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**(2021) 11 NCLT CK 0064**

**In the National Company Law Tribunal**

**Case No :** MA No. 1262/MB/C-II/2019 In C.P (IB) No. 2668/MB/C-II/2018

**Qamruddin Faizi VsKaizen Aac Blocks Pvt Ltd**

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**Date of Decision :** 26-11-2021

**Acts Referred:**

Insolvency and Bankruptcy Code, 2016 — Section 5(24), 5(24)(a), 5(24)(b), 5(24)(c), 5(24)(d), 5(24)(e), 5(24)(f), 5(24)(g), 5(24)(h), 5(24)(i), 5(24)(j), 5(24)(k), 5(24)(l), 5(24)(m), 7, 9, 21(2)  
Companies Act, 2013 — Section 58, 175

**Citation :** (2021) 11 NCLT CK 0064

**Hon'ble Judges :** Ashok Kumar Borah, Member (J); Shyam Babu Gautam, Member (T)

**Bench :** Division Bench

**Advocate :** Shyam kapadia, Dr. S. K. Jain, Yahya Batatawala

**Final Decision :** Disposed Of

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## **Judgement**

Shyam Babu Gautam, Member (Technical)

1. The present application is moved by Javed Abdul Rahim Sayed and Anr. (hereinafter called as "the Applicants") in the matter seeking an order from this Tribunal to direct the Interim Resolution Professional i.e. Mr. Manoj Kumar Jain ("IRP") to accept and verify the proof of claim ("Form - C") filed by the Applicants and after verifying the 'From-C' direct the IRP to conduct a meeting of creditors and from Committee of Creditors ("CoC").

Submissions made by Applicant:

2. The Applicant states that the Applicants were the Promoters of the Company called Kaizen AAC Blocks Private Limited ('Corporate Debtor') when the Corporate Debtor was incorporated. Since, the Corporate Debtor was in need of funds for the day to day business, the Applicant being the Promoters, time to time provided unsecured interest free loan totaling to sum of Rs.2,11,04,000/- (out of which a sum of Rs.1,08,52,000/- paid by the Applicant No. 1 and sum of Rs.1,02,52,000/- paid by the Applicant No. 2) to the Corporate Debtor. The Applicants were retired from the board of directors of the Corporate Debtor on

23rd January 2018. At the time of retirement, the Applicants have executed a Memorandum of Understanding ('MOU') dated 18th January 2018 with the Corporate Debtor wherein the Corporate Debtor had agreed the Applicants to return the unsecured interest free loans pursuant to the terms mentioned therein.

3. Pursuant to MOU dated 18th January 2018 and prior payment before execution of MOU, the Corporate Debtor had paid a sum of Rs.43,98,250/- to the Applicant No. 1 and a sum of Rs.69,36,000/- to the Applicant No. 2 towards the repayment of unsecured interest free loan. Even after till date a sum of Rs.64,53,750/- is due and payable to Applicant No. 1 and a sum of Rs.33,16,000/- is due and payable to the Applicant No. 2. It is pertinent to note that the unsecured interest free loans provided by the Applicants to the Corporate Debtor are showing under the head of 'unsecured loan' as per the books of Corporate Debtor.

4. The Applicants states that after their retirement, one of the current directors of the Corporate Debtor Mr. Qamruddin Faizi, had filed the captioned Company Petitioned under Section 7 of Insolvency and Bankruptcy Code, 2016 to initiate Corporate Insolvency Resolution Process against the Corporate Debtor claiming an unsecured loan provided to the Corporate Debtor by the director. This Tribunal by an order dated 23rd January 2019 admitted the Petition filed by the existing directors and appointed Mr. Manoj Kumar Jain as IRP to carry the function as mentioned under the Insolvency and Bankruptcy code, 2016. Thereafter, by a public announcement dated 1st February 2019 the IRP had called upon all the creditors of the Corporate Debtor to file their claims on or before 17th February 2019.

5. The Applicant states that currently the Applicants are the directors of the Company called Scientific Devices (Bombay) Pvt. Ltd. Pursuant to the public announcement dated 1st February 2019 and published in Financial Express Newspaper on 4th February 2019, the Applicants on 16th February 2019 forwarded their proof of claim i.e. Form-C along with supporting documents to the IRP from their common official email id, where currently the Applicants are directors. Since, the IRP failed to conduct CoC within 30 days from the date of the admission order and failed to give response to the Form-C forwarded by the Applicants, the Applicants enquired regarding the same with one of the creditors Mr. Shakebuddin Khan, who has also filed the Form-C with IRP, when he has informed the Applicants that the IRP has scheduled a meeting on 1st March 2019 of CoC. Subsequently, the Applicant inquired the same with the IRP over a call, when the IRP has informed the Applicants that since the Applicants have forwarded the Form-C from their common official email id, he could not consider the Form-C forwarded by the Applicants.

6. Upon hearing from IRP, the Applicant once again on 27th February 2019 forwarded the Form-C to the IRP from their personal email ids. Subsequently, on 28th February 2019, the Applicants forwarded the Form-C along with all the annexures by way of Speed Post. The same were duly received by IRP on 1st

March 2019. Thereafter, at request of IRP, the Applicants once again served the original Form-C along with all the supporting documents to the IRP by way of hand delivery. The same has been duly received by IRP on 5th March 2019. In the original Form-C, the Applicants have made disclosure stating that they are not related to Corporate Debtor and not covered under the definition of section 5(24) of the Insolvency and Bankruptcy Code, 2016.

7. The Applicants state that after the receipt of Form-C, till date IRP has neither verified the claim submitted by the Applicants and nor conducted the meeting of CoC. In view thereof, Applicants have no other remedy except to approach this Tribunal by way of this Application seeking an order this Tribunal directing IRP to accept and verify the Form-C filed by the Applicants.

Submissions made by Interim Resolution Professional (IRP):

8. IRP submit that the Applicants had submitted their claims as Financial Creditor, which had been admitted. However, the Applicants being the Related Parties under Section 5(24) of the IBC, 2016, they were not entitled to participate, represent and vote in the CoC under Section 21(2) of the IBC, 2016.

9. IRP further submits that apart from Applicants, 7 other Financial Creditors had also filed their claims which were also admitted but as all the 9 Financial Creditors (including the Applicants) were Related Parties, they were not entitled to participate, represent and vote in COC. Para 7 of Reply to the Misc. Application No. 1262 of 2019 ("said MA") where reasons elaborated for treating all the 9 Financial Creditors (including the Applicants) as Related Parties under Section 5(24) of IBC, 2016. Hence, the prayer 12(a) for giving direction to consider and verify the proof of claim i.e. Form C submitted by the Applicants does not survive.

10. As regards prayer 12(b) in the said MA is concerned for giving direction to the Applicants to schedule a Meeting of Creditors and thereafter form a COC, IRP had already constituted CoC on 01/03/2019 and also filed the report about the constitution of COC before this Tribunal on 25/03/2019. However, COC though constituted by IRP could not function as all the Financial Creditors were Related Parties under Section 5(24) of IBC 2016 and were not entitled to participate, represent and vote in the CoC.

11. As regards the claim of the Applicants that they are not Related Parties under Section 5(24) of the IBC and hence, not debarred from participating, representation and voting in the CoC, IRP's submissions and Reply are reproduced under:

a. The Applicants in the Captioned Application have claimed that they had resigned w.e.f. 23/01/2018 pursuant to purported Agreement for Purchase of Shares and Repayment of Debt ("MOU") dated 18/01/2018.

b. The Applicants also claim though they were Promoters and 1st Directors of the Company, they are not covered with any of the sub section 'a' to 'm' of Section 5(24) of the IBC, 2016 and hence, they are not Related Parties.

c. The Applicants further claim that a person to be a Related Party must presently be a Director and Section 5(24) of the IBC, 2016 does not include the persons who may at some point in the past have been Directors.

d. The claim of the Applicants that they are not Related Parties as they had resigned as Directors of the Corporate Debtor has already been decided by the Hon'ble Supreme Court in its Judgement in Civil Appeal No. 2842 of 2020 decided on 01/02/2021 in the matter of Pheonix ARC Pvt Ltd vs Spade Financial Services Ltd & Ors. The Hon'ble Supreme Court in the said Judgements has succinctly dealt with whether a Director who had already resigned from the Company is to be considered as a Related Party. The Hon'ble Supreme Court has held as under:

"95. Hence, while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from the CoC, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder. Mr. Kaul has argued, correctly in our opinion, that if this interpretation is not given to the first proviso of Section 21(2), then a related party financial creditor can devise a mechanism to remove its label of a 'related party' before the Corporate Debtor undergoes CIRP, so as to be able to enter the CoC and influence its decision making at the cost of other financial creditors.

96. In the present case, there is a finding that AAA and Spade were related parties within the meaning of Section 5(24) at the time when the alleged financial debt on the basis of which they assert a claim to be a part of the CoC was created. This was due to the long-standing relationship between Mr Arun Anand and Mr Anil Nanda, and their respective corporations. Admittedly, such a relationship still existed even in 2017, since Mr Anil Nanda's JIPL held shareholding in Mr Arun Anand's Spade. Further, we have also concluded that the transactions between Spade and AAA on one hand, and the Corporate Debtor on the other hand, which gave rise to their alleged financial debts were collusive in nature. Therefore, it is evident that there existed a deeply entangled relationship between Spade, AAA and Corporate Debtor, when the alleged financial debt arose. While their status as related parties may no longer stand, we are inclined to agree with Mr Kaul that this was due to commercial contrivances through which these entities seek to now enter the CoC. The pervasive influence of Mr Anil Nanda (the promoter/director of the Corporate Debtor) over these entities is clear and allowing them in the CoC would definitely affect the other independent financial creditors."

e. The ratio of the Judgement squarely applies to the case of the Applicants as at the time of disbursement of unsecured interest free loan to the Corporate Debtor, they were Directors and held 25% shares each in the paid-up share capital of the Corporate Debtor. They purportedly had resigned as Director of the Corporate Debtor purportedly under collusive MOU dated 18/01/2018. Hence, they were

Related Party within the meaning of Section 5(24) of the IBC, 2016 (kindly refer para 7(i) and (ii) of Reply to said MA).

f. Further submits that the Applicants in Para 2 and 3 have relied on MOU dated 18/01/2018 purportedly executed with the Corporate Debtor wherein the Corporate Debtor had agreed with the Applicants to return the unsecured interest free loans pursuant to the terms mentioned therein. A Copy of the said purported MOU is annexed to the said MA at Page Nos. 7- 30.

g. The purported MOU dated 18/01/2018 is collusive, illegal and invalid. Also crave leave to refer to my submissions in Para 7(iv) to (xii) of my Reply to said MA. Further it is submitted that the purported MOU is inter alia invalid and illegal on the following grounds:

i. At Sr no. 11, Page 30 of the said MA, Mr. Hifzur Rehman Irtebatuddin Khan has signed the said MOU on behalf of the Corporate Debtor pursuant to undated Resolution passed by the Board of Directors of the Company. It is thus clear that no circular resolution purportedly passed on 18/01/2018 approving the terms of MOU by the Board of Corporate Debtor's was not in existences at the time of signing of the said purported MOU.

ii. Form DIR 12 at Page 113- 127 of the Reply to the said MA has been digitally signed by Mr. Hifzur Rehman Irtebatuddin Khan on the authority of Board of Directors of the Company vide no. (NA) dated 11/10/2014. The said authority given by the Board on 11/10/2014 could not cover the resignations of 6 Directors including the Applicants which are all identical and are all dated 23/01/2018.

iii. Certified True Copy of the Resolution passed by the Board of Directors of the Company for placing the Resignation of 6 Directors is not annexed to Form DIR 12.

iv. The Minutes of Board Meeting of the Corporate Debtor held on 31/03/2018 (a copy of which is annexed at Page 128 to 134 of Reply of the IRP) has granted leave of absence to Mr. Qamruddin Faizi and on the ground that he had conveyed to the Board his inability to attend the said meeting due to pre occupation and requested the Board to grant him leave of absence. Mr. Qamruddin Faizi has recorded his statement in the Minutes of Management Committee that he was never informed about the any Meeting of the Board of Directors nor he was allowed to participate in the management of the Company. I have annexed Minutes of Meeting of Committee of Management and their respective representative dated 25/03/2019 which was attended by Mr. Qamrudding Faizi, Financial Creditor/ Director and Mr. Shakebuddin I Khan, both Directors of the Corporate Debtor. In the said Minutes the statement of Qamruddin Faizi has been recorded that the terms as entered into by the Company and its ex-Directors is not acceptable to him as he was not made a party to the said MOU even though he is the Director of the Company. He had further stated he was not aware about such MOU entered into between the Company and its Directors. The Applicants has relied on email dated 24/03/2018 purportedly sent to Mr. Qamruddin Faizi, a

copy of which is annexed as Exhibit A to the Affidavit in Rejoinder of the Applicants. The said email mentions "find attached call letter of Board of Directors". The Applicants have also annexed a copy of purported Notice of Board of Director meeting dated 21/03/2018 wherein Agenda items are mentioned as under:

"i. Current business status

ii. Resignation acceptance of Directors

iii. Any other and further points to be discussed with permissions of Chair in the interest of the Company"

It is submitted that the purported email dated 24/03/2018 cannot be construed as Notice of Meeting of Board of Directors in as much as on perusal of purported Minutes of Board Meeting held 31/03/2018, it is revealed that there are several Agenda Items which do not find any mention in the purported Notice dated 24/03/2018.

It is further submitted that as per Secretarial Standard- I issued by Institute of Company Secretaries of India under clause 1.3.7 Agenda and Notes on Agenda shall be sent to all Directors by hand or by speed post or by registered post or by e-mail or by any other electronic means. It is submitted that Mr. Qamruddin Faizi who had attended meeting of Committee of Management held by IRP on 25/03/2019 had candidly stated that he was never informed about any meeting of the Board of Directors nor was he allowed to participate in the management of the Company. the said Meeting was also attended by Mr. Shakebuddin I Khan, suspended Director of the Corporate Debtor who has not raised any objection to the statement made by Mr. Qamruddin Faizi that he was never informed about any meeting of Board of Directors nor was he allowed to participate in the management of the Company. Hence, the purported Notice dated 24/03/2018 and purported Minutes of Board Meeting held on 31/03/2018 was not a proper Notice and Minutes as Mr. Qamruddin Faizi was also one of the Directors of the Corporate Debtor and had not received any such purported Notice nor he had sought any leave of absence as recorded in the said Minutes of Board Meeting dated 31/03/2018

v. The Minutes of Board of Directors held on 31/03/2018 had also made noting of circular resolution passed by the Board of Directors on 18/01/2018 approving the purported MOU dated 18/01/2018 is illegal and invalid as it is not in accordance with the provisions of Section 175 of the Companies Act, 2013. Moreover, it is nowhere mentioned that draft resolution was circulated to all the Board Members and it was passed by majority of the Board Members.

h. Further submits that the purported MOU is not enforceable in law as it has not been approved by the Shareholders of the Corporate Debtor in General Meeting and terms of the said MOU have not been incorporated in the Articles of Association ("AOA") of the Corporate Debtor. I refer to the following case law:

i. World Phone India Pvt. Ltd. & Ors. vs Wpi Group Inc., (decided by the Hon'ble Delhi High Court on 15/03/2013)

"Para 15. The legal position is that where the AoA is silent on the existence of an affirmative vote, it will not be possible to hold that a clause in an agreement between the shareholders would be binding without being incorporated in the AoA. The question to be asked is whether the provisions of an agreement, that are not inconsistent with the Act, but are also not part of the AoA, can be said to be applicable. All that Section 9 states is that clauses in the agreement that are 'repugnant' to the Act shall be 'void'. This does not mean that clauses in the agreement which are not repugnant to the Act would be enforceable, notwithstanding that they are not incorporated in the AoA."

i. The purported MOU for transfer of shares as provided in Clause 4 (Page 18- 23 of the said MA) is ultra-virus to Article 9 and 10 of the AOA of the Corporate Debtor (Page 29 of the Reply to said MA).

That the Article 9 of AOA provides for the procedure for transfer of shares by any member and Article 10 provides no transfer of shares shall be made or registered without previous sanction of the Board except when the transfer is made by any member of the Company to another member or to a member's wife or child or children or his legal heirs and the Directors may decline to give such sanction without assigning any reason subject to Section 58 of the Companies Act, 2013.

i. V.B. Rangaraj vs V.B. Gopalakrishnan & Others (decided by Hon'ble Supreme Court on 28/11/1991)

"Para 9. Hence, the private agreement which is relied upon by the plaintiffs whereunder there is a restriction on a living member to transfer his shareholding only to the branch of family to which he belongs in terms imposes two restrictions which are not stipulated in the Article. Firstly, it imposes a restriction on a living member to transfer the shares only to the existing members and secondly the transfer has to be only to a member belonging to the same branch of family. The agreement obviously, therefore, imposes additional restrictions on the member's right to transfer his shares which are contrary to the provisions of the Article 13. They are, therefore, not binding either on the shareholders or on the company. In view of this legal position, the finding recorded by the courts below that the sale by the first defendant of his shares to defendants 4 to 6 is invalid as it is in breach of the agreement, is erroneous in law. In view of our above finding, it is unnecessary to go into the question whether the High Court was justified in directing the transfer of shares by defendants 4 to 6 to the plaintiffs even if its finding that the sale was invalid was correct."

j. Thereafter IRP submits that as per Clause 4 of the purported MOU, the transfer of shares to Mr. Shakebuddin Khan and Mrs Shabana Shakebuddin Khan are violatile of Article 9 of the AOA of the Corporate Debtor as they were not the existing members of the Corporate Debtor. Furthermore, in absence of non-

adoption of procedure as provided in Article 9 and transfer of shares as per purported MOU to be made without previous sanction of the Directors is violative of Article 10 of the AOA of the Corporate Debtor.

12. The allegation of the Applicants that the IRP appears to be acting on the behest of Mr. Qamruddin Faizi, Financial Creditor is dishonest, malicious and defamatory in nature. In fact it is the Applicants who are trying to enter the CoC on the basis of purported MOU dated 18/01/2018 with an intention to hijack the CoC. The claim of the Applicants that a copy of the Board Resolution had already been circulated to all the Directors including Mr. Qamruddin Faizi on 18/01/2018 for his approval and their claim that the Company had emailed on 25/03/2018 to all the Directors and Shareholders including Mr. Qamruddin Faizi intimating that Board Meeting was to be conducted on 31/03/2018 is denied by Qamruddin Faizi and his statement that he was never informed about the Meeting of Board of Directors nor was he allowed to participate in the management of the Company is duly recorded in the Minutes of Meeting of Committee of Management and their representative held on 25/03/2019 which was attended by Mr. Shakebuddin I Khan also. The statement of Mr. Qamruddin Faizi was not controverted by Mr. Shakebuddin I Khan. Therefore, this Tribunal to discern the conduct of the Applicants who have made a false and motivated allegation against IRP and have tried to tarnish image before this Tribunal.

#### Findings:

13. We have perused records available and heard the submissions of parties also examined facts of this case in the lights of Hon'ble Supreme Court in its Judgement in Civil Appeal No. 2842 of 2020 decided on 01/02/2021 in the matter of Phoenix ARC Pvt Ltd vs Spade Financial Services Ltd & Ors. relied by IRP while submissions ratio of case squarely applies to facts of this case and IRP was right not to make Applicants member of CoC as being related party as per section 5(24) of the Insolvency and Bankruptcy Code, 2016. Therefore, as per section 21(2) of the Insolvency and Bankruptcy Code, 2016 the Applicants being a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

14. With the aforesaid observation the present IA No. 1262 of 2019 In C.P (IB) No. 2668/MB/C-II/2018 stands disposed of.