(2020) 12 NCLT CK 0046

In the National Company Law Appellate Tribunal

Case No : IA-1828/ND Of 2020 In IB-1404(ND) Of 2019

Axis Bank Ltd. And Anr. APPELLANT

Vs

M/s. Prius Commercial Projects Pvt. Ltd. And Anr. RESPONDENT

Date of Decision : 14-12-2020

Acts Referred:

National Company Law Tribunal Rules, 2016 — Rule 11
Insolvency And Bankruptcy Code, 2016 — Section 5(24), 5(24)(f), 5(24)(h), 5(24)(m), 5(24)(i), 5(24)(t), 21(2), 28(3), 29A, 30(4), 60(5)

Citation : (2020) 12 NCLT CK 0046

Hon'ble Judges : Mohd Sharief Tariq, J;Narender Kumar Bhola, Member (Technical)

Bench : Division Bench

Advocate : Sumant Batra, Pooja Mahajan, Srishti Kapoor, Gaurav Arora, Abhinav Vashisht, Priya, HarshitKhare, Krishnendu Dutta, Aditi Mittal, Aditya Narayan Mahajan, Rahul Gupta

Final Decision : Dismissed

Judgement

,,,,

1. Under consideration is IA-1828/N0/2020 filed under Section 60 (5) of the Insolvency and Bankruptcy Code. 2016 (hereinafter referred as ""IBC,",,,,

2016"") R/w Rule 11 of the National Company Law Tribunal Rules (hereinafter referred as ""NCLT Rules, 2016""), by the Resolution Professional viz.,",,,,

Mr. Chandra Prakash (hereinafter referred as ""Applicant"") of M/s. Dignity Buildcon Private Limited, (herein referred as Dignity Buildcon) against the",,,,

Resolution Professional viz., Mr. Mahender Kumar Khandelwal (hereinafter referred as ""Respondent"") of the Corporate Debtor viz., M/s. Pirus",,,,

Commercial Project Private Limited, (hereinafter referred as ""Corporate Debtor or Pirus"") and prayed as follows:",,,,

a. Direct the Respondent to invite the Applicant for participation and voting in the meetings of the CoC of the Corporate Debtor;",,,,

b. Direct the Respondent to provide similar treatment to the Applicant, as any other financial creditor;",,,,

c. Pass such other further order/ orders(s) as may be deemed fit and proper in the facts and circumstances of the case.""",,,,

2. The factual matrix of the case is as follows; -,,,,

i. The Corporate Insolvency Resolution Process (hereinafter referred as ""CIRP"") of the Corporate Debtor viz., M/s. Pirus Commercial Project Private",,,,

Limited was initiated vide Order dated 09.08.2019 and Mr. Mahender Kumar Khandelwal was appointed as the IRP of the Corporate Debtor vide,,,,

same order.,,,,

ii. The Applicant viz., Mr. Chandra Prakash, is the Resolution Professional of M/s. Dignity Buildcon Private Limited, which is currently undergoing the",,,,

CIRP vide Order dated 24.04.2019 of this Authority. On 23.05.2019 the Committee of Creditors (hereinafter referred as ""CoC"") of M/s. Dignity",,,,

Buildcon Private Limited, had recommended the name of the Applicant for appointment as RP and this Authority vide Order dated 11.06.2019",,,,

approved the same.,,,,

iii. It is submitted that the public announcement calling for claims against the Corporate Debtor was made by the Prius' RP. Pursuant thereto, the",,,,

Applicant on 06.09.2019, on behalf of Dignity Buildcon, submitted the claim with proof to the RP in Form C, as a Financial Creditor of the Corporate",,,,

Debtor for an amount of Rs. 1,77,47,90,694/- including interest of Rs.31,50,90,694/., of which details are provided in the application under",,,,

consideration.,,,,

iv. It is further submitted that pursuant to repeated follows up with the Respondent regarding the acceptance of the claim form submitted by Dignity,,,,

Buildcon, on 27.11.2019 the Respondent sought clarification on certain issues and asked the Applicant to give details of any relation of Dignity",,,,

Buildcon with the Corporate Debtor. In response to the said email, the Applicant through its email dated 13.12.2019, while responding, clearly stated",,,,

that there exists no relationship between the Dignity Buildcon and the Corporate Debtor as on the insolvency commencement date in terms of Section,,,,

5(24) of the IBC to the knowledge of the Applicant,,,,

v. It is averred that the claim of Dignity Buildcon against the Corporate Debtor was admitted in full as financial debt, the Respondent denied the",,,,

Applicant the right to participate in the meetings of the Committee of Creditors (""CoC"") of the Corporate Debtor, under Section 21(2) of the IBC,",,,,

claiming that the Corporate Debtor and the Applicant may be related parties. The Respondent through its email dated 30.12.2019 to the Applicant,",,,,

raised certain issues with respect to the relation between the Dignity Buildcon and the Corporate Debtor which are reiterated as follows; -,,,,

a. During the time of consummation of the transaction for which a claim has been filed, Mrs. Shabnam Dhillon was a common director in",,,,

the Corporate Debtor and Prius Real Estate (Holding Co. of Dignity Buildcon). While Pr/us Real Estate held 100% shares in Dignity,,,,

Buildcon during the said period. Mrs. Shabnam Dhillon held a majority stake of 84% shares in Prius Commercial Projects Private Limited,,,,

during the same above-mentioned period.,,,,

b. In FY 2017-18 and FY 2018.19. Prius Commercial and Dignity Buildcon had common directors. Further, under the same period, an",,,,

agreement to make the abovementioned loans as interest-free was entered.,,,,

3. It is further averred that the Applicant, in response to the email by the Respondent, undertook to explain in detail that the Corporate Debtor and",,,,

Dignity Buildcon are not related as on the insolvency commencement date and are required to be invited to the CoC meeting in terms of the IBC. The,,,,

Applicant again wrote vide email dated 14.02.2020 to the Respondent seeking response to the request made by the Applicant for inclusion in the CoC.,,,,

The Respondent, in response to the said email, reiterated its response given earlier.",,,,

4. It is submitted that the acts of the Respondent in denying the Applicant a right to participate in the CoC of Corporate Debtor are contrary to the,,,,

provisions of the IBC. It is further submitted that for the purpose of establishing a relation between the Dignity Buildcon and Corporate Debtor, as",,,,

alleged by the Respondent, the relation must fall within the terms of the Section 5(24) of the IBC, which the Respondent has evidently failed to",,,,

establish. Moreover, the relation between the parties in terms of Section 5(24) of the IBC is required to be seen as on insolvency commencement date",,,,

of the Corporate Debtor i.e.,09.08.2019. Mrs Shabnam Dhillon resigned from the directorship of the Prius Real Estate Pvt. Ltd, the holding company",,,,

of Dignity Buildcon on 17.08.2016.,,,,

Reply on Behalf of Respondent.,,,,

5. The Respondent/Resolution Professional of the CD viz., Prius Commercial Projects Private Limited, submitted that the role of the Respondent is to",,,,

ensure that the Corporate Debtor is being run as a going concern and the corporate insolvency resolution process is conducted in line with the,,,,

provisions of the Insolvency and Bankruptcy Code 2016 (""Code""), read with applicable rules and regulations and in doing so, the Respondent followed",,,,

the provisions of the Code in true intent and spirit.,,,,

6. It is stated that the claim of the applicant has been admitted by the Resolution Professional in its entirety and in terms of the provisions of the,,,,

resolution plan submitted by consortium of Kotak Investment Advisors Limited, Minicon Insulated Wires LLP and Elita Capital Advisors LLP",,,,

(""Successful Resolution Applicant""), and approved by the committee of creditors comprising of Axis Bank Limited, State Bank of India, Punjab &",,,,

Sindh Bank, Oriental Bank of Commerce (now amalgamated into Punjab National Bank effective 01 April 2020) and phoenix ARC (""CoC"") with",,,,

100% voting share, the applicant (along with other stakeholder) shall be paid out the amounts proposed under the approved resolution plan against the",,,,

amount of claim filed and admitted, once the resolution plan is approved by this Hon'ble Tribunal.",,,,

7. It is further submitted that pursuant to the approval of the resolution plan by the members of the CoC of the Corporate Debtor with 100% voting,,,,

share, no further meetings actions on the part of the CoC are required, since no voting items are to be placed before the CoC. In light of the same, the",,,,

instant application filed by the Applicant becomes infructuous and the outcome of this Application shall yield no value in the corporate insolvency,,,,

S. No.,Name,Companies,Appointment Date,Date of Cessation

1.,"Mr. Jagatbir

Singh Sandhu","1. Prius Commercial Projects Private

Limited",17.08.2016,30.10.2018

,,Dignity Buildcon Private Limited,17.08.2016,Present*

2.,"Mr. Sukhpinder

Singh Grewal","Prius Commercial Projects Private

Limited",17.08.2016,19.02.2019

,,Dignity Buildcon Private Limited,17.08.2016,27.10.2018

(iii) Mrs. Shabnam Dhillon held a majority stake of 84% shares in the Corporate Debtor.,,,,

(iv) In FY 2017-18 and FY 2018-19, when the Addendum was signed to make the above-mentioned Dignity Buildcon Loan as interest-free,",,,,

the Corporate Debtor and the applicant/Dignity Buildcon had two common directors.,,,,

16. The contention of Respondent is that the factual position stated above, per se is enough to hold that the applicant/Dignity Buildcon is a related",,,,

party of the CD. The respondent has relied upon the observation made by the Hon'ble NCLAT, while dealing with the issue of related party status, in",,,,

re Spade Financial Services Limited and Anr. Vs. Hari Krishan Sharma and Ors. (2019 SCC OnLine NCLAT 1266). For the sake of convenience,",,,,

the relevant portion of para 19 of the order is reproduced as follows; -,,,,

Section 5(24)(t) of I&B Code, 2016 provides that anybody corporate whose Board of Directors, Managing Director, in the ordinary",,,,

course of business, acts on the advice, directions or instructions of a Director, Partner or Manager of the Corporate Debtor.",,,,

Pertinently during the transaction period of 2010 to 2013, Spade Financial Services Private Limited under Mr. Arun Anand was making",,,,

substantial financial arrangements on behalf of AKKME Projects Limited by acting on the advice, directions or instructions of the Director",,,,

and Management of the AKKME Projects Limited, being Mr. Sonal Anand and Mr. Anil Anand, thereby clearly falling under the provisions",,,,

of Section 5(24)(t) of I&B Code, 2016.""",,,,

17. The Respondent while rebutting the arguments of the applicant has contended that the suggestion given by the Ld. Counsel for the,,,,

applicant/Dignity Buildcon during the oral submissions- that by virtue of 30% voting share it would have influenced the other members of the CoC, is",,,,

misconceived. In this regard, the Hon'ble Supreme Court of India, while dealing with the issue of fiduciary duty of CoC, in re Committee of Creditors",,,,

of Esser Steel India Limited Through Authorised Signatory Versus Satish Kumar Gupta &Ors., (2019 SCC OnLine SC 1478) has at para 125 held",,,, that:,,,,

The Committee of Creditors does not act In any fiduciary capacity to any group of creditors, as is sought to be suggested by Shri Sibal. On",,,,

the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including",,,,

dissentient creditors. It is important to note that the original threshold required by way of majority was 75%. It is during the working of the,,,,

Code that this was found to be unrealistic and therefore reduced to 66% - see the amendments made to Section 28(3) and 30(4) of the Code,,,,

by the Insolvency and Bankruptcy Code (Second Amendment) Act of 2018. For all these reasons therefore, it is not possible to accept Shri",,,,

Sibal's arguments.""",,,,

18. The Respondent further while giving rebuttal to the arguments of the applicant has submitted that Ld. Counsel for the applicant/Dignity Buildcon,,,,

during the oral arguments referred to decision of the Hon'ble NCLT, Mumbai Bench in re Royale Partners Investment Fund Limited Vs Mr. Mohan",,,,

La! Jain (Resolution Professional), which being of a coordinated bench, does not operate as a precedent for this Hon'ble Tribunal and further the",,,,

judgments referred to by the Ld. Counsel completely vary in facts and circumstances, in so much as the judgment deal with assignment of loans,",,,,

qualification under Section 29A and relevant time frame for the same.,,,,

19. The Respondent has also contended that the CoC, which comprises of Axis Bank Limited, State Bank of India, Punjab & Sindh Bank, Oriental",,,,

Bank of Commerce (amalgamated with Punjab National Bank w.e.f. 01 April 2020) and Phoenix ARC, after being satisfied with the contents of the",,,,

resolution plan, had approved the resolution plan submitted by the Successful Resolution Applicant with 100% voting shares on 20 August 2020 (date",,,,

on which voting was closed), and if it is to be assumed that had the Applicant/ Dignity Buildcon been part of the CoC, then in such hypothetical",,,,

situation also, the resolution plan which has been approved by 100% voting share, would have been approved by 70% voting share (more than the",,,,

requisite majority requirement threshold of 66%), since admittedly Dignity Buildcon's voting share would have been approximately 30%. In this",,,,

connection the respondent has relied upon ruling of the Hon'ble NCLAT. While dealing with a similar issue, the Hon'ble NCLAT in re K Bharathi Vs.",,,, Kotak Mahindra Bank Limited and Ors. (2019 SCC OnLine NCLAT 1213) has at para 18 held as under:,,,,

while we are not deliberating the issue whether the Appellant is a 'Financial Creditor' of the Corporate Debtor or not, we are of the view",,,,

that the `Kotak Mahindra Bank Limited' having more than 65% votingshare, it makes no difference whether Appellant should be made a",,,,

member of the 'Committee of Creditors'.""",,,,

20. The Respondent has also relied upon the IBBI's circular dated 14 September 2018, which provides that inclusion of a financial creditor in the CoC",,,,

as a member subsequent to constitution of the CoC does not affect the validity of any decision taken by the CoC prior to such inclusion. Accordingly,",,,,

in the instant case, since the resolution plan of the Successful Resolution Applicant has already been voted and approved by the CoC members with",,,,

100% voting share, prior to Dignity Buildcon's application IA 1828 of 2020 being heard and decided, hypothetical inclusion of Dignity Buildcon in the",,,,

CoC will not affect the approval of the resolution plan.,,,,

21. It is elucidated by the Respondent that in the same hypothetical situation, had the applicant/Dignity Buildcon dissented to the Resolution Plan",,,,

(which has been approved by the CoC members with 100% voting share), then as per the Liquidation Value finalised by the Valuers appointed in the",,,,

process, the liquidation value due to the applicant/Dignity Buildcon (as part of pool unsecured financial creditors) would have been approximately Rs.",,,,

8.62 Crores, as compared to Rs. 14.33 Crores proposed for the applicant/ under the Resolution Plan approved by the CoC with 100% voting share.",,,,

22. The interpretation of the provisions of Section 21(2) r.w. the definition of 'Related Party' given in Section 5(24) of the IBC given by the Ld.,,,,

Counsel for the Applicant/Dignity Buildcon does not appear to be in line with the intent of the Legislature for the reasons that unless the overall,,,,

circumstances are taken into consideration to check the status of Financial Creditor falling with in the purview of first proviso to Sub-section (2) for,,,,

being 'Related Party', no just conclusion can be drawn. It is due to the past transactions, the liabilities of the CD remain continuing and the FC other",,,,

than those stated in second proviso to sub-section(2) of Section,,,,

21 of the IBC, if permitted to be the part of COO, it can influence the decisions of the COO. The business relations of an entity with such FC could be",,,,

interwoven, like the present case, as detailed in Para No.16 herein above, which clearly demonstrate that the applicant/Dignity Buildcon is related",,,,

party of the CD. The assertion of the Respondent with regard to the status of the Dignity Buildcon being related party of CD is held to be justified in,,,,

the facts and circumstances of the case.,,,,

23. Besides the above, the Resolution Plan has already been approved by the COO with 100% voting share and even if assuming that the applicant",,,,

being part of the COC with 30% voting share dissented, the plan would been approved with more than requisite majority of voting share. Moreover,",,,,

the applicant/Dignity Buildcon would get more than that which it would have got being dissenting Financial Creditor in the event of liquidation of the,,,,

CD. In short, no prejudice has caused to the Applicant/Dignity Buildcon. Therefore, this Authority agrees with the factual and legal position stated by",,,,

the Respondent and rejects the application of Dignity Buildcon being devoid of merits.,,,,

24. The order is pronounced through video conferencing.,,,,

