**(2020) 07 NCLT CK 0069**

**In the National Company Law Tribunal**

**Case No :** Interlocutory Appeal No. 752 Of 2019 In Company Petition (I.B.) No. 178/Nclt/Ahm Of 2018

Piyush Patel APPELLANT

Vs

Sunil Kumar Agarwal (Irp) And Ors RESPONDENT

**Date of Decision :** 10-07-2020

**Acts Referred:**
Insolvency And Bankruptcy Code, 2016 — Section 5(8), 7, 9, 10, 12(A), 60(5)
Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 — Regulation 30(A)(4), 30(A)(5)

**Citation :** (2020) 07 NCLT CK 0069

**Hon'ble Judges :** Manorama Kumari, J

**Bench :** Single Bench

**Advocate :** Dhiren Dave, Pratik Thakkar, Vishal Dave, Vishal Raval

**Final Decision :** Allowed

# Judgement

Manorama Kumari, J

(Through video conferencing)

1) The instant application is filed by the Applicant, Mr. Piyush Patel, one of the Promoter of M/s. Shilpraj Developers Pvt. Ltd., under section 60(5) of the IB Code.

2) The fact of the case is that the application under section 9 of the IB Code was filed by the Respondent No. 3 of the instant application being Operational Creditor in C.P. (IB) No. 178/2018, which said application was admitted on 24.07.2019. Thereafter, IRP was appointed. During the pendency of CIRP, the instant application is filed on 19.11.2019 with the following prayers:

a. Interim Prayer

i. Stay be granted on the process of CIRP until outcome of this Application as practically there is no claim and Corporate Debtor has enough liquidity to pay the claim of original applicant. Number of days this IA remain pending be excluded from the threshold limits to conclude the CIRP.

b. Prayers

i. R-2- Mukesh Desai's claim as Financial Creditor as admitted by the R-1 be cancelled.

ii. On cancellation of claim of R-2 as Financial Creditor, COC constitution be declared as cancelled.

iii. R-3 being original applicant be paid from the current account of the Company having enough balance.

iv. No other creditor remains and CIRP commenced may be declared as stopped as there being no claim by creditors as R-3 only creditor is being paid and no grievance remains on their part.

v. Cost may be imposed on R-1 IRP for doing such acts against the code in conspiracy with R-2.

vi. R-1's action may be declared as suspicious and matter may please be referred to IBBI for necessary action.

vii. For costs

3) The Applicant (Corporate Debtor of C.P. (I.B) No. 178/2018) submitted that IRP made paper publication as required in the IB Code. Subsequent to the advertisement, IRP convened first meeting on 16.09.2019, wherein, sole member, Mr. Mukesh Desai was constituted as COC as sole Financial Creditor. It is submitted by the Applicant (Corporate Debtor of C.P. (I.B) No. 178/2018) that Mr. Mukesh Desai is the partner in the project of the Corporate Debtor and cannot be taken as a Financial Creditor for the purpose of constituting COC. The said issue has been raised before the IRP by the Corporate Debtor/Applicant but the IRP/RP has ignored the fact. It is further submitted by the Applicant that there is no other claim received by the RP in response to the advertisement issued as per the IB Code, as all the creditors are aware that Company has huge assets and financially capable to repay the entire debt of the Company.

4) The Applicant further alleged that the Company is based at Gujarat and all the parties are also based at Surat, Gujarat, such as, Suspended Management as well as Mr. Mukesh Desai but the RP continued to convene the meeting at Ahmedabad instead of Surat, which cost inconvenience to the Applicant. Not only that, the IRP is also charging a some of Rs. 10,000/- as a local travelling expenses, which is too exorbitant and is not justifiable.

5) Further, in support of the contention, the Applicant annexed the Annexure-E, which is the reply of public notice, wherein, it is clarified that Mr. Mukeshbhai Nanubhai Desai is having an ownership of 25% shares in the land meant for a project named as "Coconut", wherein, Mr. Mukeshbhai Nanubhai Desai said to

have paid an amount of Rs. 12,57,42,071/- towards 25% of ownership. In the said notice, it is categorically stated that it was understanding that Castle Construction, partnership firm had to transferred amount paid to them in M/s. Shilpraj Developers Pvt. Ltd. (Corporate Debtor) and as per the condition of MOU, Castle Construction has transferred said amount to M/s. Shilpraj Developers Pvt. Ltd.

6) The Applicant has also relied on the document Annexure-1 at page No. 80, issued by Mr. Alkesh Gandhi, Advocate on 26.01.2019, being the Arbitrator to Mr. Mukeshbhai Nanubhai Desai, wherein, it reflects that an Arbitration proceeding is pending between the Applicant and Mr. Mukeshbhai Nanubhai Desai, with regard to the dispute of MOU.

7) Seen the reply of Respondent No. 1/RP, and reply of Respondent No. 2, Mr. Mukesh Desai. Vide said reply, both the Respondents have denied the averments and the allegations so made by the Applicant against the RP i.e. Respondent No. 1 and Respondent No. 2. The RP/Respondent No. 1 submitted that there is a term loan of Rs. 4,41,82,071/- of Respondent No. 2 as per page No. 44 of the application annexed by the Applicant and in view of that the Respondent No. 2 has been admitted as Financial Creditor. The RP has also submitted that he has never raised any exaggerated expenses as alleged by the Applicant and he can justify as and when required to this Adjudicating Authority.

8) Also gone through the reply of Respondent No. 2 namely Mr. Mukesh Desai, who has submitted that he has financed M/s. Shilpraj Developers Pvt. Ltd. (Applicant) to the tune of Rs. 4,41,82,071/- in the year 2014.

9) In Affidavit in reply, Respondent No. 2 also submitted that he has entered into MOU in respect of a project, executed on 26.05.2014 amongst various parties as first part and himself as second part.

10) Gone through the reply, rejoinder and the document annexed therein by the parties.

11) On perusal of the record, it is found that Respondent No. 2 has entered into MOU on 26.05.2014 and 28.05.2015, wherein, the Respondent No. 2 is arrayed as party of the second part and in the said MOU, it is clearly mentioned that the parties of the second part become the partner of the 25% share, so "parties of the second part shall pay cost of land and construction in project, according to the said partnership share to party of the first part Therefore, it is decided to transfer 25% land to parties of the second part", (sic)

12) It is further covenanted in clause number 4 of the said MOU that the party of the second part shall pay cost of construction to Shilpraj Developers Pvt. Ltd. towards construction of said project upto sample flat in the said project. It is also covenanted that, "after completion of the construction, whatever income earned from the flat purchasers, deduct price of land, construction cost, brokerage, corporation expenses, service tax Vat, Income Tax and all other expenses,

whatever amount (net profit) remain, its 25% shall be paid to party of the second party by party of the first part towards profit (sic)

13) Thus, on perusal of the MOU, it is clear that the Respondent No. 2 is only entitled for 25% of the net profit of the project. That apart, as per MOU, both sides agreed that in case of any dispute, the matter shall be resolved by the arbitration. It is also a matter of record that as per Annexure-E, page No. 59 of the Application i.e. reply of public notice given for title clearance, wherein, Mr. Mukeshbhai Nanubhai Desai has been shown as having ownership of 25% share in the "Coconut" project and to that effect MOU has been executed.

14) On perusal of the record, i.e. page No. 44 of the Application, "Notes on Accounts for the Year Ended March 31, 2019", the term loan of Mr. Mukeshbhai Nanubhai Desai is shown as Rs. 4,41,82,071/-, however, this Notes on Account is silent with regard to any interest payable to the Respondent No. 2. It is also a matter of record that an arbitration proceeding is also pending.

15) Further, on perusal of the record, it is found that the RP has declared Respondent No. 2 as a sole Financial Creditor as reflected from Minutes of Meeting dated 14.11.2019, to which the Applicant/Suspended Management raised an objection, as reflected from page No. 22 of the rejoinder to reply filed by the Respondent No. 1 and thereafter the instant application is filed on 19.11.2019.

16) On perusal of the record, it is also found that in the 6th meeting of the COC held on 18.03.2020, RP has stated that Respondent No. 2, Mr. Mukeshbhai Nanubhai Desai was considered as a Financial Creditor finally by the Court. The relevant portion of the para is quoted herein below:

"Mukeshbhai was considered as Financial Creditor finally by the court. His claim needs to be updated a little with correction in interest calculations. " (sic)

17) It is a matter of record that as on 18.03.2020, no such order has been passed whereby Mr. Mukeshbhai Desai (Respondent No. 2) is declared/considered as Financial Creditor.

18) It is also a matter of record that in the 7th meeting of the COC held on 01.05.2020, the RP apprised in the meeting that a request has been received from the Operational Creditor for withdrawal of the Application.

The said fact is reflected in the Item No-6 of the Minutes of Meeting dated 01.05.2020 page No. 46 of the rejoinder to reply filed by the Respondent- 1, which is quoted herein below:

"The request on 24th March, 2020 has been received from M/s. Nuvoco Vistas Corporation Limited to withdraw application admitting CIRP under Section 12A of IBC. As application for withdrawing CIRP proceedings requires consent of 90% of Financial Creditor as per Section 12A of IBC, 2016 (which is reproduced here below), the same is placed before COC members for their consideration:

 

Section 12A of IBC

12A-Withdrawal of application admitted under section 7, 9 or 10- The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the Applicant with the approval of ninety percent voting share of the committee of creditors, in such manner as may be specified.

Regulation 30-A, sub clause 4 and 5 of IBBI regulations on CIRP prescribes procedure to call for COC meeting and take approval of at least 90% voting and then upon approval to move application.

To comply with the above requirement, RP asked FC whether he consents to withdraw CIRP proceeding. FC declined to withdraw and hence following resolution was passed by COC.

Resolved that CIRP process shall not be withdrawn but will be continued. "

Thus, it is evident that withdrawal application is filed by an Operational Creditor and the issue was already discussed but the Respondent No. 2, who as on 01.05.2020, though not declared by this Adjudicating Authority as a Financial Creditor, has not consented to withdraw the Application claiming himself to be a sole Financial Creditor, which said fact is in the knowledge of the RP as he has received the copy of the instant application and has also filed reply but have also not apprised this Adjudicating Authority, which is not expected.

19) It is also evident and a matter of record that public announcement has been made but not a single claimant has put forward their claim before the RP. Under such situation it can be presumed that the Corporate Debtor is a going concern and sound company and he has no creditor in the market.

20) It is also a matter of record that in the first meeting of the COC, which was held on 16.09.2019, the claim amount of Respondent No. 2 was shown as Rs. 7,62,50,000/-, however, in the 4th meeting held on 02.01.2020, the claim amount of Mr. Mukeshbhai Nanubhai Desai is shown as Rs. 4,41,82,071/-, that itself create a doubt with regard to the claim of the Respondent No. 2 and also propriety of RP. More so, on the attendance sheet of 4th meeting of the COC, the Respondent No. 2 was shown as a "Financial Creditor", whereas, it is in the knowledge of the RP that the instant application is still pending and the same was filed on 19.11.2019, wherein, the issue with regard to the Financial Creditor in relation to the Respondent No. 1 is subjudice.

21) On perusal of the record, it is found that the amount so paid by the Respondent does not have any time value of money or includes interest.

For the sake of convenience, the definition of "Financial Debt" is reproduced hereunder:

"Financial Debt means a debt alognwith interest, if any, which is disbursed against the consideration for the time value of money and includes:

 

a. borrowed against the payment of interest;

b. any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

c. any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

d. the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

e. receivables sold or discounted other than any receivables sold on non-recourse basis;

f any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

g. any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

h. any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

i. the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

22) Further in the matter of Saregama India Ltd. vs. Home Movie Makers Pvt. Ltd., the Hon'ble NCLAT observed as under:

"By relying on the aforesaid Judgment of this Appellate Tribunal, we are of the view that the Appellant, who claims to be a Financial Creditor, however, claims made by it, is not a Financial Debt, it is reiterated that in the marketing agreements and subsequent correspondent exchanged between the Appellant and the Respondent, no way it is mentioned that the amount paid by the Appellant to be repayable along with interest over a period of time in a single or series of payments in future. However, we are of the firm opinion that the Appellant has not disbursed money against the consideration for the time value.

Accordingly, we hold that the claim of the Appellant is not a Financial Debt within the meaning of Section 5(8) of IBC. "

23) On perusal of the record, it is amply clear that amount so paid by the Respondent No. 2 has no time value of money by way of interest or repayable along with interest, as is also admitted by the Respondent No. 2 himself that the same is paid towards development and construction of the project and he has to get 25% from the net profit, as reflected in MOU and its various covenants/terms and conditions. Further, even if it is assumed that amount is paid as a loan, but

 

admittedly it was paid in 2014 and as such is barred by limitation.

24) It is needless to mention herein that the very object of the Code is resolution, as evident from the long title of the Code, which reads as under:

"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate person, partnership firms and individual in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alternation in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India... "

The Hon'ble NCLAT, in the matter of Binani Industries Limited Vs. ank of Baroda & Am. clarified the objectives of the Code as under:

"The first order objective is "resolution". The second order objective is "maximisation of value of assets of the "Corporate Debtor" and the third order objective is "promoting entrepreneurship, availability of credit and balancing the interest". This order of objective is sacrosanct.

Thus, when the Company is sound and going concern and looking to the object of the IB Code, it would not be prudent to bring the Company under liquidation for some vested interest.

25) Under the facts and circumstances as narrated herein above in sequel, the status of the Respondent No. 2 (Mr. Mukesh Desai) cannot be taken as Financial Creditor. Hence, the COC so constituted by the RP is void ab initio. Further, the Operational Creditor have liberty to file his application through RP and RP shall make all endeavour to file Form F.A., so filed by the Operational Creditor for withdrawal of the CIRP before this Adjudicating Authority. Accordingly, the instant Application is allowed with the above observations.

 