
(2023) 07 NCLT CK 0032

In the National Company Law Tribunal

Case No : IA No. 141/2020 & IA No. 145/2021 In CP (IB) No.311/Chd/Pb/2018

TDC Tablet Devices Canada Inc Vs Arvind Kumar ?

Date of Decision : 20-07-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(24)(m), 5(24A)(h), 9, 14, 17, 18, 19, 20, 24(A)(h), 44, 60(5), 74(2)
National Company Law Tribunal Rules 2016 — Rule 11
Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 — Regulation 16

Citation : (2023) 07 NCLT CK 0032

Hon'ble Judges : Harnam Singh Thakur, Member (J); Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : Vriti Gujral, S.S. Brar

Final Decision : Dismissed

Judgement

Subrata Kumar Dash, Member (Technical)

IA No. 141/2020

1. This application has been filed by Mr. Arvind Kumar-Resolution Professional of the corporate debtor, for taking appropriate action against the respondents under Section 74(2) of the Insolvency and Bankruptcy Code, 2016 (herein referred to as 'Code') and seeking direction against the respondents to refund the amount of Rs. 5,00,036.00/- withdrawn after the pronouncement of moratorium under Section 14 of the Code.

2. The CIRP of the corporate debtor commenced on 13.11.2019, and thereby, publication in Form A was made by the IRP on 14.11.2019, calling for the claims from the creditors of the corporate debtor. The IRP as per his duties in Sections 17 to 20 of the Code, sought to collect information regarding the business operations of the corporate debtor. It was discovered by the IRP that respondent No. 1, i.e. Mr Ibadat Singh, was a director of the company till 31.03.2017. However, he remained an authorized signatory and operated all the bank

accounts of the corporate debtor. After various enquiries held by the IRP, the bank account of the corporate debtor with Indian Bank account No. 613720959, shows that funds have been withdrawn by Respondent No. 1 for a total amount of Rs. 5,00,036/- on 15.11.2019 which was done after the declaration of the moratorium. Thereby, the applicant IRP sent notices via speed post on 20.01.2019 along with an email dated 22.01.2019 to the persons in whose account the funds had been transferred. (Annexure A-3 and A-4 of the application)

Name of the Beneficiary

Amount Paid (Rs.)

Date of withdrawal

1.Avtar Singh Vill. Kukowal, P.O, Dihana, Garhsankar,
Hoshiarpur, 144406, Punjab

100005.00

15.11.2019

2. Balbir Singh

120/73, Majitha Road, Indira Colony Sere Punjab Avenue, Amritsar, 143001,
Punjab

82005.00

15.11.2019

3.Dlawarpreet Kaur

120/73, Majitha Road, Indira Colony Sere Punjab

170013.00

15.11.2019

4.Inderpreet Singh

120/73, Majitha Road, Indira Colony Sere Punjab

148013.00

15.11.2019

Total Amount

500036.00

3. In the short written submissions filed by the applicant vide Dairy No. 02234/2 dated 15.03.2020, it has been further added by the applicant that the CoC in the meetings held on 11.01.2018 and 02.02.2018 allowed the financial creditors to

settle the dispute outside of the CIRP from personal guarantors, due to which the amount was transferred to the financial creditors from the account of personal guarantors. The applicant RP then wrote a letter asking the financial creditors to reverse the said amount into the account of personal guarantors.

4. We have heard the learned counsel for the parties and carefully perused the available record.

5. It is noted that the amounts have been withdrawn during the moratorium period. It is also noted that the various notice dated 20.01.2019 and the same have been sent via emails dated 22.01.2019 regarding the violation of the moratorium to the respondent have been sent, and the record does not indicate that and reply to the same has been made. The contention of the applicant that the email of the respondents is operated by Mr. Lakhvir Singh Tuli, who is the father of Mr. Suneet Tuli, i.e., suspended director of the corporate debtor, has not been rebutted by the respondents. Further, the respondents have proceeded ex-parte vide our order dated 13.10.2022 and was thereby reserved for orders on 17.03.2023.

6. In view of such facts, the respondents are directed to refund the said amount of Rs. 5,00,036.00/- withdrawn after the pronouncement of a moratorium under Section 14 of the Code to the applicant within 30 days of this order.

7. In the result, IA No. 141/2020 is allowed and disposed off accordingly.

IA No. 145/2020

8. This application has been filed by TDC Tablet Devices Canada Inc. under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, read with Rule 11 of NCLT Rules, 2016, read with IBBI (Insolvency Resolution Process for Corporate Persons), with the following prayers:

- i. To direct the respondent to accept the claim of the applicant company in full as he has only provisionally accepted it as a secured creditor of the corporate debtor.
- ii. Direct the respondent to recognize the applicant company as a secured creditor of the corporate debtor to the extent provided for in the charge certificate in favor of the applicant company;
- iii. Direct the respondent to nullify the decision of liquidation;
- iv. Restrain the respondent from taking any more decisions until the rights of the parties concerned are finally decided by this Tribunal; v. Restrain the respondent from disposing of or creating any third-party rights over the property subject to the charge in favor of the applicant herein/TDC.

9. The applicant has stated, inter alia, that:

9.1 The applicant company entered into a contractual arrangement with the corporate debtor through a supply agreement dated 15.09.2016, wherein it was agreed that the applicant company would supply goods/materials such as mobile

devices, computer tablets, computer keyboards, and other allied accessories to the corporate debtor. (Annexure A- 2 of the application) As on May 2019, the corporate debtor had an outstanding debt of Rs.91,41,50,663.98/- along with interest to the applicant and, therefore, charge dated 25.05.2018 (Charge Identification Number: 100241231) who was created with the registrar of companies, Chandigarh, Ministry of corporate affairs. Thereafter, a company petition was filed by M/s Haiko Logistics India Private Limited under section 9 of the Insolvency and Bankruptcy Code, 2016, against the corporate debtor, and this Hon'ble Tribunal admitted the said petition vide order dated 13.11.2019 and appointed Mr. Arvind Kumar as the interim resolution professional. The respondent-RP published a public announcement in Form-A, and subsequently, on 26.11.2019, the applicant company submitted its claim to the RP as a financial creditor in Form-C for an amount of Rs.91,41,50,663.98/- (Annexure A-6 and Annexure A-7 of the application). The respondent RP through his email dated 02.12.2019, stated that the claim is not covered under the definition of 'financial debt' and the same cannot be accepted as a financial creditor and opined that the applicant company should apply under the capital of operational creditor. Thereby, the applicant company submitted its claim as an operational creditor in Form-B on 06.12.2019, along with the requisite documents (Annexure A-9 of the application). The applicant also wrote an email dated 10.12.2019 to implore the resolution professional to send an invitation to the applicant for its COC meeting in pursuance to Regulation 16 of the CIRP Regulations as produced below:

16. Committee with only operational creditors. -

(1) Where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this Regulation.

(2) The committee formed under this Regulation shall consist of members as under-

(a) eighteen largest operational creditors by value:

Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors;

(b) one representative elected by all workmen other than those workmen included under sub-clause (a); and

(c) one representative elected by all employees other than those employees included under sub-clause (a).

(3) A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.

Explanation- For the purposes of this sub-regulation, "total debt" is the sum of-

- (a) the amount of debt due to the creditors listed in sub-regulation 2(a);
 - (b) the amount of the aggregate debt due to workmen under sub-regulation 2(b); and
 - (c) the amount of the aggregate debt due to employees under sub-regulation 2(c).
- (4) A committee formed under this regulation and its members shall have the same rights, powers, duties, and obligations as a committee comprising financial creditors and its members, as the case may be.

9.2 However, neither was the applicant admitted to be a part of the CoC meeting and nor any adequate response to the said email has been received by the applicant whereas, after the first COC meeting, the RP in his email dated 10.12.2019, provisionally accepted the claim of the applicant. Further, the RP, through his email dated 27.02.2020 (Annexure A-12 of the application), stated that the exclusion of the applicant

company was done on the ground of Section 5(24)(m) and Section 5(24A)(h) of the Code.

9.3 Further, the applicant stated that the supply agreement with the corporate debtor as per clause 5 of the supply agreement which reads as follows:

"Payment conditions: All invoices shall be payable within 120 days from the delivery of goods by the supplier. The Buyer acknowledges that this 120-day term of payment is the equivalent of providing capital by the supplier as would have been done by a financial creditor. The indebtedness created by these payment terms will be secured by a general continuing security over all of the current and future assets of the Buyer including tangible and intangible assets accounts receivables and potential claims. Buyer will cooperate with the supplier in registering lien if required at any time by the Buyer. Any payment delayed beyond 120 days will accrue interest at a compounded rate of 12 percent per annum."

9.4. The applicant refutes the grounds taken by the respondent RP that there has been any formulation of policies or technical exchange of information, and both entities are separate and registered under separate laws, registered in separate countries. Furthermore, the respondent RP has to this date, neither accepted nor rejected the claim of the applicant, which is purported to not be legally tenable.

9.5. The applicant also brings forward the Debt Agreement dated 19.07.2019 in which the outstanding of Rs. 91,41,50,663.98/- was accepted by the debtor (Annexure A-13 of the application). As per clause-c of this agreement, the corporate debtor admitted about the financial difficulty faced by them to manage the litigation and thereby agreed to assign all the court cases as per Schedule B of the Assignment Deed to the applicant-creditor. The applicant also brings forward the report filed by an independent Resolution Professional (Annexure

A-14 of the application) in which it is concluded that the applicant company is eligible to become a member of the CoC.

10. The respondent has filed his short reply vide dairy no. 107/01 dated 14.11.2022 and states the following:

10.1. The respondent has stated that the present application is a defence used by the applicant company towards the application filed by the respondent under section 44 of the Code wherein preferential transactions by the suspended board of directors in favour of the applicant have been reported.

10.2. Further, the respondent submits that the claim of the applicant company has been duly accepted as a related party and, therefore, not entitled to be a part of the CoC.

11. We have heard the learned counsels and have gone through the relevant records.

12. In the case at hand, the CIRP was initiated by an order of this Bench dated 13.11.2019 much prior to the same, there was a charge created dated 25.05.2018 on the assets of the corporate debtor. Subsequently, an Assignment Debt Agreement between M/s. Datawind Innovations Private Limited and M/s. TDC Tablet Devices Canada Inc. (LLP)-creditor and OLA Display India Private Limited, an LLP-assignee. In the said agreement, it is stated that the corporate debtor had an outstanding overdue debt of Rs. 91,41,50,663/- plus interest owed to the creditor, which was incurred by the supply of table computers and smartphones by the creditor of the corporate debtor.

13. It is further stated that the debtor has agreed to return to creditor inventory in the value of Rs. 2,36,42,887/- and has further agreed to assign all its rights, titles and interest in the said inventory. It is also mentioned that the debtor had difficulty in financing the litigation involved in collecting receivables and hence, agreed to assign the Court cases to the creditor with a corresponding value mentioned against such Court cases along with its rights, titles, and interests in the said matters, subsequently, after the initiation of CIRP of M/s. Datawind Innovations Private Limited, the said amount of Rs. 91,41,50,663/- was accepted provisionally, as mentioned in the email from the IRP dated 24.02.2020. In the said email, the IRP also clarified that "in terms of Section 5(24) and 5 (24) (a), you are a related party to the corporate debtor and hence shall not have any right to representation, participation or voting in a meeting of the Committee of Creditors". The rationale for classifying the creditor, i.e., M/s. TDC Tablet Devices Canada Inc. has been classified in the email from the RP dated 27.02.2020 as under:

"Dear Sir,

As per the information by the ex director of the Corporate Debtor, Mr. Suneet Tuli, who is your son, the corporate debtor (CD) Datawind Innovations Pvt. Ltd. has ceased its operations in India sometime in Oct. 2018. Thereafter the affairs

of the CD are being managed by the company owned by you ie. TDC Tablet Devices Canada Inc. This claim of the ex director has been confirmed by you when you provided some information regarding the CD in reply to the e-mails of the Resolution Professional.

In this case of CIRP the CD is under your control and all decisions, actions are being taken/ controlled by you i.e. TDC Tablet Devices Canada Inc. Thus in fact as on this date there is no difference between CD and You, CD at present is just your extension.

Section 5(24)(h) provides; 'related party in relation to a corporate debtor means- (h) any person on whose advice directions or instructions a director, partner or manager of the corporate debtor is accustomed to act; Admittedly, there are no directors of the CD, as all of them have claim to have resigned long back, TDC tablet Devices Canada Inc. is managing all the affairs of the CD and hence relationship is squarely covered under Section 5(24)(h) of the Insolvency & Bankruptcy code 2016."

14. For the sake of clarification, the relevant provisions of the Code relied upon by the RP are extracted below:

"5. In this Part, unless the context otherwise requires,— xxxx

(24) " related party ", in relation to a corporate debtor, means—

xxxx

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

xxxx

(m) any person who is associated with the corporate debtor on account of—

(i) participation in policy making processes of the corporate debtor; or

(ii) having more than two directors in common between the corporate debtor and such person; or

(iii) interchange of managerial personnel between the corporate debtor and such person; or

(iv) provision of essential technical information to, or from, the corporate debtor;

15. We have also gone through the opinion attached regarding the eligibility of the corporate debtor, wherein it is mentioned as under :

"Therefore, it could be easily ascertained that the products received from TDC Tablet Devices Canada INC carried higher sale price than their cost of purchase by Datawind Innovations private Limited.

Hence the business transactions between TDC Tablet Devices Canada INC and M/

s. Datawind Innovations Private limited could neither be considered as the undervalued transaction nor any preferential transactions being them at arms length. The IRP/RP could not exclude TDC Tablet Devices Canada INC from the Committee of Creditors on the ground that one of the directors of Datawind Innovations Private Limited is related to the Director of TC Tablet Devices Canada INC. The Director of TDC Tablet Devices Canada INC do not hold any controlling interest in M/s. Data wind Innovations Private Limited.”

16. As stated in the reply of the respondent, the master data of the corporate debtor lists two directors, i.e., Mr. Suneet Singh Tuli son of Mr. Lakhvir Singh Tuli (Director of the applicant herein) and Tejinder Singh. It is also noted that Mr. Lakhvir Tuli is the director of OLA Display India Private Limited and holds 99% shares in it.

17. The major issue to be adjudicated in this application is whether the applicant is falling under the category of “related party” of the corporate debtor as per the provisions of Section 5 (24) (m) and 5 (24A) (h). For the sake of clarity, the aforementioned Sections are extracted below:

*5. In this Part, unless the context otherwise requires,—

(24) “related party”, in relation to a corporate debtor, means—

xxxx

(m) any person who is associated with the corporate debtor on account of—

(i) participation in policy making processes of the corporate debtor; or

(ii) having more than two directors in common between the corporate debtor and such person; or

(iii) interchange of managerial personnel between the corporate debtor and such person; or

(iv) provision of essential technical information to, or from, the corporate debtor;

(24A) “related party”, in relation to an individual, means—

XXXX

(h) a person on whose advice, directions or instructions, the individual is accustomed to act;

18. We note the fact that the applicant, i.e., TDC Tablet Devices Canada Inc. had entered into a supply agreement with the corporate debtor, i.e., Datawind Innovations Private Limited on 15.09.2016 and the same was signed by Mr. LS Tuli on behalf of the Supplier Canada and Mr. Ibadat Singh on behalf of the buyer- corporate debtor, as a part of this manufacturing agreement, electronic goods like keyboards, tablets, phones etc. were supplied to the corporate debtor. We also note the fact that the applicant is incorporated in Canada and is

regulated by the laws of that country.

19. We also note the fact that in May 2019, the corporate debtor had an outstanding debt of Rs. 91.41 Crores along with interest, and subsequently and charge dated May 25, 2018 (Charge identification No. 100241231) was created by the Registrar of Companies (ROC) Chandigarh, Ministry of Corporate Affairs for the said amount. Subsequently, on 21.08.2018, the application under Section 9 of the IBC by M/s. Haiko Logistics India Private Limited-operational creditor was filed for initiating CIRP in the case of the corporate debtor, and by its order dated 13.11.2019, this Adjudicating Authority directed the initiation of the CIRP.

20. The applicant company first filed its claim as a financial creditor in Form C through email dated 02.12.2019 but subsequently re-filed the same in Form B on December 6, 2019. We further take note of the assignment agreement dated 19.07.2019 signed between the following parties:

Datawind Innovations Private Limited- a limited liability company ("Debtor")

And

TDC Tablet Devices Canada Inc., a limited liability company ("creditor") And

OLA Display India Private Limited., a limited liability company ("Assignee")

21. The relevant para of the assignment of debt agreement is extracted below:

A. The Debtor has an outstanding and significantly overdue debt in the amount of Rs. 914,150,663.95 plus interest owed to Creditor which was incurred by the supply of tablet computers and smartphones by the Creditor to the Debtor.

B. The Debtor has agreed to return to creditor, inventory in the value of Rs. 2,36.42,887.14/- (Rupees, Two crores Thrity Six Lakhs Forty-Two Thousand Eight Hundred Eighty-Seven and Fourteen Paise only) as listed in Schedule A in extinguishment of an equivalent amount of debt. Debtor has agreed to assign all of its rights, title and interest in the inventory listed in Schedule A to the Creditor and all benefit and advantage derived or to be derived therefrom, to have and to hold the same unto the Creditor absolutely, from and after the date of the agreement, subject to the performance and observance by the Creditor of the terms and conditions of the present Agreement,

C. The Debtor is attempting to collect receivables through various court actions, which were primarily generated as a result of inventory supplied by Creditor. The Debtor has had difficulty in financing the corresponding litigation to secure these receivables, The Debtor has agreed to assign the court cases listed in Schedule B to the Creditor with a corresponding value defined therein. Debtor has agreed to assign all of its rights, title and interest in the matters listed in Schedule B to the Creditor and all benefit and advantage derived or to be derived therefrom, to have and to hold the same unto the Creditor absolutely, from land after the date of agreement, subject to the performance and observance by the creditor of the terras and conditions of the present Agreement."

22. On the perusal of the documents before us, we note that the corporate debtor is part of a group of companies controlled by Shri. Lakhvir Singh Tuli and his family members, it appears that the corporate debtor was the distributor for the products supplied by TDC Tablet Devices Canada Inc., and its entire business revolves around the distribution of the computer-related hardware of the family-owned group. It is also noted that the business of the corporate debtor has already come to an end, and the key personnel are not staying in India. The resolution professional, in his email dated 27.02.2020 to Mr LS Tuli of TDC Tablet Devices Canada Inc., has given the reasons for treating the creditor as a related party. In his reply, Mr LS Tuli admitted that his company is the only secured creditor of the corporate debtor and its debt actions for 99% of the debt of the corporate debtor. The assignment debt agreement also indicates that the corporate debtor has agreed to allow the corporate debtor to pursue recovery actions in the courts. He has also agreed to give the assignee, i.e., Ola Display India Private Limited, the right to collect the amounts to return debts in Schedule B. Apart from that, a part of the inventory amounting to Rs.2.36 Crores, as listed in Schedule A, has been returned to the creditor.

23. It is further noted that the assignee- Ola Display India Private Limited, is owned by Mr LS Tuli, i.e., the father of the director of the corporate debtor considering the maze of arrangements made by the corporate debtor as well as its creditors and look at the nature of the business of the corporate debtor, which is that of a sole distributor of the products of the global group, and further, the father and the son relationship between the directors of the group companies. It would be logical to hold that the applicant is a "related party" of the corporate debtor within the meaning of section 24(A) (h), i.e., a person on whose advice, directions or instructions the individual is accustomed to act.

24. After carefully going through the facts of the case, it is apparent that the applicant has been an integral part of a family run closely held global business group, and the corporate debtor has been an extension of the same group in India. The applicant has not been able to rebut the allegations that the agreements have been made between various wings of the family concerns, and even the assignee mentioned in the Assignment Agreement is controlled by the same group. Prima facie, it looks like an arrangement and not a genuine contract driven by business considerations. In view of the same, we are of the view that the applicant is a related party of the corporate debtor within the meaning of Section 24(A)(h) of the Code. Therefore, we do not accede to the prayers made by the applicant and barring the RP to treat the claim of the applicant as per the provisions of the IBC.

25. In the result, IA No. 145/2021 is dismissed.