Applicant claims himself to be the real financial creditor pursuant to MOUs dated 06.11.2019 and 06.03.2020. In the 1st CoC Meeting, the voting percentage of Applicant is 18.46% and that of 2nd Respondent is 49.08%. It is averred that meanwhile the Respondent No.2 filed an IA bearing No. 499/2022 and Respondent No.2 obtained order dated 07.07.2022 in his favour by concealing all the primary facts before this Adjudicating Authority. Following the said order, 2nd CoC meeting was held on 16.07.2022 reducing the percentage of voting rights of the

Applicant from 18.46% to 10.79% and increased the voting percentage of Respondent No.2 from 49.98% to 70.76%. The voting percentage of the Applicant was further reduced to 8.26% in the 4th CoC meeting.

2.9 The Resolution Professional further apprised in the 4th CoC meeting that the Resolution Plan received was from the 2nd Respondent (person disqualified under Section 29A of the Insolvency & Bankruptcy Code, 2016) which has been approved by the CoC as Respondent No.2 herein is holding 76.48% of voting in the CoC and the SBI is soft peddling the issue as they have charge on the collateral securities.

2.10 The Applicant alleged that orders in the instant CP and IA No. 499/2022 were obtained by Respondent No.2 by fraud, misfeasance, mis-representation and concealment of material facts. Hence, prayed this Tribunal to declare Respondent No.2 as not a ‘financial creditor’ and to recall the orders in IA No. 499/2022 and CP 225/2021 as they were obtained by fraud and committing perjury and concealing the facts.

3. **Respondent No.2 filed Counter contending:-**

3.1 That Respondent No.3 who is the promoter of Corporate Debtor Company has approached Respondent No.2 herein for expansion of business, however failed to a lot shares as agreed and duped the investors and fled the country after the CDC was admitted into CIRP.

3.2 It is contended that the allegation made **w**ith regard to the constitution of CoC, conduct of CoC meetings, approval of the Resolution Plan by the Applicant are all false as the Minutes of the CoC were shared with all the CoC Members including the Applicant.

3.3 That the instant application is filed to protract the approval of the Resolution Plan. It is contended that the statement of the Applicant that Respondent No.2 is a shareholder is false as he has neither been allotted shares as agreed in the Agreement dated 26.12.2018 nor refund of the invested money by the 3rd Respondent and CDC, which constrained the 2nd Respondent to file case under NIA Act and application under Section 7 of IBC.

3.4 Respondent No.2 submits that he was appointed as Additional Director for a few months by the Board of the Corporate Debtor pending confirmation by the shareholders in the Annual General Meeting (AGM).

However, since the appointment was not regularised, the 2nd Respondent vacated the seat.

3.5 The 2nd Respondent further deny the allegation of the Applicant with regard to ineligibility of Respondent No.2 under Section 29A of the Code to file resolution plan.

4. Respondent No.4 filed his counter, inter-alia, contending as under:-

4.1 That Respondent was appointed as IRP by this Tribunal vide order dated 19.04.2022 in CP (IB) No.225/7/HDB/2022 and in the meeting of COC held on 17.05.2022, the IRP was confirmed as RP with 70.10% voting share for conduct of CIRP against the Corporate Debtor.

4.2 That in response to the public announcement on 24.04.2022 and based on the claims received, the Resolution Professional constituted the CoC and the Applicant was one of the members of the COC. Further in the 1st COC meeting held on 01.05.2022, the status of claims received from financial creditors and operational creditors were discussed in which the Applicant was present.

4.3 That the RP had received the claim from the applicant for Rs.52 lakhs. In the meantime, the 2nd Respondent filed IA No. 499/2022 seeking directions to Resolution Professional to admit his claim of Rs. 5 crores along with interest, which was allowed by this Tribunal vide order dated 07.07.2022.

4.4 The Resolution Professional submits that pursuant to publication, he has received two Expression of Interest (EOI) from prospective resolution applicants, out of which the Resolution Professional received resolution plan from one prospective resolution applicant. After evaluation of the qualitative and quantitative parameters, the resolution plan submitted by Respondent No.2 has been approved by the CoC with 98.11% votes in favour of the plan. It is contended that the Applicant was present in all the CoC meetings and the minutes of the meetings were shared with all the CoC members including the Applicant.

4.5 It is further contended that the allegations of the Applicant herein are absolutely false, misleading and is bad under law and sought dismissal of the same.

5. In the light of the afore-mentioned contest, the point that emerges for our consideration is

   1. Whether the order in IA 499/2022 dated 07.07.2022 and the admission order dated 19.04.2022 in Company Petition (IB) 225/7/HDB/2021 can be recalled on the grounds stated in the Application? If so, whether the Applicant is entitled for other reliefs prayed for in the Application?

6. We have heard Shri Samuel Nagadesai, Ld. PCS for the Applicant, Shri S. Ravi, Ld. Senior Counsel for Resolution Professional and Shri Santosh Jadav, Ld. Advocate for Successful Resolution Applicant.

Point.

Whether the order in IA 499/2022 dated 07.07.2022 and the admission order dated 19.04.2022 in Company Petition (IB) 225/7/HDB/2021 can be recalled on the grounds stated in the Application? If so, whether the Applicant is entitled for other reliefs prayed for in the Application?

7. At the outset, it may be stated that the genesis of triggering CIRP proceedings against the Corporate Debtor by the 2nd Respondent herein, is the “Subscription and Shareholders Agreement dated 26.12.2018. Admittedly, the present Applicant is one of the signatories to the said Agreement. There is no dispute from the Applicant’s side that under the

said Agreement, the investors have agreed to invest an amount of Rs. 5 crores in the Corporate Debtor for subscribing to the share capital of the Company and a sum of Rs. 2 crores as unsecured loan to the Company. On account of non-payment of the unsecured loan of Rs. 2 crores, the 2nd Respondent herein has initiated proceedings under Section 7 of IBC, against the Corporate Debtor vide CP (IB) No. 225/7/HDB/2021, which was allowed by this Tribunal vide order dated 19.04.2022 and admitted the Corporate Debtor into CIRP. This admission order was not questioned by the Applicant herein. As the Resolution Professional rejected the claim of the 2nd Respondent made alleging non-allotment of shares, the 2nd Respondent herein preferred IA No. 499/2022 which was allowed by this Tribunal vide order dated 07.07.2022, which order is now sought to be set aside alleging fraud, collusion etc, by the Company Petitioner.

8. A perusal of the order dated 07.07.2022 discloses that the same was passed, placing reliance on Section 42 (6) of the Companies Act, which is as follows:-

> (6) A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the expiry of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent. per annum from the expiry of the sixtieth day:

Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—

(a) for adjustment against allotment of securities; or

(b) for the repayment of monies where the company is unable to allot securities.

9. At the outset it may be stated that the Applicant having alleged *fraud and collusion* on the part of the 2nd Respondent, is bound to plead the details of the so called of fraud and collusion, lest the plea shall fail invariably. We are unable to find any such details of fraud and collusion in the pleading of the applicant. Therefore, the plea of fraud cannot be entertained.

10. Nextly, it is not the case of Applicant's that for the investment of Rs. 5 crores shares were allotted within 60 days from the date of receipt of the application money. Therefore, in the absence of such allotment, recourse in terms of Section 42 (6) of the Companies Act is available to the Applicant to seek return of the amount in terms of Section 42 (6) of the Companies Act. Needless to say, that had there been allotment of shares of 1st Respondent for the investment of Rs. 5 crores, the necessity of filing a claim before the Resolution Professional or IA No. 499/2022 before this Tribunal would not have arisen at all.

11. We, therefore find that on facts and circumstances, the present application is devoid of any merit or substance and is liable to be dismissed. Accordingly, the same is hereby dismissed. No costs.

SD/- SD/-

(Charan Singh) (Dr. Venkata Ramakrishna Badarinath Nandula)
Member (Technical) Member (Judicial)

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