(2021) 08 NCLT CK 0041

In the National Company Law Tribunal

Case No : C.P. (IB) - 1139/MB/2020

Mrs. Sandhya Dinesh Sancheti APPELLANT

Vs

Trimurti Foodtech Private Limited RESPONDENT

Date of Decision : 11-08-2021

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 3(12), 4, 5(8), 7, 9, 13, 14, 15, 18, 31, 75
Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 — Rule 4
Companies Act, 2013 — Section 161

Citation : (2021) 08 NCLT CK 0041

Hon'ble Judges : Suchitra Kanuparthi, Member (J);Chandra Bhan Singh, Member (T)

Bench : Division Bench

Advocate : Arshil Shah, Harsh Kesharia

Final Decision : Allowed

Judgement

,

Chandra Bhan Singh, Member (Technical)",

1. Mrs. Sandhya Dinesh Sancheti (hereinafter called as â??Petitioner No. 1â??), Mr. Amesh Ajitkumar Daga (hereinafter called as â??Petitioner No.",

2â??), Mr. Nemichand Balaram Khinvasara (hereinafter called as â??Petitioner No. 3â??) and Mr. Shashikant Zumbarlal Katariya (hereinafter",

called as â??Petitioner No. 4â??) have sought the Corporate Insolvency Resolution Process against Trimurti Foodtech Private Limited (hereinafter,

called as â??Corporate Debtorâ??) on the ground that the Corporate Debtor committed default to the extent of Rs. 20,98,78,265/- as provided under",

Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called as the â??

Codeâ??) read with Rule 4 of the Insolvency and Bankruptcy",

(Application to Adjudicating Authority) Rules, 2016.",

Contentions of the Petitioner:,

2. The Counsel for the Petitioners submits that the Corporate Debtor had been in the business of food products and its export thereof. During July,",

2018, husband of the Petitioner No. 1 and father of the Petitioner No. 2 happened to meet with Mr. Atul Banginwar who is one of the Director of the",

Corporate Debtor Company. In this meeting, Mr. Atul Banginwar offered to carry out some business with the Petitioners as the Corporate Debtor",

Company was financially in bad shape to streamline their business. At this meeting, a proposal was offered to the Petitioners that if some financial",

support is extended from Petitioner No.s 1 to 4 then a business synergy can be built for the mutual benefits of both the Corporate Debtor and the,

Petitioners.,

3. After a series of discussions, the Petitioner No.s 1 & 2 got convinced to put a fund of approximately Rs. 50,00,000/- to restart the plant and get the",

factory running. Accordingly, the Petitioner No.s 1 & 2 agreed to contribute sum of Rs. 25,00,000/- each to the Corporate Debtor to restart the",

factory.,

4. The Counsel for the Petitioners further submits that during August 2018, the Corporate Debtor was struggling to settle the dues of State Bank of",

India which stood at an amount of Rs. 16,89,29,237/-. The State Bank of India then offered to the Corporate Debtor to settle its dues for an amount of",

Rs. 11,77,13,152/- as One Time Settlement to be paid within four months of the sanction. Thereafter, the Directors of the Corporate Debtor",

approached the Petitioners again to capitalize on the opportunity of One Time Settlement offered by the State Bank of India and to bail out the,

Corporate Debtor this time also but the Petitioner No.s 1 & 2 showed their helplessness in paying off such a big amount and therefore, the Petitioner",

No.s 3 & 4 were introduced by the Petitioner No.s 1 & 2 to honor the terms of One Time Settlement offered by the State Bank of India.,

5. The Counsel for the Petitioners further submits that the Corporate Debtor through its Directors entered into Memorandum of Understanding dated,

28.11.2018 with Petitioner No. 1 to 4 to offer 60% of shareholding in the Corporate Debtor Company to Petitioner No.s 1 to 4 in exchange of the, Petitioners helping the Corporate Debtor to honor the terms of One Time Settlement (OTS). The parties then again entered into a Memorandum of,

Understanding dated 28.11.2018 to declare the fixed assets of the machineries of the Corporate Debtor and certain checks and balances to be in place,

in order to have a revised shareholding of Mr. Atul Dattatray Banginwar as 40% and Petitioner No.s 1 to 4 to hold shares of 15% each.,

6. The Petitioners, in addition to the payment for the purpose of OTS with the State Bank of India, continued to bear other expenses and employ funds",

for the Corporate Debtor Company under the good faith. In place of all the prior understanding, the Petitioners and the Corporate Debtor entered into",

an Investment Agreement dated 18.05.2019. As per Clause 2 of this Agreement, the stipulated six months for the purpose of issue of shares expired",

on 17.11.2019. As per Clause 9 of the said Agreement, on failure of the Corporate Debtor to issue shares by the date of 17.11.2019, the Petitioners",

are entitled to refund of the entire amount of payment along with interest at the rate of 18% p.a.,

7. Further, the Petitioners had joined the Corporate Debtor Company by way of appointment as an Additional Director with effect from 28.11.2018 to",

assure that their invested money remains safe. But, the term of the Additional Director for all the four Petitioners came to an end on 30.09.2019 as",

per Section 161 of the Companies Act, 2013 (i.e. the date on which Annual General meeting of the Company should have been held).",

8. The Counsel for the Petitioners further submits that even one of the Operational Creditor had initiated the CIRP under Section 9 of the Code,

against the Corporate Debtor and again, the Petitioner No. 3 helped the Corporate Debtor in making settlement with the said Operational Creditor by",

making payment to the Corporate Debtor of an amount of Rs. 14,46,496/-. A summary of the total default amount by the Corporate Debtor is as",

below:,

9. In spite of all the support and financial help by the Petitioners, the Corporate Debtor and its Director had reneged from their promise and failed to",

repay the outstanding. The Petitioners have also lost all their control in the Corporate Debtor Company even though they had invested heavily in the,

Corporate Debtor. The Petitioners have also sent Notices of Return on 16.06.2020 to the Corporate Debtor for the default that took place on, 17.11.2019. The Record of Default was also submitted with Information Utility (National e-governance Services Ltd.) by all the Petitioners. The acts,

of the Corporate Debtor were in gross aberration with the stipulations of the Investment Agreement and thus, the Petitioners filed the present Petition",

against the Corporate Debtor.,

Contentions of the Corporate Debtor:,

10. The Counsel for the Corporate Debtor submits that the present Petition is not maintainable and ought to be dismissed. The Petitioners have,

included purported claims of eight other entities who are their relatives beside the claims of themselves in the total default amount despite the fact that,

the relatives were neither privy to the Memorandum of Understanding nor to the Investment Agreement. It is submitted that the Petitioners have,

acted as agents of the above said eight other entities to allege the default of Rs. 20,98,78,265/- purported to have been committed by the Corporate",

Debtor and therefore, the amount alleged to be defaulted by the Corporate Debtor does not fall within the purview of â??Financial Debtâ?? as",

defined under Section 5(8) of the Code. Thus, the present Petition deserve to be dismissed on account of suppression of the above said facts by the",

Petitioners. The relatives of the Petitioners whose computation of default has been included in the present Company Petition are as under:,

11. The Counsel for the Corporate Debtor further submits that the Petitioners were included as Authorised Signatories to the current Bank Accounts,

of the Corporate Debtor and the same is been continued till date as per Memorandum of Understanding dated 28.11.2018. Also, the Petitioners were",

appointed as Additional Directors of the Corporate Debtor w.e.f. 28.11.2018. Their appointments as Additional Directors were in compliance of the,

two Memorandum of Understandings dated 28.11.2018 and therefore, the Petitioners can not claim that the Investment Agreement was in",

supersession and substitution of earlier Agreements.,

12. The Counsel for the Corporate Debtor submits that the Petitioners had agreed to invest a sum of Rs. 15.90 Crores in the Corporate Debtor and,

upon receipt of investment of Rs. 15.90 Crores, the Corporate Debtor was bound to allot shares to the Petitioners after completion of the valuation",

process of the Corporate Debtor by the Registered Valuers. It is submitted that the Valuers were appointed by the Petitioners, however, the Valuation", Report was never received by the Corporate Debtor. The Petitioners were in majority of Board of Directors of the Corporate Debtor, but still they did",

not take make any efforts to allot themselves equity shares of the Corporate Debtor even after having invested in the Corporate Debtor for the sole,

purpose of acquiring equity share capital.,

13. The Counsel for the Corporate Debtor submits that the Petitioners shall be able to levy interest at the rate of 18% p.a. upon the Corporate Debtor,

only after termination of the agreement as per the Investment Agreement. However, no notice of termination had been issued to the Corporate",

Debtor. So, the act of the Petitioners to impose an interest of 18% p.a. is completely arbitrary.",

14. It is submitted that the submission of the Petitioners that they vacated their office as Additional Directors of the Corporate Debtor w.e.f.,

30.09.2019 is a false statement. Instead, the Petitioners have attended the Meeting of Committee of Creditors of the Corporate Debtor dated",

08.02.2020 as Directors. Also, the Petitioners uploaded Form DIR-11 with the Registrar of Companies w.e.f. 25.06.2019. Therefore, the resignation",

of the Petitioners is a complete after thought as in the present Petition, the Petitioners have stated their directorship ceased w.e.f. 30.09.2019.",

15. The Counsel for the Corporate Debtor submits that as per Clause 7.3(b), i.e., Review of Management of the Investment Agreement dated",

18.05.2019, the Petitioners had all rights to review the management of the Corporate Debtor, however, the Petitioners have deliberately failed to avail",

the said option. The Petitioners invested in the Corporate Debtor, however, their investment failed as they could not manage the affairs of the",

Corporate Debtor in a fair and prudent manner which lead to huge losses and hence, the investment in the Corporate Debtor was eroded.",

16. The Counsel for the Corporate Debtor further submits that the Petitioners had purportedly invested sums in the Corporate Debtor prior to,

Investment Agreement dated 18.05.2019 as financial debts and claimed the date of default as 17.11.2019. It is submitted that if the Petitioners were,

so prudent and aware about the default on 17.11.2019 then why they would continue investing in the Company after the date of default till March-,

April 2020. Also, the Bank Statements annex to the Petition are only bank Statements of the Petitioners and their relatives. There are no ledger", accounts of the Petitioners annexed to the Petition. In the circumstances mentioned above, the Counsel for the Corporate Debtor submits to reject the",

Petition with heavy costs and punish the Petitioners under Section 75 of the Code for omitting vital and important facts related to the present Petition.,

Findings:,

17. This Petition CP No. 1139 of 2020 has been filed by Mrs. Sandhya Dinesh Sancheti, Petitioner, against Trimurthi Foodtech Private Limited, the",

Corporate Debtor, on 25.06.2020 under Section 7 of IBC, 2016. This Petition has been filed by four Petitioners viz, Mrs. Sandya Dinesh Sancheti",

(Petitioner No. 1), Mr. Amesh Ajitkumar Daga (Petitioner No. 2), Mr. Nemichancd Balaram Khinvasara (Petitioner No. 3) and Mr. Shashikant",

Zumbarlal Katariya (Petitioner No. 4). As per the Petition, the total amount of debt consequent to a default as on 31.05.2020 is Rs. 20,98,78,265/-.",

18. The Corporate Debtor company is controlled by two shareholders namely Mr. Atul Dattatraya Banginwar (DIN No. 01054858) and Mr. Pradeep,

Dattatraya Banginwar (DIN No. 01283850), who together hold about 70% of the shareholding whereas the remaining about 30% is held by their close",

relatives.,

Debt Information,

Type of Debt,Financial

Debt Reference No.,18052019

Creditor Location,Pune

Debt Contract Date,18-05-2019

Debt Start Date,18-05-2019

Debt Currency,INR

Sanctioned Debt

Amount","4,68,33,290.00

Tenure,Six months

Facility Name,"InvestmentÂ agreementÂ withÂ LoanÂ

and

expenses

Total Outstanding

Amount","4,68,33,290.00

Amount Overdue,"4,68,33,290.00

Days past due (DPD),215

Account closed Flag,No

Rate of Interest,18

Old Debt Reference

No.",28.11.2018

Repayment frequency,Others

Lending arrangement,Others

Sanction currency,INR

Sub type- Debt,Credit facility

Funded type,Funded

Drawing Power,"4,68,33,290.00

Principal

Outstanding","3,62,91,599.00

Interest Outstanding,"1,05,41,691.00

27. Therefore, it is clear that well before passing of 6 months of the Investment Agreement, the Petitioners were not on the Board of the Corporate",

Debtor Company and they had tendered their resignation which was duly accepted by the MD of the Corporate Debtor Company. The Petitioners had,

also filed Form DIR- 11 with the Registrar of Companies, Mumbai stating therein that they have resigned as Directors of the Corporate Debtor w.e.f.",

25.06.2019. Form DIR-11 of one of the Directors is reproduced below:,

Â,

Â,

28. The Corporate Debtor contended that the Petitioners, despite being in control and majority in Board of Directors of the Corporate Debtor",

Company, did not allot shares to themselves. The Bench notes that the Corporate Debtor never allowed the valuation of the Company to take place as",

is evident from their Reply dated 15.07.2020 to the Notice of Return, i.e., Recall Notice dated 16.06.2020. In Reply to the Notice of Return, i.e., Reply",

to the Recall Notice, the Corporate Debtor clearly mentioned that the Corporate

Debtor Company did not got the valuation done because an amount",

of Rs. 15.90 Crores were not paid to the Corporate Debtor. The relevant paragraphs of the Reply dated 15.07.2020 to the Notice of Return dated,

16.06.2020 are extracted below:,

Â â??4. (iii) As per Clause 2 of the said Agreement, the Company was bound to either issue equity shares to the Investors or return the said Investment amount",

within a period of six months, provided the Investors had invested the agreed sum of Rs. 15.90 crores with the Company. However, the Investors have invested the",

said sum of Rs. 15.90 crores only by April/May 2020. However, the Investors have not brought/ raised the balance funds as per the MOU.",

(iv) Further, despite the Investors not investing the agreed sum of Rs. 15.90 crores with the Company upon execution of the Agreement, there was no question of",

conducting the valuation of the company under any circumstances. It is pertinent to note that the Company has never retracted from issuing equity shares to the,

Investors and the Company shall issue the equity shares to the Investors against their investment in the Company upon the easing out of the lockdown due to,

COVID-19.,

â?¦,

6. (ii) With reference to unnumbered Second Paragraph, the Company denies that the Company did not take any efforts to issue the equity shares. It is further",

denied that the Company did not take any efforts to return the amount of the received Investment. The Company states that it has received the Investment amount,

from the Investors upto April/May 2020 and due to the ongoing COVID-19 pandemic, the Company has been unable to carry out its valuation. It is repeated that",

the valuation of the Company could not be carried out due to non-receipt of the Investment amount as per MOU dated 28-11-18 by the Company. It is submitted,

that the Company shall issue its Equity Shares as and when its valuation is conducted.â??,

29. The Bench notes that in the given scenario, it was the Corporate Debtor who did not allow the valuation of the shares to happen and therefore,",

saw to it that the shares do not get transferred within 6 monthsâ?? time. The Corporate Debtor's contention that valuation was to happen only after,

the payment of Rs. 15.9 Crores by the Petitioner is incorrect because as per Clause 3 of the Investment Agreement, it was agreed between the",

parties that the Corporate Debtor will allot equity shares to the Petitioners within one week from the date of the completion of the valuation process,

which the Corporate Debtor never allowed to happen. Therefore, the contentions of the Corporate Debtor that the Petitioners necessarily have to pay",

the full amount to the Corporate Debtor beforehand is not justified.,

30. The Petitioners have mentioned in their Petition that they have continuously helped the Corporate Debtor which is also evident from the fact that,

the Petitioners have helped the Corporate Debtor in making the settlement with another Operational Creditor which resulted in the withdrawal of the,

CIRP of the Corporate Debtor in relation to Section 9 Petition in early 2020, i.e., much before the Petitioner herein filed CIRP proceeding against the",

Corporate Debtor itself. One of the grounds taken in defence by the Corporate Debtor is that in the earlier CIRP under Section 9, the Petitioners",

participated in the Committee of Creditors (COC) as the Ex-Directors of the Corporate Debtor. Letâ??s assume for the sake of argument that the,

Petitioners were in the control of the Board of Directors of the Corporate Debtor, i.e., the Petitioners, if not de jure then de facto, were in control of",

the Corporate Debtor Company. However, even then the fact remains that the Petitioners would have the right and would be eligible to file for CIRP",

against the Corporate Debtor as a â??Related Partyâ? for the payment of the amount invested by the Petitioners. Just the fact that the Petitioners,

were the Ex-Directors of the Corporate Debtor, do not take away their right to claim for their outstanding amount payable by the Corporate Debtor to",

them.,

31. Considering the above facts, we come to conclusion that the nature of debt herein is a â??Financial Debtâ? as defined under Section 5(8) of the",

Code. It has also been established that there is a â??Defaultâ? as defined under Section 3(12) of the Code on the part of the Corporate Debtor. The,

two essential qualifications, i.e., existence of â??debtâ?? and â??defaultâ??, for admission of a Petition under Section 7 of the I&B Code, have been",

met in this case. Besides, the Company Petition is well within the period of limitation.",

32. As a consequence, keeping the aforesaid facts in mind, it is found that the Petitioner has not received the outstanding debt from the Corporate",

Debtor and that the formalities as prescribed under the Code have been completed by the Petitioner, we are of the conscientious view that this",

Petition deserves â??Admissionâ??.,

33. Further that, we have also perused the Form â?" 2, i.e., written consent of the proposed Interim Resolution Professional submitted along with this",

Petition by the Petitioner and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim,

Resolution Professional. The IRP proposed by the Petitioner, Mr. Manoj Kumar Mishra, having registration No. IBBI/IPA-001/IP-P01152/2018-",

19/11902, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.",

34. Having admitted the Petition/Application, the provisions of Moratorium as prescribed under Section 14 of the Code shall be operative henceforth",

with effect from the date of order, and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of",

the assets of the Corporate Debtor etc. However, the supply of essential goods or services to the â??Corporate Debtorâ? shall not be terminated",

during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan,

prescribed under Section 31 of the Code.,

35. That as prescribed under Section 13 of the Code, on declaration of Moratorium, the next step of Public Announcement of the Initiation of",

Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment.,

36. That the Interim Resolution Professional shall perform the duties as assigned under Section 18 and Section 15 of the Code and inform the progress,

of the Resolution Process and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an,

early date, if need be.",

37. In view of the above, the Bench â??Allowsâ?? the Company Petition No. CP (IB)/1139/MB/2020 under Section 7 of the Code initiating CIRP",

against the Corporate Debtor, i.e., Trimurti Foodtech Private Limited. The commencement of the Corporate Insolvency Resolution Process shall be", effective from the date of the Order.,

38. Ordered Accordingly.,

