(2021) 09 NCLT CK 0049

In the National Company Law Tribunal

Case No : MA No. 3545 of 2019 In CP No. 2285/MB/C-II/2018

Phoenix ARC Private Limited APPELLANT

Vs

Deegee Cotsyn Private Limited RESPONDENT

Date of Decision : 23-09-2021

Acts Referred:
Insolvency and Bankruptcy Code, 2016 — Section 18, 60(5)

Citation : (2021) 09 NCLT CK 0049

Hon'ble Judges : Ashok Kumar Borah, Member (J);Shyam Babu Gautam, Member (J)

Bench : Division Bench

Advocate : Zaid Mansuri, Manaswi Agrawal

Final Decision : Disposed Of

Judgement

Shyam Babu Gautam, Member (Technical)

1. This is an Application by IDBI Bank Limited, Applicant (hereinafter referred to as the Applicant) Under Section 60 (5) of Insolvency and Bankruptcy Code, 2016 seeking direction against the Resolution Professional of the Corporate Debtor for admission of claim as per the FORM C and to update the Committee of Creditors voting share ratio after admitting the claim of the Applicant.

Applicant sought following prayers vide this Application:

a. That this Hon'ble Adjudicating Authority direct the Respondent that the claim of the Applicant as per the FORM C dated 12th September 2019 be admitted by the Respondent;

b. That this Hon'ble Adjudicating Authority direct the Respondent to Stop the E - Voting scheduled on November 04, 2019 (Monday) at 4:00 PM till November 08, 2019 (Friday) at 4:00 PM and initiate the laiddown process after admitting aforesaid claim of the Applicant;

c. That the Respondent be direct to update the Committee of Creditors voting share ratio after admitting the claim of the Applicant;

d. For cost;

e. For such other and further reliefs as the Hon'ble Adjudicating Authority may deem fit.

SUBMISSIONS ON BEHALF OF APPLICANT:

2. The Applicant states that captioned company petition was filed by the Financial Creditor against the Corporate Debtor for initiation of Corporate Insolvency Resolution Process ("CIRP"). The Captioned petition was admitted by this Adjudicating Authority on 26th February 2019 and CIRP was initiated.

3. The applicant states that the Applicant had sanctioned various credit facilities aggregating Rs. 35 Crore, out of which Cash Credit Facility was for Rs. 20 Crores, Term Loan for Rs. 14 Crores and Bank Guarantee for Rs. 1 Crore to M/s. Deegee Orchads Private Limited vide Sanction letter dated 12th December 2009. The applicant states that to avail these facilities the Corporate Debtor herein provided Corporate Guarantee to secure the loan facilities vide Corporate Guarantee agreement dated 22nd January 2010. A copy of the Sanction Letter dated 09th December 2009 annexed as "Exhibit - 2" to the Application and "Exhibit - 3" is a copy of the Corporate Guarantee dated 22nd January 2010, annexed to the Application.

4. The Applicant states that the non-fund based facilities are form of credit facilities under the banking regulations and upon invocation the amount paid to the beneficiary is debited to the account of the borrower and therefore becomes a debt which is confirmed in the security documents and covered under the definition of Financial Creditor under the Insolvency and Bankruptcy Code, 2016.

5. The Applicant further states that the above mentioned facilities were further renewed vide Sanction letter dated 23rd March 2011 and 6th July 2012, the Application states that Cash Credit of Rs. 20 Crores and Bank Guarantee of 1 crore were renewed documents in this regard were issued and terms and conditions were accepted by Corporate Debtor herein by submitting resolution dated 5th July 2012 and acceptance to sanction letter dated 6th July 2012, A Copy of accepted sanction letter dated 23rd March 2011 is annexed and marked as "Exhibit - 4" and "Exhibit - 5" copy of the accepted sanction letter dated 6th July 2012 and "Exhibit - 6" is a copy resolution of Corporate Debtor dated 5th July 2012.

6. The Applicant states that the applicant invoked the Corporate Guarantee dated 22nd January 2010 vide letter dated 10th July 2014, as the principal borrower failed to make payments as per the sanctioned terms and calling upon the Corporate Guarantor for the outstanding dues of the principal borrower. A Copy of the letter dated 10th July 2014 invoking the Corporate Guarantee is annexed and marked as "Exhibit - 7".

7. The Applicant states that the Applicant pursuant to the Public Announcement made by the Resolution Professional submitted its revised proof of claim in Form C of the IBC before the Resolution Professional on 12th September 2019 claiming a total sum of Rs.61,41,79,589.59/- (Rupees Sixty-One Crore Forty-One Lakh Seventy Nine Thousand Five Hundred Eighty Nine Fifty Nine Paisa Only) as on 26th February 2019. A Copy of the Form C submitted before the Resolution Professional is annexed and marked as "Exhibit - 8" to the Application.

8. The Applicant states that the Resolution Professional vide email dated 14th October 2019 has rejected the part claim of the Applicant herein. The Resolution Professional provisionally admitted a claim of Rs. 47.33/- Crore and rejected the part of the claim on the grounds that consent of existing lenders was not obtained and therefore the Corporate Guarantee could not have been entered and executed, the Resolution Professional also rejected the claim on the grounds that there is no board resolution provided when the Applicant extended loans to Deegee Orchads Ltd ("Principal Borrower"). A copy of the email dated 14th October 2019 rejecting claim is annexed and marked as "Exhibit - 9".

9. The Applicant states that the Applicant vide letter dated 27th September 2019 addressed to Resolution Professional, has clarified, interalia that there is no legal requirement/practice as such for the Corporate Guarantor to obtain/submit prior written permission from its existing lenders to furnish a Corporate guarantee. Further, vide letter dated 25th October 2019 addressed to Resolution Professional, the Applicant has, interalia, informed that the Bank Guarantee and Cash Credit facility were renewed, the other facility being the term loan did not require renewal. Also informing the Board of Directors of the Corporate Debtor, Deegee Cotsyn Private Limited vide Board Resolution dated 19th September 2013 has acknowledged the execution of Guarantee Agreement dated 22nd January 2010 and vide revival letter dated 21st July 2012 and also confirmed the outstanding balance of term loan and cash credit in the accounts of Deegee Orchads Private Limited as on 30th June 2013. A copy of the Letter dated 27th September, 2019 and 25th October 2019 is annexed and marked as "Exhibit - 10(a) and 10(b)", a copy of the Board Resolution dated 19th September 2013 is annexed and marked as "Exhibit - 11" and a copy of the Revival Letter dated 21st July 2012 is annexed and marked as "Exhibit -12" to the Application.

10. The Applicant states that the Resolution Professional has arbitrarily rejected the part claim of the Applicant, the Applicant states that the Respondent does not have jurisdiction to determine the claim of the Applicant herein. The duty of the Respondent is to collate the claim as filed by the Applicant/Financial Creditor. Under Section 18 of the Insolvency and Bankruptcy Code, 2016 the duty of the Resolution Professional is to receive and collate all the claims submitted by Creditors.

11. The Applicant states that is has filed its revised claim before the Respondent which needs to be immediately admitted by the Respondent and updated the voting share of the Committee of Creditors.

12. The Applicant further states that in the adjourned 8th Committee of Creditors held on 1st November 2019, it was decided to finalise the Resolution plan submitted by resolution applicant. Also it was proposed to do E - voting for CoC members. The E - voting window was to be opened on November 04, 2019 (Monday) at 4:00 PM till November 08, 2019 (Friday) at 4:00 PM.

SUBMISSIONS MADE BY WAY OF AFFIDAVIT IN REPLY BY RESPONDENT/RP

13. Pursuant to public announcement made in addition to other proof of claims received, he received a proof of claim dated 07.08.2019 from IDBI Bank i.e. only after 155 days of the initiation of Corporate Insolvency and Resolution Process for an amount of Rs.65,59,66,435.12/- (Rupees Sixty-Five Crore Fifty-Nine Lakh Sixty-Six Thousand Four Hundred Thirty-Five Twelve Paisa Only). Having regard to the fact that the said claimant is a PSU Bank, the Respondent/RP did not raise any objections for such delayed filings.

14. Subsequently, series of emails were exchanged between the Applicant and Respondent RP seeking additional information/workings and computations with regard to the said claim.

15. During the course of verification, the Applicant once again filed a revised Form C dated 12.09.2019 i.e. on the 191st day of Corporate Insolvency and Resolution Process (beginning from 05.03.2019).

16. The Respondent further states that it is pertinent to note that the Applicant had over a verbal communication informed the Respondent / RP within the first 30 days of initiation of Corporate Insolvency and Resolution Process that they have an exposure and would file a claim shortly, which was eventually received on the 155th day. The Respondent/ RP diligently and promptly updated the CoC members about the said exposure and has also noted that the Corporate Guarantee was given by the Corporate Debtor to IDBI Bank to the tune of Rs. 26.74 Crores, in the minutes of the 1st CoC meeting held on 03.04.2019.

17. The Respondent states that the Applicant was included as part of the CoC in the 7th CoC meeting held on 17.10.2019 wherein the Applicant i.e. IDBI Bank was allotted the highest voting share of 32.46% (erroneously computed as 33.54% - this has been clarified in the 8th CoC meeting held on 24.10.2019) based on the admitted claim of Rs.47,33,11,572/- out of the amount claimed Rs. 61,41,79,590/-(Rupees Sixty-One Crore Forty-One Lakh Seventy-Nine Thousand Five Hundred Ninty Only).

18. The Respondent submits that the Applicant itself agreed that it does not have any Board Resolution passed by the Corporate Debtor of Rs. 35 Crores on behalf of the Principal Borrower i.e. Deegee Orchards Private Limited. In fact, the last available Board Resolution on the subject is dated 05.07.2012 wherein Corporate Guarantee of only Rs. 21 Crores has been approved by the Corporate Guarantor. Hence, the claim has been admitted based on the available information, having regard to the provisions of Regulation 14 of the IBBI (Insolvency Resolution

Process for Corporate Persons) Regulations, 2016.

19. Further Respondent states that Applicant has attached certain sanction letters and related documents but fails to place crucial documents before this Bench with regard to the fact that other financial creditors which are also PSU Banks having secured charge over the assets of the Corporate Debtor have refuted the claim made by the Applicant in respect to the Corporate Guarantee allegedly executed by the Corporate Debtor. The lenders have also stated that no prior permission of the Consortium lenders was taken by the Corporate Debtor prior to executing the alleged Corporate Guarantee inspite of the terms and conditions as per the sanction letter dated 24.08.2007, inter alia restricted the Corporate Debtor to "undertake guarantee obligations on behalf of any other company, firm or person" and hence, the said corporate guarantee ought to be treated as void ab initio.

20. The Respondent states that the Applicant is referring to the letter dated 10.07.2014 invoking the corporate Guarantee and claiming Rs. 30,49,24,849/- as of that date. The Applicant has not placed on record the objections raised by other Financial Creditors.

a) Letter dated 02.08.2014 addressed by Union Bank to IDBI Bank.

b) Letter dated 14.07.2014 addressed by Canara Bank to IDBI Bank.

c) Letter dated 02.07.2014 addressed by Oriental Bank of Commerce to IDBI Bank.

All the above mentioned banks have raised concerns over invocation of Bank Guarantee in absence of permission from existing consortium lenders.

21. The respondent further submitted that the Applicant has filed a revised claim on 12.09.2019 for an amount of Rs. 61.41 crores but has conveniently left out to mention the following facts: -

a) All the objection letters which were issued by other consortium lenders in the year 2014, against the IDBI's invocation of Corporate Guarantee letters dated 10.07.2014, which are now placed on record by the Respondent RP.

b) The said claim was first filed only after 155 days of Corporate Insolvency and Resolution Process which the revised claim was filed on 191st day of Corporate Insolvency and Resolution Process, still the RP, having regard to the relevant CIRP Regulations, has treated the Applicant as a CoC member and infact the Applicant already enjoys the maximum voting share compared to other secured Financial Creditors i.e. 32.46% which is higher than all other lenders.

22. The Respondent states that the Applicant is trying to escape from a stringent requirement of seeking NOCs from the existing lenders of the Corporate Debtor, before accepting any such Corporate Guarantee moreover. Secondly, it is interesting to note that a Bank of such repute, accepts a Board Resolution dated 19.09.2013 for ratifying a Corporate Guarantee Agreement dated 22.01.2010.

Moreover, in view of the Respondent / RP there is no such official record as per the secretarial records of the Corporate Debtor. A search was also conducted on the RoC website to verify the same and it was found that no such Board Resolution was uploaded. This is nothing else but a complete disregard of need to have material and critical documents in place and non-adherence of statutory requirements.

23. The Respondent further states that the Applicant was also a part of the CoC member and had a right for e-voting, which the Applicant has very well exercised and was only Financial Creditor to vote "against" the Resolution Plan, which otherwise has received favourable votes in excess of the threshold of 66% of the total voting share. Moreover, the Resolution Plan itself had proposed a payment of 71 lacs to the Applicant. Hence the Applicant was no way prejudiced from its right to be a party of the Resolution Plan.

24. We have perused the records, it is observed that the Applicant is conveniently trying to escape from the onus of proving its claim rather than expecting the Respondent / RP to the same without any application of mind, which is a clear mis-interpretation of the provisions of Section 18 of the Code. The RP is duty bound to apply his mind while collating and verifying the information to justify the claim and where the said claim is not supported with documentary evidences, the RP ought to refrain from admitting such claims. The Applicant fails to appreciate that an IRP/RP is not a mere rubber stamp to keep admitting claims without any verifications. Form the facts of the case it is clear that RP has conscientiously reached at conclusion not admitting partial claim of the Respondent which was not supported by documents. Therefore, we are not inclined to allow this application, hence the same is rejected.

25. With the above observations and directions MA 3545 of 2019 In CP No. 2285 of 2018 is disposed of as rejected.

26. In this matter Original Petitioner i.e. Phoenix ARC Private Limited filed IA 518 of 2021 for rejection of MA 3545 of 2019, In the lights of above observations nothing survives in IA 518 of 2021. Hence the same is also disposed of.