IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 5, MUMBAI BENCH

I.A. 1148/2020

in

C.P. 2995/I&B/MB/2019

Under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 *read with* Rule 11 of the NCLT Rules, 2016

In the matter of

G. S. Constro & Infra Pvt. Ltd. and others

… Applicants

vs.

Small Industrial Development Bank of India and others

… Respondents

and

In the matter of

Small Industrial Development Bank of India

... Financial Creditor

vs.

E. & G. Global Estates Limited

… Corporate Debtor

Order delivered on: 03.12.2020

Coram: Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)
Hon'ble Shri. Chandra Bhan Singh, Member (Technical)

For the Applicants: Adv. Rohan Rajyadhaksha, Adv. Rahul D. Oak, Adv. Siddhesh Shetye

For the Respondents: Adv. Ayush J. Rajani, Adv. Shavez Mukri, Adv. Ajit Singh Tawar, Adv. Priyank Kapadia, Adv. Mahajan Sameer

Per: Chandra Bhan Singh, Member (Technical)

ORDER

1. The Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor by an order dated 24.06.2020, on a Section 7 Petition filed by the Financial Creditor, wherein Mr. Gajesh Labhchand Jain, was appointed as an Interim Resolution Professional (IRP).

Contentions of the Applicants:

2. The Applicant submits that the Applicant No. 1 is the registered Company under the provisions of the Companies Act, 1956, engaged in the business of construction, whereas Applicants No. 2 & 3 are the Directors of Applicant No. 1. All the Applicants herein are mainly the investors and shareholders of the Corporate Debtor, i.e., *E. & G. Global Estates Limited,* having 48% of the shareholding. Respondent No. 1 herein is Small Industrial Development Bank of India (hereinafter referred as "SIDBI") which had initiated insolvency proceedings against the Corporate Debtor under the I & B Code. Respondent No. 2 is the Interim Resolution Professional of the Corporate Debtor. Respondent No. 3 is the elected representative of home buyers of Corporate Debtor in the 1st CoC meeting dated 24.07.2020. Respondent No. 4 is the Corporate Debtor. Respondents No. 5 to 9 are the promoters/ directors of the Corporate Debtor and personal guarantors to the financial loan of SIDBI. Respondent No. 10 is one of the alleged Financial Creditor of the Corporate Debtor who has filed his financial claim and the same is under verification.

3. The Applicant submits that the Respondents No. 3 to 7 approached the Applicants somewhere in 2018 and told that the Corporate Debtor was facing some financial issues. They mentioned to the Applicants that the Corporate Debtor was in dire need of funds to complete the construction of bungalows/ leisure resort project named "E & G Green Court". Therefore, the Applicants infused funds in the said project of the Corporate Debtor upon the understanding that Respondents No. 5 to 9 herein will transfer 100% shares of E & G Global Estate Limited to the Applicants. Accordingly, Promoters/ Directors of the Corporate Debtor and the Applicants entered into an MoU dated 10.12.2018 thereby specifically stating the poor financial condition of the Corporate Debtor and requirement of investment from the Applicants. The said relevant clauses of the said MoU are extracted below:

> *"Clause C: Company is in stressful financial position and company account is NPA and valuation of Company is in minus condition and it has a project currently named as "E & G Green Court" ("Project Koroli Hill Station").*
>
> *Clause D: The Acquirer is well equipped with essential funds as well as manpower to deliver the project and to take forward the business of the Company."*

4. The Applicant further submits that as per the above said MoU, the Applicants paid Rs. 75,00,000/- to SIDBI towards part payment of the loan amount and thereby saved the account from becoming NPA. Beside the said MoU, a Loan Agreement dated 12.02.2019 was entered into between the Applicants and the Corporate Debtor since the Applicants invested huge funds in the said Bungalow Project of the Corporate Debtor. Through this Loan Agreement, it was agreed that out of the loan amount to the tune of Rs. 1,60,00,000/-, Rs. 1,00,00,000/- would be utilized for repayment of overdue installments of SIDBI immediately. It was also decided by the directors of the Corporate Debtor that a loan up to Rs. 25 crores would be borrowed from the Applicants as per financial needs of the Corporate Debtor. It

was also agreed that an interest of 12% p.a. would be charged on the said loan. The Applicants then submits that the Corporate Debtor passed a Resolution dated 18.01.2020 thereby specifically resolved to borrow loan of Rs. 5,00,00,000/- from the Applicants to repay the loan amount of SIDBI.

5. The Applicant then submits that the Applicants No. 2 & 3 were inducted as the Additional Directors of the Corporate Debtor in February, 2019 but the composition of Board of Corporate Debtor was always dominated by the Respondents No. 5 to 9. The Applicants were made signatory to the operating Bank Account of the Corporate Debtor but other bank accounts of the Corporate Debtor were never disclosed to the Applicants and Respondents No. 5 to 9 were having access of the same. It is further submitted that the posts of Additional Director of the Applicants No. 2 & 3 were vacated automatically as per the provisions of the Companies Act, 2013 since Respondents No. 5 to 9 failed to conduct Annual General Meeting (AGM) of the Corporate Debtor in 2019. The said fact was also confirmed by the Respondents No. 5 to 9 in their notice dated 10.12.2019 sent to the Applicants. The Respondents No. 5 to 9 were having access for the compliance with the ROC and they did not updated in ROC portal about the Applicants No. 2 & 3's vacating of post as Additional Directors, due to which the Applicants No. 2 & 3 reflect as Directors and not Additional Directors till date. The same was also reflected in earlier MA No. 3182 of 2019.

6. The Applicant then submits that the Applicants started following up with the Respondents No. 5 to 9 for implementation of the said MoU at the earliest since the condition precedent of the said MoU was to acquire 100% shares of the Corporate Debtor and the Applicants were infusing huge funds towards construction activity, daily expenses, salaries, wages of employees etc. but the Respondents No. 5 to 9 started ousting Applicants from the Company and shying away from the MOU as well as Loan Agreement entered into with the Applicants when the said Bungalow Project started developing.

7. The Applicant further submits that the Applicants were kept in dark by Respondents No. 5 to 9 as they sold off the 12 2-BHK Bungalows, 4 Studio Apartments and 3 4-BHK Bungalows to third parties. The Applicants further learnt that the respondents No. 5 to 9 have accepted huge cash in the said transaction by siphoning off the funds of the Corporate Debtor and no NOC was obtained from SIDBI for the said transactions. All these transactions were made behind the back of the Applicants without informing them anything. The Applicants further submit that the Respondents No. 5 to 9 had no locus to enter into any transaction on behalf of the Corporate Debtor as per the MOU dated 10.12.2018.

8. The Applicant then submits that the Applicants came to know about the above said transactions somewhere around September, 2019. Later, when the Applicants made enquiries, surprisingly they came to know about the filing of the Company Petition (IB) No. 2995 of 2019 by SIDBI against the Corporate Debtor. The Applicants then immediately filed a Miscellaneous Application No. 3182 of 2019 seeking to intervene in the said Company Petition. The Respondents No. 3 o 7 appeared in the said M.A. No. but refused to appear in the main Company Petition though the composition of Board of Corporate Debtor was in their majority. The Applicants further submit that the Applicants expressed their willingness to pay the entire balance loan amount of the Corporate Debtor but the Respondents No. 5 to 9 did not cooperate with the Applicants. The Applicants submit that the Respondents No. 5 to 9 deliberately and with the malafide intention had avoided implementation of the said MOU and Loan Agreement, suppressed every communication/ Notices of SIDBI from the eyes of the Applicants and let the Corporate Debtor be liquidated for their ill motives.

9. The Applicants then submit that the Applicants, upon the suggestion of this Tribunal and with an intention to prove their bonafide intention, deposited Rs. 50 lakhs with SIDBI without

prejudice to their rights and contentions and even after pending settlement talks with the Respondents No. 5 to 9 as well as SIDBI. Inspite of all the efforts of the Applicants, the said Company Petition was heard and admitted by this Tribunal on 24.06.2020 and the said M.A. was dismissed. The Applicants further submit that by virtue of the said order dated 24.06.2020 passed in the Company Petition, Interim Resolution Professional (IRP) started the Resolution Process as per the provisions of I& B Code and sought claims through publication. The Applicants, being the Financial Creditor of the Corporate Debtor, submitted their claim by filing Form-C along with supporting documents to the IRP, but the IRP considered Applicants No. 2 & 3 as the Suspended Directors of the Corporate Debtor. The Applicants, through their written Representation dated 23.07.2020, illustrated to the IRP about why the Applicants deserve to be considered as Financial Creditors and not as Suspended Directors. The Applicants also submitted all the supporting documents and quoted latest case laws along with said Representation to the IRP, but the IRP did not even considered the said Representation.

10. The Applicant further submits that the IRP included various alleged Bungalow Owners in the COC and also allotted them the voting rights without even verifying their documents. The said inclusion of the Bungalow Owners by IRP is not only arbitrary but also violative of the core essence of the I & B Code. *Per Contra,* the legitimate financial claim of the Applicants was kept under verification in spite submission of concrete supporting documents such as Loan Agreement, MoU, Bank Statements, Resolution etc. It is further submitted by the Applicant that the alleged Bungalow Owners dominated the voting percentage in the first COC meeting which was held on 24.07.2020, thereby rejecting the appointment of Mr. Gajesh Jain (IRP) as the RP and also rejected the forensic audit of the Corporate Debtor. The Applicants submit that the said alleged Bungalow Owners are in the process of proposing the name of the IRP who is in their favor and

that's why ousted the Applicants from the Resolution Process.

11. Therefore, the present Application is filed seeking the following prayers:

a) That this Hon'ble Tribunal appoint IRP for Resolution Process of Corporate Debtor;
b) That the Minutes of the Committee of Creditors meeting dated 24th July, 2020 be quashed and set aside;
c) That existing Committee of Creditors of the Corporate Debtor be quashed and set aside;
d) That the verification of all claims be completed before appointment of new COC;
e) That the Applicants be inducted as member of the Committee of Creditors of Corporate Debtor along with the proportionate voting right;
f) That the induction of Bungalow Owners in Committee of Creditors of Corporate Debtor without legitimate documents be set aside;
g) That this Hon'ble Tribunal appoint auditor for the forensic audit of the Corporate Debtor;

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h) Ad-interim/interim order be passed in terms of prayer clause b) above;
i) Any other or further order be passed in favor of the Applicants.

Contentions of the Respondent No. 1:

12. The Respondent No. 1 submits that the Corporate Debtor had availed certain credit facilities from the Respondent No. 1 amounting to Rs. 7.01 crore (the Corporate Debtor was disbursed a sum of Rs. 7.01 crore against sanction of Rs. 15.24 crores). The Corporate Debtor and the Respondent No. 1 entered into a Loan Agreement dated 18.02.2016 for the same. The Applicants had created security interest

by way of mortgage in respect of the certain assets to secure the said loan amount, thereby making Respondent No. 1 a secured creditor having first charge over the mortgaged assets of the Corporate Debtor.

13. The Respondent No. 1 further submits that the Applicants had already filed M.A. No. 3182 of 2019 relying upon the same documents as in the present Application and the same was dismissed by this Tribunal after dealing with it particularly regarding the MoU and Loan Agreement entered between the Applicants and the Corporate Debtor. It is further submitted by the Respondent No. 1 that the Tribunal had mentioned in the said order that the said MoU will not have any legal consequence as there is condition precedent in Para 4 of the MoU itself for obtaining written consent from the Respondent No. 1. Also, Section 5 (h) of the General Conditions to the Loan Agreement dated 18.02.2016 prevents any transfer of shares in the borrowers capital without intimation or approval of SIDBI and as such any agreement without intimation or approval of SIDBI will not create any legal rights of whatsoever nature.

14. The Respondent No. 1 further submits that the Applicants have primarily relied upon the two documents to be considered as a Financial Creditor and those are MoU dated 10.12.2018 and Loan Agreement dated 12.02.2019. These two are the two distinct transactions and cannot be conjoined together to derive at one claim. A financial debt cannot be claimed through such a MoU as the same is for the purpose of investment in the Corporate Debtor, thereby obtaining a shareholder’s capacity within the Corporate Debtor.

15. The Respondent No. 1 submits that the Applicants are the related party to the Corporate Debtor only through the Loan Agreement dated 12.02.2019 which was executed between the Applicants and the Corporate Debtor and as such cannot be made part of the COC. Moreover, by virtue of Proviso to Section 21 (2), a Financial Creditor being a related party as mentioned therein do not have any right of

representation, participation or voting in the COC. It is also submitted that the Applicant No. 2 had also attended the 1st COC meeting in the capacity of the Suspended Director which is apparent from the minutes of the said meeting.

16. The Respondent No. 1 further submits that even after assuming that there is a claim of any related party which can be considered as an unsecured Financial Creditor but still, they cannot be permitted to participate or drive the CIRP as a member of COC.

<u>Contentions of the Respondent No. 2:</u>

17. The Respondent No. 2 submits that the present Application filed by a shareholder of the Corporate Debtor seeking order from this Tribunal to direct the respondent No. 2 to consider it as a 'Financial Creditor' is not maintainable and to be quashed since it is being filed merely with an attempt to scuffle the CIRP proceedings while the present Applicant also made a similar attempt during the hearing of the main Company Petition by filing an M.A. 3182 of 2019 which was ultimately dismissed and CIRP was initiated vide common order dated 24.06.2020.

18. The Counsel for the Respondent no. 2 further submits that pursuant to the public announcement published for inviting claims from all the creditors, the Respondent No. 2 received a proof of claim from the present Applicants also. On pursuing the documents and the records, the following undisputed facts discovered with regard to the relationship between the Applicants and the Corporate Debtor which the Applicants did not brought on record:

a) The Applicant No. 1 is a shareholder of 36.35% equity of the Corporate Debtor while Applicant No. 2 himself owns 4.09% of equity shares and Applicant No. 3 herself owns 7.48% of equity shares in the Corporate Debtor in their individual capacity as per the shareholding pattern of the Corporate Debtor.
b) The Master Data of the Corporate Debtor, as per MCA website,

reflects the fact that Applicant No. 2 and Applicant No. 3 continues to be Directors of the Corporate Debtor. Applicant No. 2 is the common Director of the Corporate Debtor as well as Applicant No. 1 while Applicant No. 3 is a Director of the Corporate Debtor.

c) On perusal of M.A. 3182 of 2019 filed by the Applicant, it was discovered that the Applicant, at Para No. 1 of the same M.A., claimed to have acquired 44% shareholder of the Corporate Debtor in November 2018. Also, the Applicant No. 2 claimed to be the Director of the Corporate Debtor in the said M.A., annexing himself the Master Data of the Corporate Debtor as per the records of MCA website which showed his position as a 'Director' of the Corporate Debtor. The Applicant No. 2 also had accepted the seat on the table as a 'Suspended Director' during the two COC meetings and accepted the notices, agenda and minutes of the COC meetings in his capacity as a 'Suspended Director'.

d) The Applicants hold equity shares in the Corporate Debtor which categorizes them as 'Related Party' in terms of the provisions of Section 5(24)(a) and 5(24)(d) of the Code, thereby no voting shares can be given to the Applicants in terms of provisions of the Code.

e) On perusal of the Form C, i.e., the claim form, received from the Applicant No. 1, with it a Board Resolution dated 29.11.2018 of the Corporate Debtor was annexed which shows that any infusion of funds from the present Applicant into the Corporate Debtor was purely in the nature of 'takeover offer' and not in the nature of financial disbursement with the time value of money which is a pre-requisite for a 'debt' to be covered under Section 5(8) of the Code.

19. The Respondent No. 2 further submits that the Applicants relies on MoU dated 10.12.2018 entered into between the Applicant No. 1 and the Corporate Debtor wherein the Applicant relies at 'Clause D' of the MoU which does not support Applicants but merely fortifies the stand of the Respondent No. 2 that the Applicant No. 1 is a 'shareholder'.

20. The Respondent No. 2 further submits that the claim of the Applicant No. 1 about the disbursal of Rs. 1,60,00,000/- to the Corporate Debtor at the rate of 12% p.a. interest stands admitted. However, since the Applicant No. 1 holds 36.35% shareholding in the Corporate Debtor, it is covered under the definition of 'related party' and hence, the Applicant No. 1 cannot be given any voting rights towards the said debt.

21. The Respondent No. 2 then submits that as per the Applicants, the Corporate Debtor merely 'resolved' to borrow an amount of Rs. 5 crores and therefore, it does not mean that the Applicant has a right to claim Rs. 5 crores as financial debt/ loan when it has only disbursed Rs. 1.60 crores. Also, no explanation of the said transaction has been provided in the Form C filed by the Applicant. Hence, the said contention of the Applicant deserves to be quashed.

22. The Respondent No. 2 further submits that the allegation of the Applicants that the Respondent No. 2 did not consider the claim filed by the Applicants is completely baseless and contrary to the facts. The Applicant had sent an email dated 03.08.2020 with detailed explanation in regard to the status of the claim of the Applicants and the Applicants also sought information and documents in compliance with Sections 185 and 186 of the Companies Act, 2013 which has yet not been furnished to the Respondent No. 2 and meanwhile, the Applicants filed this Application. Moreover, the Applicants on one hand attending COC meetings and accepting notices as 'Suspended Directors' and on the other hand, they are claiming to be treated as 'Financial Creditors' before this Tribunal which is clearly two contrary positions.

23. The Respondent No. 2 further submits that as far as the contention of the Applicants regarding CoC rejecting the appointment of the forensic auditor is concerned, it is to be clarified that the CoC rejected the ratification of fees payable to the forensic auditor which was

capped at 4 lacs and not the appointment of the forensic auditor *per se.* As per the Code, the RP has to ratify the fees and costs by the CoC members which stood rejected in the present case. So, the Respondent No. 2 reached out to some other forensic auditors and sought quotations below the limit of Rs. 4 lacs as it is well within his duties to appoint a forensic auditor in terms of provisions of Section 25(2)(d) of the Code. Thereafter, the Respondent No. 2 received a quotation of Rs. 3.75 lacs and the appointment of M/s. Mazars Business Advisors Pvt. Ltd. was finalized and the team would be able to submit its report sometime in next 2 months since the financial statements for the last 4 years are not available.

24. The Respondent No. 2 lastly submits that the prayers of the Applicants are not maintainable as the Application is frivolous and is only with and intention to stall the entire CIRP of the Corporate Debtor and the allegations amongst the suspended promoters/ directors *interse* show that the issue is more of 'oppression and mismanagement'.

<u>Contentions of the Respondent No. 5</u>:

25. The Respondent No. 5 submits that the Respondent No. 5 was neither the director nor received any notice regarding the said Board Meeting because the Respondent No. 5 had resigned from the Directorship on 11.02.2010. The copy of the Resignation Letter, Form 32 filed with the ROC on resignation and Director Master Data are annexed to the Reply. The Respondent No. 5 holds 2,37,500 shares in the Corporate Debtor. It is further submitted that the Respondent No. 5 was not involved in any discussion or negotiation and was only present at the time of execution of MoU on request of Respondent No. 7 and Applicants No. 2 & 3. The Respondent no. 5 signed the said MoU only in the capacity of shareholder/ guarantor to the loan provided by SIDBI to the Corporate Debtor though the designation as Director was wrongly mentioned in the MoU.

26. The Respondent No. 5 then submits that the present Application is not maintainable against the Respondent No. 5 as the Respondent No. 5 is not a Director of the Corporate Debtor. The Respondent No. 5 never attended any board meeting after the resignation nor any notice of meeting was sent to him. Therefore, the contention of the Applicants about dominating the board meeting along with other directors is not true. Also, the Respondent No. 5 is not a signatory for any banking or other purposes since the resignation therefore question of siphoning of any funds of the Corporate Debtor by the Respondent No. 5 could not arise.

27. The Respondent No. 5 further submits that the Bench while dealing with M.A. 3182 of 2019 observed that the Applicants with having just 48% shares were enjoying and managing the affairs of the Corporate Debtor. On the other hand, by the present Application, the Applicants are stating that the Respondents No. 5 to 9 are responsible for ROC compliances which is truly misconceived. The Applicants are making frivolous claims with respect to the units sold behind their back because all the sold units were represented to the Applicants and the said transactions were in their knowledge as per MoU dated 30.11.2018. The Respondent No. 5 had no authority to sale any unit or property at that point of time since the Respondent No. 5 resigned as the Director.

28. The Respondent No. 5 submits that from the documents annexed to the Application, it can be seen that the loan provided under the said Loan Agreement was paid off by conversion of the same into equity, so there is no question of avoiding the implementation of the MoU or any other agreement. The Applicants were supposed to pay the loan amount to SIDBI and even complete the obligations of the Corporate Debtor towards the home buyers. It is then submitted that the Applicants have failed to perform their obligations under the said MoU.

29. The Respondent No. 5 further submits that when the Respondent

No. 5 was in Board of the Corporate Debtor, there was no likelihood of the Corporate Debtor becoming NPA in the books of any lender. Later, the Applicants stepped in to protect the Corporate Debtor from becoming NPA. So, the allegations on the Respondent No. 5 for not attending the hearing of the Company Petition before this Tribunal, even after resigning from the post of Director, is self-explanatory. The Respondent No. 5 then had to appear during the hearing of the M.A. 3182 of 2019 because of the baseless allegations against the Respondent No. 5 by the Applicants.

30. The Respondent No. 5 lastly submits that the Applicants had not shown any proof of the amount and to what extent the Applicants are the financial creditor of the Corporate Debtor. Secondly, the prayers sought are, in the nature of setting the entire process in motion again from the beginning and rejecting the decisions of the CoC taken so far in the matter, nothing but the technique to delay the whole process of CIRP further.

<u>Contentions of the Respondent No. 6:</u>

31. The Respondent No. 6 submits that the Respondent No. 6 along with other Respondent Directors had given entire secretarial data to the Applicants in November, 2018. The Applicants were inducted as Directors, made signatories to the bank accounts and since this Tribunal had already observed that the Applicants were running the Corporate Debtor, therefore the question of hiding any whereabouts regarding anything from the Applicants does not arise.

32. The Respondent No. 6 further submits that all the stipulations under various documents were being adhered to and there was no shying away on the part of the Respondent No. 6 from any documents. It is submitted that when the Applicants got to know about the blunder of the Respondents in September, 2019 then why did the Applicants No. 2 & 3 took active participation in the Board Meeting of the Corporate Debtor held on 18.01.2020. The Respondent No. 6 further

submits that SIDBI served the notice to the Directors of the Corporate Debtor and thereafter, the Respondent No. 7 personally delivered the said notice of SIDBI to the Applicant No. 2. Since the entire property and functioning of the Corporate Debtor was in the hands of the Applicants so there is no question of hiding any fact from the Applicants and not attending the hearing of the Company Petition by Respondent No. 6.

Contentions of the Respondent No. 8:

33. The Respondent No. 8 submits that the Respondent No. 8 was neither the director nor received any notice regarding the said Board Meeting because the Respondent No. 8 had resigned from the Directorship on 02.05.2017. The copy of the Resignation Letter, e-Form DIR-12 filed with the ROC on resignation and Director Master Data are annexed to the Reply. It is further submitted that the Respondent No. 8 was informed by the Respondent No. 7 that the Corporate Debtor is to be sold along with entire shareholding. The Respondent No. 8 was holding 1,80,100 shares in the Corporate Debtor and the Respondent No. 8 transferred the entire shareholding for consideration of Rs. 15,83,100/- which was received in two installments by the Respondent No. 8. It is further submitted that the Respondent No. 8 was not involved in any discussion or negotiation and was only present at the time of execution of MoU. The Respondent no. 8 signed the said MoU only in the capacity of shareholder though the designation as Director was wrongly mentioned in the MoU.

Rejoinder filed by the Applicants against the Replies of the Respondents:

34. The Applicants submit that the contention raised by SIDBI regarding 'related party' is factually incorrect and misleading. As per the provision of Section 161(1) of the Companies Act, 2013, the post of the Additional Director will be automatically vacated if the AGM of the company is not conducted within 6 months from the end of the

respective financial year. Section 96 of the Companies Act, 2013 compels any company to hold AGM within 6 months from the date of closing if the financial year. The said fact was also confirmed by way of a notice dated 10.12.2019 sent by promoters of the Corporate Debtor to the Applicant. With the said facts, it proves beyond doubt that the Applicants No. 2 & 3 cannot be dragged under the tag of the 'related party'.

35. It was then submitted by the Applicants that since the shareholding of Applicants No. 2 & 3 is 4.09% and 7.48% respectively which is below 20% and therefore, the bar provided by the Code under Section 5(24)(j) does not apply. In addition to the same, since Applicants No. 2 & 3 were never appointed as Directors and vacated the post of Additional Directors with effect from 30.09.2019 which is much before initiation of Corporate Insolvency process, therefore Applicants No. 2 & 3 cannot be considered as 'related party' as per Section 5(24)(a) of the Code.

<u>Findings:</u>

36. The relief which this applicant has sought in this MA can be divided into three parts:

a. That the Applicants' main grievance is that they have not been made part of the CoC as they have been considered as "related party" nor their amount invested with the Corporate Debtor is being considered as Financial Debt and, therefore, they have been denied proportionate voting in the Corporate Debtor Company.

b. The other relief sought is that the minutes of the CoC meeting held on 24.07.2020 be quashed and the existing CoC of the Corporate Debtor may also be quashed and set aside. Decision on these reliefs would largely depend on the view this Bench takes with respect to the fact whether the set of Applicants are "related party" or not?

c. Demand for a Forensic Audit of the Corporate Debtor Company.

37. The Bench notes, as stated by the Applicants, that together they hold about 48% of the shareholding of the Corporate Debtor Company. The Applicant No. 1 is the Company 'G.S. Constro & Infra Pvt. Ltd.' which holds 36.35% shareholding in the Corporate Debtor while Applicant No. 2, i.e., Mr. Sushil Govindrao Uttarwar (DIN- 03202812) and Applicant No. 3, i.e., Mrs. Kalpana Sushil Uttarwar (DIN- 03203291) hold 4.09% and 7.48% of equity shares in the present Corporate Debtor Company in their individual capacity. The Resolution Professional, based on their shareholding pattern and also their directorship in the Corporate Debtor Company, have covered them under the definition of Sections 5(24)(a) and 5(24)(m) and has defined them as "related parties". The Bench also had the advantage of having the copy of the Master Data of the MCA as per which both Mr. Sushil Govindrao Uttarwar and Mrs. Kalpana Sushil Uttarwar has been shown as the Directors of the Corporate Debtor Company. This Master Data of MCA has been provided by the Applicant at Annexure A in MA 3182/2019 filed by the Applicant at the time of admission of the Petition.

38. The Applicants mention that they were only appointed as additional director and not as director on 11.02.2019 and since they were additional director, as per the provisions of Section 161 of the Companies Act, 2013, additional director have to automatically vacate if the AGM of the Company is not conducted within six months from the end of the respective financial year. The Applicant mentions that as per the Section 96 of the Companies Act, 2013, the Company necessarily have to hold the AGM in six months' time from the closing of the financial year and holding the AGM was the responsibility of other Directors. Resultantly, commencing September 2019, they cease to be Additional Director and therefore are not related party. This Bench, in order to formalize its views on the subject, has also relied on

MA 3182/2019 filed by the same set of Applicants before the final consideration of "Admission" of the Corporate Debtor under CIRP wherein the Bench notes the following two facts as mentioned by the same set of Applicants. These facts as reproduced from the MA are as under:

a. "….. Applicant No. 2 and 3 herein, i.e., Mr. Sushil Govindrao Uttarwar and Mrs. Kalpana Govindrao Uttarwar are the Directors of the Corporate Debtor along with its erstwhile Directors. Hereto annexed and marked as Annexure A in the List of Directors of the Corporate Debtor as on date."
b. "The Applicants are in possession of the Corporate Debtor and looking after all the expenses of the day to day ……".

The above two portion of the paragraphs lifted from MA 3182/2019 bring out true facts which are very germane to the whole matter. They were Directors of the Company by virtue of the shareholding and were not Additional Directors. This is also corroborated by the MCA records. The second point which is also very important to note is these set of Applicants, i.e., Applicant No. 1, i.e., G.S. Constro & Infra Pvt. Ltd., Applicant No. 2, i.e., Mr. Sushil Govindrao Uttarwar and Applicant No. 3, i.e., Mrs. Kalpana Sushil Uttarwar, were in possession of the Company and were running the day to day affairs of the Corporate Debtor. Therefore, it can safely be construed that not only that they were directors of the Corporate Debtor Company, but also the affairs of the Company to the Insolvency Resolution Professional passed, not from Respondents No. 5 to 9 to the Insolvency Resolution Professional but also from these three Directors subsequent to the "Admission" of the Corporate Debtor Company under CIRP.

39. The averments made by the Applicants that they were Additional Directors only till September 2019 is not correct for the simple reason that they continued to plead before this bench for the non-admission of CP 2995 of 2019 and non-commencement of CIRP on not less than

10 hearings before this Bench commencing from 25.09.2019 till 12.02.2020 when their MA 3182/2019 was finally "dismissed" and CIRP against the Corporate Debtor commenced. On none of the occasion, they ever mentioned that they are not Directors of the Company and they are not in-charge. Therefore, all through, they are accepting that they were Directors of the Company and also that they are in-charge of the Company.

40. The Bench therefore has no hesitation in accepting the fact that together the Applicants hold about 48% shareholding of the Corporate Debtor and Applicants No. 2 and 3 are shareholders with shareholding of more than 3% each and also were Directors of the Company and now suspended Directors of the Company. They were not only the Directors but also in control of the affairs of the Company. This Bench therefore concludes that the Applicants are "Related Party" in terms of Section 5(24)(a) and also in terms of Section 5(24)(m)(i) which reads as under:

> *"Section 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;*
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> .
>
> .
>
> .
>
> *(m)* any person who is associated with the corporate debtor on account of—
>
> *(i)* participation in policy making processes of the corporate debtor; or"

The Applicants were not only the directors of the Company and covered squarely under Section 5(24)(a) of the Code but they were also managing the day-to-day affairs of the Company as per their own submissions and therefore, they are perfectly covered under Section 5(24)(m)(i) of the Code. The Bench has no doubt in its mind that the

Applicants were aware of this fact and it is for this reason that the Applicant No. 2, as brought out by the Resolution Professional, has attended the CoC meeting held on 24.06.2020 (1st CoC meeting) as well as the 2nd CoC meeting held on 12.09.2020, as "Suspended Director" of the Company.

The claim amount which the Applicants want to be treated as "Financial Debt":

41. The Applicants has submitted a claim of Rs. 8.43 crores with the Resolution Professional as shown in Form C filed by the Applicants with the document along with Annexure of Board Resolution dated 28.11.2018 for the Corporate Debtor. The copy of relevant part of Board Resolution is reproduced below:

RESOLVED THAT the board of directors of the company be and is hereby accorded its consent to offer takeover of company and its projects to G. S. Constro & Infra Private Limited due to company's weak financial position and to serve interest of company's all stakeholders.

RESOLVED FURTHER THAT the board of directors of the company be and is hereby authorized to execute Memorandum of Understanding with G. S. Constro & Infra Private Limited subject to approval of takeover offer by G. S. Constro & Infra Private Limited and all the Directors be and are hereby jointly and/or severally authorized to do all such acts, deeds and things which are necessary to give effect to this resolution.

RESOLVED FURTHER THAT the company be and is hereby bound to follow terms and conditions mutually agreed in MOU executed between E&G Global Estates Limited and G. S. Constro & Infra Private Limited.

The Bench notes that this Resolution only talks about a 'take over' of the Company by G. S. Constro & Infra Pvt. Ltd. as per the mutually agreed MoU and does not at all mentions that they were financial creditor.

42. The second set of documents which the Applicant has mentioned based on which his claims should be considered as "financial debt" is the MoU dated 10.12.2018, entered between Applicant No. 1 who is defined as the Acquirer of the Corporate Debtor. The relevant part of the MoU is extracted below:

D. The Acquirer is well equipped with essential funds as well as manpower to deliver the Project and to take forward the business of the Company.

E. The Acquirer is willing to buy the Company and the Shareholders are ready to sell the Company on the terms and conditions as mentioned herein.

NOW THEREFORE IT IS AGREED TO BETWEEN THE PARTIES AS FOLLOWS:

1. TRANSACTION

1. The Acquirer has agreed to purchase 100% shares of the Company and the representatives of the shareholders of the Company, viz. the Guarantors as mentioned above have agreed to sell 100% of its shares to the Acquirer in following manner;
2. The Acquirer has agreed to purchase minimum 85% of the Company of the shareholders as per attached shareholders list within 120 working days of receipt of NOC from SIDBI or 120 working days of signing of Share Purchase Agreement, whichever is earlier.
3. The balance % of shares of the shareholders mentioned in will be purchased by the Acquirer once loan obligation of SIDBI is completed.

2. CONSIDERATION

1. The mutually agreed price for transfer of 81.67% Equity shares of the Company by the representatives of the shareholders of the Company to the Acquirer is Rs. 2.30 Crores payable to the Equity shareholders of the Company. The consideration will be paid in stages after the receipt of SIDBI NOC for change in shareholding and change in management of the Company. Said consideration will be paid proportionately to the number of Equity shares transferred to the Acquirer by the Shareholders of the Company.
2. The acquirer already infused Rs 85.00 Lakh in company by way of paying 3 installment of SIDBI amounting Rs 75.00 Lakh and Rs 10.00 Lakh towards project related expenses. Further required payment to company and SIDBI will infused as unsecured loan by the acquirer to the company.

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3. SHARE TRANSFER METHODOLOGY:

The share transfer modalities will be done by mutual consent of the share holders and acquirer.

Promoters of the Company, viz. the Guarantors as mentioned above have agreed to transfer 81.67% of the shares of the Company to be transferred as per attached shareholders list in favor of the Acquirer immediately on receipt of SIDBI NOC and on execution of Share purchase agreement. Both parties have agreed to allow 60 days time for payment of proposed consideration to Shareholders of the Company towards Share transfer from the date of receipt of NOC from SIDBI.

Further the representatives of the shareholders of the Company, viz. the Guarantors as mentioned above have agreed to transfer 18.33% of the shares of the Company to be transferred by as per attached shareholders list in favour of the Acquirer Immediately on receipt of Loan closure letter of SIDBI loan and on receipt of consideration as may be agreed after negotiation with the shareholders.

43. The Bench notes two things from this: (a) that the MoU is for the acquisition of the Company and the money which has been given to the Corporate Debtor is not by way of 'financial debt' but for acquisition of share; (b) that the acquirer, i.e., the Applicants have infused Rs. 85 Lakhs by paying installments of SIDBI amounting to Rs. 75 Lakhs and Rs. 10 Lakhs. That this payment to SIDBI is for acquisition of shares that is also clear from the fact that as per Para 3 of the MoU, the Corporate Debtor Company have agreed to transfer 18.33% share of the Company to the acquirer immediately on receipt of loan closure letter of SIDBI loan. The Bench therefore notes that all payments being made to SIDBI by the Corporate Debtor through the funds received from the Applicants is not a financial debt but a payment towards treating acquisition of shares in the Corporate Debtor Company.

44. Certain interesting facts which would clearly demonstrate that the payments to the Corporate Debtor and their Board was being made by the Applicants, not only as the financial debt but to acquire shares, is evident from the written submission of the Corporate Debtor in their Application No. 3182/2019 in the same CP 2995 of 2019 where at Para 7, the same set of Applicants , i.e., Applicant No. 1, i.e., G.S. Constro & Infra Pvt. Ltd., Applicant No. 2, i.e., Mr. Sushil Govindrao Uttarwar and Applicant No. 3, i.e., Mrs. Kalpana Sushil Uttarwar, as per terms of the MoU, granted Rs. 58,20,000/- to Respondent No. 5 towards purchase of shareholding thereby acquiring 22% in the shareholding in the Corporate Debtor. In addition to the said, Rs. 9 Lakhs was paid to Respondent No. 6 towards purchase of shareholding thereby acquiring 7% shareholding in the Corporate Debtor. The Bench notes that whatever payments have been made by the Applicants are not as financial debt but for acquisition of shares which finally has resulted into about 48% shareholding with the Applicants in the Corporate Debtor Company. Therefore, the Bench is of the considered view that

the payments given, as per MoU dated 10.12.2018, is only for acquisition of shares and not as financial debt.

45. Before this Bench, the Applicant has submitted an Agreement dated 12.02.2019 wherein it has been mentioned that an amount of Rs. 1.6 crores is being given as loan to the Corporate Debtor at an interest of 12% p.a. Therefore, the Applicants' claim that Rs. 1.6 cores should be considered as a "financial debt" and not as a payment towards equity contribution. The Bench, however, notes that the Applicants very cleverly have avoided clause 4 of the same loan agreement whereby the Company has the option of converting this loan of Rs. 1.6 crores into equity in Agreement with the lender. The Bench notes that subsequently, this loan of Rs. 1.6 crores has already been converted into equity and a "return of allotment" has been annexed by Applicant himself at Page 31 of his Application and a copy of the Board Resolution Conversion of Loan to Equity was passed on 11.02.2019 which is extracted below:

CIN: U45400MH2008PLC182480 E-MAIL: accounts@eandg.in ... Thatte Nagar Nashik 422005

CERTIFIED TRUE COPY OF THE SPECIAL RESOLUTION PASSED AT THE EXTRA ORDINARY GENERAL MEETING OF THE MEMBERS OF E & G GLOBAL ESTATES LIMITED HELD ON MONDAY, 11TH FEBRUARY, 2019 AT 11.00 A.M. AT THE REGISTERED OFFICE OF THE COMPANY SITUATED AT 6, NEW SHIVSAGAR SOCIETY GANGAPUR COLLEGE LINK ROAD, THATTE NAGAR NASHIK 422005

SPECIAL RESOLUTION:

"**RESOLVED THAT** Pursuant to section 62 and other applicable provisions of the Companies Act, 2013 shareholders of the company be and is hereby give assent to issue and allotment of 16,00,000 (Sixteen Lakhs) Equity shares of face value of Rs. 10/- each to G.S.Constro & Infra Private Limited in lieu of and against the conversion of loan Rs. 1,60,00,000/- (One Crore Sixty Lakhs) taken by company.

FURTHER RESOLVED THAT the new equity shares shall rank pari passu in all respects with the existing shares of the company.

FURTHER RESOLVED THAT for the purpose of giving effect to this Resolution, Mr. Dnyaneshwar Vana Chaudhari, Managing Director of the company is and hereby authorized to do all things, deeds, matters, and things regard to issue and allotment of new equity shares."

For E & G Global Estates Limited

Managing Director
Name : Dnyaneshwar Vana Chaudhari
DIN : 02272566
Add : A/7, Kasturi park ...

Director
Name : Ganesh Kashiram Ahire
DIN : 00384120

46. This Bench is aware of the fact that the sum of Rs. 50 Lakhs was paid by the Applicant on behalf of the Corporate Debtor to SIDBI. It has been paid to SIDBI towards settlement of dues of M/s E & G Global Estates Limited. The relevant Para of this letter of October 2019 mentions that *"we will pay token amount of Rs.50 Lakhs towards as token amount for settlement of case of Rs. 4 crores filed by SIDBI against M/s. E & G Global Estates Ltd."*. The Bench notes, subsequently Rs. 50 Lakhs was paid directly by the Applicants to SIDBI on behalf of the Corporate Debtor. Therefore, a question arises as to how to treat this Rs. 50 Lakhs. Should it be treated as a "financial debt" or as a payment towards 'take-over' of the Company? The Bench notes that earlier also, the Applicants has paid money to SIDBI not

directly but through Corporate Debtor and in view of that they have acquired shares, as has been mentioned at Para No. 43 above. Therefore, this amount of Rs. 50 Lakhs paid directly by the Applicants to SIDBI cannot be construed as a "financial debt" to the Corporate Debtor but a money paid on behalf of the Corporate Debtor to save the Company from Corporate Insolvency Resolution Process and the return which they would have got, as has been the case earlier, by way of acquisition of further shares in the Company.

47. This Bench, therefore, have no doubt in its mind that any money given to the Corporate Debtor by the Applicants was only and only for the purpose of acquisition of the Company by way of incremental purchase of shares and not a "financial debt". This Bench is also clear, as has been demonstrated in the other paragraphs, that the set of the Applicants are "related party", therefore, have no business to be the part of the CoC. The Resolution Professional has rightly taken them as suspended directors of the Company.

48. Regarding the prayer of the Applicants to conduct the forensic audit of the Corporate Debtor Company, the Resolution Professional mentions that a forensic audit has already being conducted by M/s. Mazars Business Advisors Pvt. Ltd. and that the Auditors would be submitting their reports in next two months' time. In view of the above, other prayers of the Applicants, regarding the existing CoC, be quashed as it is of no consequence and cannot be considered.

49. In view of the above, IA 1148/2020 in CP 2995/I&B/MB/2019 is "**Dismissed**".

SD/-	SD/-
Chandra Bhan Singh	Suchitra Kanuparthi
Member (Technical)	Member (Judicial)