
(2020) 12 NCLT CK 0184

In the National Company Law Tribunal

Case No : Interlocutory Appeal No. 1148 Of 2020 In Company Petition No. 2995/
I&B/MB Of 2019

G.S. Constro & Infra Pvt. Ltd. And Others

APPELLANT

Vs

Small Industrial Development Bank Of India And Others

RESPONDENT

Date of Decision : 03-12-2020

Acts Referred:

Companies Act, 2013 — Section 96, 161, 161(1), 185, 186
Insolvency And Bankruptcy Code, 2016 — Section 5(h), 5(8), 5(24), 5(24)(a), 5(24)(d), 5(24)(j), 5(24)(m), 5(24)(m)(i), 7, 21(2), 25(2)(d)

Citation : (2020) 12 NCLT CK 0184

Hon'ble Judges : Suchitra Kanuparthi, J;Chandra Bhan Singh, Member
(Technical)

Bench : Division Bench

Advocate : Rohan Rajyadhaksha, Rahul D. Oak, Siddhesh Shetye, Ayush J. Rajani, Shavez Mukri, Ajit Singh Tawar, Priyank Kapadia, Mahajan Sameer

Final Decision : Dismissed

Judgement

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 update 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 consider 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 of 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:

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.

Contentions of the Respondent No. 2:

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 â??Suspended Directorsâ?? and on the other hand, they are claiming to be

treated as â??Financial Creditorsâ?? 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 inter se show that the issue is

more of â??oppression and mismanagementâ??.

Contentions of the Respondent No. 5:

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.

Contentions of the Respondent No. 6:

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 â??related partyâ?? 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 of 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 â??related partyâ??.

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 â??related partyâ?? as per Section 5(24)(a) of the Code.

Findings:

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

parts:

a. That the Applicants's 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 monthsâ?? 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 â??Admissionâ? 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. â??â?|.. 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.â??

b. â??The Applicants are in possession of the Corporate Debtor and looking after all the expenses of the day to day â?|â?|â?.

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 â??Admissionâ?? 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;

.
. .

(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:

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:

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 Applicantsâ?? claim that Rs. 1.6 cores should be considered as

a â??financial debtâ? 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 â??return of allotmentâ? 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:

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

â??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.â?. 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 â??financial debtâ? or as a payment towards â??take-

overâ?? 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 â??financial debtâ? 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.