



IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV

**CP (IB) No.760/MB-IV/2022**

Under Section 7 of the I&B Code, 2016

In the matter of:

**Shivaji Ramling Sakhare and Anr.**

...Financial Creditor(s)

V/s

**M/s GDS Buildcon Private Limited**

[CIN: U45209PN2011PTC138161]

...Corporate Debtor

***Order pronounced on: 30.08.2023***

*Coram:*

Mr. Prabhat Kumar  
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli  
Hon'ble Member (Judicial)

*Appearances (via videoconferencing):*

For the Petitioner(s) :

Mr. Vijay Parikh a/w Mr. Prakhat  
Tandon, Adv.

For the Respondent(s) :

Mr. Amir Arsiwala, Adv.

**ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. This is a Company Petition filed on 08.06.2022 under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by Mr. Shivaji Ramling Sakhare (Hereinafter referred to as FC 1), who is the shareholder, ex-director and Ms.



Sharmila Shivaji Sakhare (Hereinafter referred to as FC 2) is the shareholder, seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of M/s GDS Buildcon Private Limited (Hereinafter referred to as Corporate Debtor/CD) is a company having CIN U45209PN2011PTC138161, the Corporate Debtor. Both the Applicants claims themselves as financial creditor (“the Financial Creditors”) of the Corporate Debtor on the principle of ‘Subrogation’

- 1.1. The date of default is stated as 24.05.2022 in Parv IV of the Application, determined on the basis that the notice 10.5.2022 issued by the Applicant to the Corporate Debtor asking it to pay the debt within 7 days was received on 16.05.2022 by the Corporate Debtor, and the deposits in the name of the Applicants, placed under lien with the The Vishweshwar Sahakari Bank Ltd. Pune (Hereinafter referred to as 'Bank') against the principal debt owed by the Corporate Debtor, came to be encashed by the Bank on 16.09.2021.
2. FC 1 & FC 2 held 30.63% shares of the Corporate Debtor and FC 1 was the director of the Corporate Debtor, at the time of taking of loans and executed those documents also. It is submitted by the Applicants that the directors of the Corporate Debtor requested the FC 1 and FC 2 to provide their fixed deposits with the Bank as security in order to avail loan from the Bank. The FC 1 and FC 2 agreed to the request of the directors of the CD. Thereafter, the Corporate Debtor requested the Bank to sanction the credit facility amounting to Rs. 1,10,00,000/- (Rupees One Crore and Ten Lacs only) on Third Party Fixed Deposit of FC 1 with the Bank.

- 2.1. The Bank sanctioned the Credit facility amounting to Rs. 1,10,00,000/- (Rupees One Crore and Ten Lacs only) on Third Party



Fixed Deposit of FC 1 to the Corporate Debtor vide Loans Account No: 2204/68 and, the FC 1 executed the loan documents with the Bank on behalf of the Corporate Debtor as its director, as well as pledgor, on 14.02.2018. The copy of the Loan Documents dated 14.02.2018 executed between The Bank and the Corporate Debtor has been placed with the Petition.

- 2.2. On 27.03.2018, the Corporate Debtor requested the Bank to sanction Temporary Overdraft (TOD) Facility amounting to Rs. 3,00,00,000/- (Rupees Three Crore only) on Fixed Deposit of FC 2. The Bank sanctioned the Temporary Overdraft (TOD) Facility amounting to Rs. 3,00,00,000/- (Rupees Three Crore only to the Corporate Debtor on fixed deposit of FC 2 vide Loan Account No. 2204/9755 and executed the loan documents with the Corporate Debtor on 31.03.2018. These loan documents were signed by FC 1, in his capacity of director of the Corporate Debtor, and FC 2 as pledgor. The copy of the Loan Documents dated 31.03.2018 is placed with the Petition.
- 2.3. Pursuant to the same, the Memorandum of Understanding (MOU) dated 04.01.2019 was executed between the Corporate Debtor, FC 1 and FC 2, whereby the FC 1 & FC 2 had agreed to transfer their shareholding in Corporate Debtor in parts in name of two named parties or their nominee against the consideration and terms stated in the MOU i.e. (i) 30% on execution of MOU; (ii) 35% on repayment of unsecured loan and balances payable to them by the Corporate Debtor; and (iii) remaining 35% to be transferred on execution of documents in relation to one immovable property owned by the Corporate Debtor in favor of Applicants. The Corporate Debtor



agreed that the outstanding payments towards the loan account no. 2204/9755 and loan account no. 2204/68 with the Bank will be fully repaid till 15.03.2019, and thereafter the Applicants had no obligations under the said facility. It was also agreed that in case the parties fail to fulfil obligations till 30.6.2019, the MOU can be terminated by either of parties in terms of clause 6 of MOU. The copy of the Memorandum of Understanding dated 04.01.2019 is placed with the Petition.

- 2.4. The Directors of the CD failed to make repayment towards the loan facilities. Thereafter, the Bank filed an application before the Hon'ble National Company Law Tribunal, Mumbai Bench under Section 7 of IBC, 2016 against the Corporate Debtor vide C.P.(IB)-501/(MB)/2021 for default in the repayment of the loan facilities.
- 2.5. During the pendency of the said application, the Bank sent a letter dated 01.09.2021 to FC 1 and FC 2 requesting them to close the loan accounts by depositing the interest within seven days from 01.09.2021 onwards. The letter further stated that if the interest is not paid by FC 1 and FC 2, then the Bank will close the loan accounts of the CD by encashing the mortgaged deposits in the said loan accounts. The copy of the letter dated 01.09.2021 sent by the Bank to FC 1 and FC 2 has been attached herewith as Annexure No. 4.
- 2.6. Thereafter, on 08.09.2021, the Bank encashed the Fixed. Deposits of FC 1 and FC 2 and realised the said amount towards the closure of the loan facilities availed by the CD. On 16.09.2021, the Bank sent another letter to FC 1 and FC 2 intimating them that they have



encashed their Fixed Deposits and closed the Loan Account No. 2204/68 and Loan Account No. 2204/9755 of the CD.

2.7. Consequent thereto, the application C.P.(IB)- 501/(MB)/2021 seeking initiation of CIRP in the matter of Corporate Debtor was withdrawn by the Bank, vide order dated 2.12.2021 passed by Mumbai Bench V of this Tribunal.

2.8. Thereafter, the FC 1 and FC 2 vide letters dated 10.05.2022 informed the Corporate Debtor that they have been subrogated to all the rights of the financial creditor against the debt due from the Corporate Debtor viz. they have stepped into the shoes of the financial creditor and demanded the Corporate Debtor to make the payment of the amount of the fixed deposits encashed by the Bank. The said letter was sent via speed post on 10.05.2022 whereas the same was returned back with the remark "Left Addressee". Thereafter, the said letter was sent to the existing directors of the Corporate Debtor via e-mail dated 16.05.2022. The copy of the letter dated 10.05.2022, speed post receipts, tracking details, return envelopes and e-mail dated 16.05.2022 has been attached herewith as Annexure No. 7.

2.9. The total outstanding against Corporate Debtor is Rs. 3,73,83,096/- (Rupees Three Crore Seventy-Three Lacs Eighty-Three Thousand and Ninety-Six only).

3. The Corporate Debtor filed its reply dated 28.11.2022 stating that -



- 3.1. The cause of action if any of the Financial Creditor is against the Visheshwar Bank in a civil suit and not against the corporate debtor by way of a petition under Section 7.
- 3.2. The Corporate Debtor is a solvent Company and has always paid its debts and till date, has not been declared insolvent. However it is the fraudulent conduct of the Financial Creditor, which requires serious investigation, before passing any order against the Corporate Debtor under Section 7 of IBC.
- 3.3. There are many fraudulent transactions conducted by the Financial Creditor i.e. Sakhare which have never been sanctioned by the Corporate Debtor, for which a criminal complaint has already been filed before the relevant authorities. The Police authorities Chakan police station arrested Mr. Sakhare. Pursuant to the FIR, Mr. Sakhare was arrested by the Chakan police station and the Ld. Magistrate remanded him to Police Custody. Thereafter, Mr. Sakhare preferred a bail application before the Ld. JMFC, which came to be rejected by the Ld. Magistrate while holding a prima facie case is made out against the Mr. Sakhare. The investigation revealed that MR. Sakhare had used bearer cheques and has used them and siphoned off monies from the Corporate Debtor in the accounts of Vishweshwar Cooperative Bank. These fraudulent transactions also includes several unauthorized transactions forming subject matter of the present petition, which have never been sanctioned by any Board Resolution. It is therefore submitted that the Financial Creditors have approached this Hon'ble Tribunal with unclean hands.
- 3.4. The Creditor Mr. Sakhare has deliberately created liabilities in the Corporate Debtor, and in fact, Sakhare has siphoned off funds from the Corporate Debtor. The modus operandi of the Creditor Mr.



Sakhare has categorically been that he has in connivance with his wife Ms. Sharmila Sakhare siphoned off funds from the Corporate Debtor and later infused the amounts into the Corporate Debtor with the intention to create liabilities and make wrongful loss to the Corporate Debtor and wrongful gain to himself. There have been diversion of funds of Corporate Debtor to a) Sakhare himself and b) Eros Industries (a partnership concern having Mr. Sakhare and other directors of Corporate Debtor as partners), amongst other accounts, aggregating to Rs. 5,35,00,000/- and withdrawal of cash from Bank account through approx. 90-100 bearer cheques aggregating to Rs. 3,51,90,000/- within a period from 15.2.2016 to 31.3.2016. These facts were brought to knowledge of the Lender Bank. The Bank after taking cognizance of the fraudulent activities of the Financial Creditor and carrying out an investigation into the complaints of the Corporate Debtor in furtherance of the powers vested under them decided to appropriate the amounts siphoned off by the Financial Creditor from the accounts of the Corporate Debtor maintained with the Said Bank. These acts of the Financial Creditor of siphoning off funds from the account of the Corporate Debtor has been highlighted by the investigating agency in their reports and the manner in which the amounts were illegally withdrawn by various persons without any authority thereof and that also within a span of just 2 days. Thus, Sakhare has siphoned off monies from the account of the Corporate Debtor only with the intention to cause wrongful loss to the Corporate Debtor.

- 3.5. Furthermore, it is true that an MOU was entered upon between the Financial Creditor Nos. 2 and 3 and the Corporate Debtor. However, when the Corporate Debtor took inspection of the book of accounts



of the Company, it was realised that huge amounts have been siphoned off by the Financial Creditor Nos. 2 and 3 in collusion with each other and were further trying to siphon off monies from the Corporate Debtor under the garb of the MOU. It was at this juncture that the MOU was called off and the corporate debtor called upon the financial creditor nos. 2 and 3 to infact repay the amounts siphoned off by them from the Corporate Debtor. The copy of the said email thereby calling upon the financial creditors to repay the amounts siphoned off by them to the Corporate Debtor is placed with Reply.

- 3.6. The Financial Creditor Nos. 2 and 3 are the partners of a firm under the name and style of Eros Industries. An amount of Rs. 2, 16, 48, 110/- was paid by the Corporate Debtor to Eros Industries and the same is reflected in the boof of accounts of the Corporate as an unsecured loan. Thereafter, after much follow up and persistence a cheque amounting to Rs. 3, 10, 65, 038/- was given by Eros Industries to the Corporate Debtor towards repayment of the loan. However, to the shock of the Corporate Debtor, the cheque was dishonoured with reasons "Funds Insufficient". Accordingly, a notice came to be issued to the Financial Creditor Nos. 2 and 3 calling upon them to repay the amounts to the Corporate Debtor. However, the same has not been done till date.
- 3.7. The Financial Creditor 2 (Sakhare) had taken a personal work contract from a party named "KBC". The material required for the said work was stolen from the Corporate Debtor with the help of Sakhare's brother and the material was billed also in the name of the corporate debtor. However, the corporate debtor was not aware of these transactions.



- 3.8. Upon learning about the fraudulent and illegal activities of the Financial Creditor, the Corporate Debtor has also filed a Commercial Suit No. 50 of 2022 against the Financial Creditor in Pune for recovery of the monies that have been siphoned off and misappropriated by the Financial Creditor.
- 3.9. Financial Creditor 1 i.e. Sakhare was also the Director and is still a shareholder of Corporate Debtor company.
- 3.10. In support of what is stated above, it was held by the Hon'ble Supreme Court of India in "**Indus Biotech Private Limited v/s Kotak India Venture (Offshore) & ors**", held that 'that a petition by a financial creditor involving disputed claims where the default is not clear on the face of it cannot be admitted under section 7 of the IBC. If the Adjudicating authority, NCLT finds from the material available, that there are certain other factors which require consideration before coming to a conclusion as to whether the petition under Section 7 of IBC is to be admitted, then in such event an objective assessment of the whole situation must be made by the Adjudicating Authority. It is noteworthy to mention that in the above referred case a section 7 application was dismissed by the Adjudicating Authority and the said decision was upheld by Hon'ble Supreme Court.
4. The Applicant Financial Creditor filed a written submission also stating that pledge of their fixed deposits for loan obtained by the Corporate Debtor are in nature of contract of surety, and under the principle of Subrogation, they steps into the shoes of Bank after appropriation of their fixed deposits against said loan outstanding. They have placed reliance on the decision of Co-ordinate Bench of NCLT, Kolkata, wherein vide Order dated 27th June 2022, it has been held in the case of Orbit Towers vs. Sampurna Suppliers CP (IB) No.



2046/KB/2019 involving identical fact situation that a Section 7 Petition filed by a guarantor is maintainable on the basis of subrogation.

- 4.1. Also that there exists a financial debt in terms of Section 5(8)(f) of the Code, and they have placed reliance on decision in the case of Pioneer Urban by Hon'ble Supreme Court holding that section 5(8)(f) is a catch-all provision having a very expansive meaning that is meant to cover those transactions that have the commercial effect of a borrowing, even though they do not fall under any specific sub-clause of Section 5(8).
- 4.2. Counsel for the Respondent has sought to rely on the judgment of the Hon'ble Supreme Court of India in NOIDA v. Anand Sonbhadra 2023 (1) SCC 724 to argue that for there to be a debt there must be a disbursement. However, it is submitted that it is not necessary that it must be from the person who approaches the Hon'ble Tribunal. For instances, in cases of assignment of debt, the disbursement is by the assignor. However, it is the assignee that files a Petition under Section 7 of the Code.
- 4.3. NOIDA (supra) is a two-judge decision and Pioneer (supra) is a three-judge decision. In case of any conflict between NOIDA and Pioneer, Pioneer must prevail.
- 4.4. Financials of Corporate Debtor for FY 2017-18 is signed by its current directors.
- 4.5. The reliance placed by the Respondent on the Order dated 24th March 2023 of the Hon'ble NCLT, Court V, in C.P. No. 492 of 2021 against the same parties is irrelevant to the facts of the case because the debts that underly both petitions are entirely different. In that Petition, the debt was directly disbursed by the Petitioners to the Corporate Debtor.



In this Petition, the debt is disbursed by the Bank, and the Petitioners have fallen into the shoes of the Bank.

- 4.6. In that Petition, the basis of the debt was the Memorandum of Understanding dated 4th January 2019. In this Petition, the basis for the debt is the principle of subrogation. The Petitioners are not relying on the memorandum of understanding.
- 4.7. The current directors of the Corporate Debtor were always aware of its dealings and signed its financial statements wherein it is admitted that the debt to Bank exists.
5. The Corporate Debtor has filed a note stating that the present Note is being filed by the Corporate Debtor only for the limited purpose of establishing a nexus between the present Petition and the Company Petition bearing no. 492/MB/2021 (First Petition) which stands disposed off as dismissed by an order of this Hon'ble Tribunal dated 24<sup>th</sup> March, 2023 (Order). These very Financial Creditors had filed the First Petition which came to be dismissed by this Hon'ble Tribunal, vide the said Order, on the ground that the Financial Creditors had failed to make out a case that any debt was due and payable to them by the Respondent and that the Memorandum of Understanding dated 4th January, 2019 (MOU) relied upon by the Financial Creditor seems to be fabricated. Furthermore, the Hon'ble tribunal has observed that the MOU is completely silent about any schedule of payments. The order also records that the debt is not a financial debt due to the malicious conduct of the Financial Creditors No. 2 and 3 and that an Investigation report of the EOW has been relied upon. The entire claim of the Financial Creditors is based on the MOU executed between Corporate Debtor and the Financial Creditors which has already been considered by the Bench of this Hon'ble Tribunal and held the same to be false and fabricated. The entire fraudulent activity of the Financial Creditors has been noted by the Investigating Agency, i.e. the EOW, in by filing



the Remand report by the Magistrate which have been relied upon by the Corporate Debtor and noted by this Hon'ble Tribunal while passing the said Order.

- 5.1. All the above facts pertaining to the fraud played the Financial Creditors on Corporate Debtor has been duly taken into account by the hon'ble Tribunal while passing the said Order and thus this present Petition is nothing but a Trojan horse to seek the same order against the Corporate Debtor.

***Findings:***

6. This bench has carefully gone through the documents and pleadings available on record and considered the arguments.
  - 6.1. The issue for consideration in this petition is “whether the Corporate Debtor owes any undisputed financial debt to the Applicant Financial Creditors, and if so, whether there is any repayment period stipulated for payment of same”.
  - 6.2. This Bench notices that the Applicants in this petition, alongwith their other associate concerns, had filed another petition bearing no. 492/MB/2021 (First Petition) which was dismissed by an order dated 24<sup>th</sup> March, 2023 by Co-ordinate Bench of this Tribunal i.e. Mumbai Bench V. The amount of debt claimed therein was the ‘Unsecured loans’ recoverable from the Corporate Debtor by the Applicants and their associate company, which are referred in the MOU dated 4.1.2019. The said MOU has been referred in this petition also, and the Applicants had transferred their shareholding in the Corporate Debtor pursuant to said MOU, containing the manner in which the amounts owed to the Bank for which the Applicant had pledged their FDRs as security and amounts due to them and their associate

concern from the Corporate Debtor came to be settled. It is not in dispute that pursuant to this MOU only, the FC -1 resigned from the Board of the Corporate Debtor as its director.

- 6.3. We agree with the contention of the Applicant Financial Creditors that CP 492/2021 came to be dismissed as the MOU was silent on the repayment of loans owed to them and their associate concerns, but the issue involved in the present petition pertains to the loan owed to the Bank, which came to be subrogated by them consequent upon discharge of liability to the Bank by encashment of pledged FDRs owned by Applicants. We also find that the Co-ordinate Bench took note of malicious conduct of the Applicant found by the EOW in its report. The relevant part of the Order is reproduced below –

*“In addition to this the Respondent has stated that the debt claimed by the FC-2 and FC-3 is not a Financial Debt due to malicious conduct of the FC 2, whilst he was the Director of the Respondent Company. In this regard an Investigation report by the Economic Offences Wing is annexed by the Respondent, wherein, it has been stated:*

*“ a. the FC 2 has illegally sold the Plots for development without consent of the other directors and has registered documents on a lower price than the market price and has siphoned off the monies that have been received over and above the agreement values.*

*b. between 01.02.2016 to 30.03.2016, an amount of around Rs1,15,00,000/- and Rs. 2,50,00,000/- has been remitted in the account of Eros Industries wherein FC 2 is a partner.*

*c. on 30.03.2016, the FC 2 has embezzled an amount of around Rs. 3,52,00,000/- in cash in form of bearer cheque in favour of different names.”*



6.4. Accordingly, we find substance in the contention of the Corporate Debtor that even if there exists a financial debt, the same can not be said to be undisputed on account of facts coming to surface consequent upon investigation by an independent agency implicating the Applicants in causing loss to the Corporate Debtor. We agree that even if these findings are not conclusive and subject to judicial determination, however, these findings leads us to a irrefutable conclusion that the debt claimed in the present petition is disputed. Moreso, the MOU dated 4.1.2019 stipulated right of termination available to both the parties in case any of party breaches the obligations containing therein after 30.6.2019, however, the applicants had never exercised that right to rescind the MOU and have the transfer of their shares and cessation of their directors declared as null.

6.5. We further find that the Co-ordinate bench in its order dated 24.03.2023 arrived at finding that “*From the submissions, it appears that entire claim of the Financial Creditor nos. 2 and 3 is based on a Memorandum of Understanding dated 4th January, 2019 (MOU) executed between Corporate Debtor and the FC Nos. 2 and 3 which purports that Mr. Gurmail singh and Mr. Raj Chaddha would pay to the FC Nos. 2 and 3 an amount of Rs. 2,30,00,000/- in lieu of the shares held by them i.e. 22800 shares by Mr. Shivaji Ramling Sakhare and 78375 shares of Ms. Sharmila Shivaji Sakhare. Further, the MOU also contemplates that the Corporate Debtor shall allot to the FC Nos. 2 and 3 plot No. A/7/H in the project “Capital Square” and for execution of a separate sale agreement and some properties that are set out in the MOU. Further, as stated by the Petitioner in para 22 of the Petition, clearly, it appears to be a case of noncompliance of the MOU, which is a subsequent document allegedly executed in the year 2019. It was submitted on*



*behalf of the Corporate Debtor that as per the documents annexed by the Petitioner themselves, the MOU appears to be fabricated as the Petitioners have relied upon a document being a Complaint to the Police Commissioner and in para 8 thereof have sought to rely upon Page 13 of the Agreement. However, perusal of the MOU attached to the present petition would show that the total number of pages of the MOU is only 11 pages. Thus, it appears that the MOU being referred to in the Complaint is fabricated and not the same as the MOU annexed to the present petition”.*

- 6.6. The applicant have placed reliance on the audited financial statements of the Corporate Debtor for the FY 2017-18 acknowledging their debt on the ground that these financial statements were signed by the present directors. However, the allegations of fraud came to surface thereafter after detailed investigation by EOW, and which are not refuted by the Applicant.
- 6.7. Accordingly, this Bench finds that there exists a dispute in relation to existence of debt itself, and following the decision of Hon’ble Supreme Court in case of **Indus Biotech Private Limited v/s Kotak India Venture (Offshore) & ors**", that a petition by a financial creditor involving disputed claims where the default is not clear on the face of it cannot be admitted under section 7 of the IBC.
7. In view of aforesaid discussion, this bench is of considered view that the present petition deserves to be dismissed. Accordingly, C.P.(IB) 760/2022 is **dismissed**.
8. It is made clear that we have adjudicated on primary fact whether there exists a financial debt, in the absence of disbursement from the Applicants, though

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we are of prima-facie view that there certainly exists a debt, even if it is not undisputed.

**Sd/-**  
**PRABHAT KUMAR**  
**MEMBER (TECHNICAL)**  
30.08.2023

**Sd/-**  
**KISHORE VEMULAPALLI**  
**MEMBER (JUDICIAL)**