

IN THE NATIONAL COMPANY LAW TRIBUNAL

DIVISION BENCH, DELHI

BENCH III

IA-2615 of 2020

In

IB -1683/ND/2018

Application under Section and 60(5) of the
Insolvency & Bankruptcy Code, 2016

In the matter of

Crayon Software Exports India (P) Ltd. ... Financial Creditor

Versus

Vas Data Services (P) Ltd. ... Corporate Debtor

In the Matter of:

Gokaldas Exports Ltd. ...Applicant

Versus

Sh. Sunil Kumar Jain, RP for

VAS Data Services Pvt. Ltd. Respondent

Order delivered on 30th March, 2021

CORAM:

CH. MOHD. SHARIEF TARIQ, HON'BLE MEMBER (JUDICIAL)

**SHRI NARENDER KUMAR BHOLA, HON'BLE MEMBER
(TECHNICAL)**

For Applicant: Mr. Krishnendu Datta and Mr. Santosh Kumar

For RP: Mr. Pankaj Jain.

ORDER

(Through Video Conferencing)

Per: NARENDER KUMAR BHOLA, MEMBER (TECHNICAL)

1. Under consideration is IA-2615 of 2020 filed under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IBC, 2016") seeking the relief that the resolution professional of the VAS Data Services Pvt. Ltd./YEPME INDIA ('corporate debtor' or 'CD') may be directed to accept and include the claim of applicant as the claim of financial creditor.
2. The facts that compelled the Applicant to file the application under consideration areas follows: -
 - a. It is submitted that the applicant was approached by the Corporate Debtor and its wholly owned subsidiary YEPME UK Limited and their common management and directors in 2017 for investment in YEPME UK Limited. Upon representation by the CD and YEPME UK Limited

and being satisfied by the global expansion plan, the applicant agreed for investment. The Investment agreement namely, YEPME UK Investment Agreement dated 31.05.2017 was entered among VAS Data Services Pvt. Ltd. YEPME UK Limited along with Vivek Gaur, Sandeep Sharma, Anand Jhadav and Applicant Company, Gokaldas Exports Limited. As per agreement the applicant paid subscription amount of Great Britain Pound (GBP) 750008 on 08.06.2017 and subscribed 22,577 'series A preference shares' in the YEPME UK Limited, constituting 33% shares holding in the said company.

- b. It is further submitted that as per clause 3.1 of the agreement the VAS Data Services Pvt. Ltd. and YEPME UK Ltd., were obligated to submit various periodical financial information, reports and documents to the applicant company but they failed to provide the same despite being made repeated requests and demands. The applicant on 3rd February 2019 sought to invoke the right to invoke the right to inspection of books of accounts and records related to their investment but the Corporate

Debtor refused to permit such inspection. Then on 3rd December 2019 the applicant through its UK solicitor issued first legal notice to Corporate Debtor along with Vivek Gaur, Sandeep Sharma, Anand Jadhav, YEPME UK Limited but was not replied by the concerned. Then the legal notice was again sent on 16th January 2020, which was replied by ShriVivek Gaur and Sandeep Sharma (Common Directors of CD and YEPME UK Ltd.) on 24.01.2020. From the reply dated 24.01.2020 the applicant came to know that the Corporate Debtor is undergoing CIR Process pursuant to an order dated 9th April, 2019 passed by this authority.

- c. It is further averred that as per clause 13 of the agreement, *“13.1 on the occurrence of the Holding Company Liquidation Event, notwithstanding anything to the company, the investor at its sole discretion shall have the right to require YEPME INDIA to purchase the series A preference shares held by the investor in YEPME UK at a price which is higher of (a) 4 four times the subscription amount or (b) provide the investor a 35% internal rate of return (in GBP terms) on the subscription amount, which*

amount, the investor shall be entitled to receive in preference to any distribution to the shareholders of YEPME INDIA or other shareholders.” It is contended that the applicant is entitled to claim the aforesaid amount i.e., 30,00,032 GBP from the CD as per investment agreement.

d. It is further averred that on 24.02.2020 the applicant sent a notice to the resolution professional of CD and called upon to pay agreed sale consideration of 30,00,032 GBP as per investment agreement within a week from receipt of this notice and further made it clear that in case of default in payment of sale consideration, the applicant shall be entitled to claim interest @ 2% per month till actual payment of entire claimed amount. The notice was not replied by the CD. This is a financial debt in law and in fact, which the corporate debtor has failed to discharge. The applicant is a financial creditor of the corporate debtor. The consideration for time value of money was and is clearly stipulated in clause 13.1 of investment agreement which obliges the corporate debtor to purchase the shares at a value 4 times of the

investment made by the claimant. The applicant has filed its claim in prescribed form on 15th April, 2020 and 23rd April 2020, however, resolution professional has not acted upon it.

3. The Resolution Professional filed its reply to the Application under consideration and submitted as follows; -
 - a. It is submitted that the Applicant has not been recorded as Financial Creditor/Lender in the books of accounts of the CD. There is no financial debt given by the applicant to CD. The investment has been made into the preference shares of the subsidiary company of CD and no loan is given to the holding Company/CD. The holding company and subsidiary company are distinct and separate entities and applicant is a shareholder to YEPME UK. The CD is not under liquidation as alleged by the applicant and the resolution plan has already been approved by the CoC on 6th August, 2020 for CD.
 - b. It is further averred that the investment agreement does not have any legal effect as the appropriate stamp duty according to the Indian Stamps Act, 1899 has not been paid, therefore, making the agreement inadmissible as an

evidence in the court of Law. Furthermore, as per para 20.7 of the investment agreement “*governing law, venue: this agreement shall be governed by and construed in accordance with the laws of United Kingdom and courts at London, United Kingdom shall have exclusive jurisdiction on the matter arising from or in connection with this agreement without regard to the principles of conflicts of laws.*”

c. It is averred that the applicant has not exercised its following rights and is therefore responsible for its own default: -

- Investor to depute at least 2 (two) employees to the company on a full-time basis at such cost as may be determined by the Investor in accordance with the applicable Law. (Clause 4.4:1)
- The transaction shall be subject to the completion of the necessary due diligence to the satisfaction of the Investor. (Clause 4.6)
- The investor shall have the right to nominate and maintain a proportionate number of directors which

shall be 2 (two) directors to the board of YEPME UK(Investor's Nominee Director). (Clause 7.2.2)

- ...x...x...quorum under mandatory applicable law and all the related provisions would apply and shall compulsorily include the presence of at least I (one) investor's Nominee Director. (Clause 7.6)
- Shareholders' Meetings: Meetings of the Shareholders shall require the presence of a representative of the Investor at all times and shall be in accordance with the provisions of the Amended and Restated Articles and the UK Companies Act.... (Clause 7.9)

d. It is further averred that the claim made by applicant is the insistence to buy their shareholding in YEPME UK Ltd. Purchase of shares is merely investment in capital of the company having risks associated with the investment and cannot be considered as "Financial Debt". Hence, prayed that the application may be rejected.

4. The resolution professional relied on the judgment of this authority in the case of **Ashok B. Jiwarjka, Director of Alok Infrastructure Ltd. V. Axis Bank Ltd.**, wherein it

was held that Subsidiary Company is a distinct legal entity, separate from the holding company which is also a separate legal entity. Furthermore, on appeal in the said case(supra) the Hon'ble NCLAT held that the CIR Proceeding initiated against Alok Infrastructure Limited (the Subsidiary Company) is completely separate from the CIR Proceeding pending against Alok Industries Limited (the Holding Company).

5. The applicant filed the rejoinder to the reply of the resolution professional and denied each and every averment made by the resolution professional in the reply and reiterated the facts of the application.
6. The applicant also filed the written submission and replied to each contention raised by the respondent during the hearing of the application under consideration as under; -
 - a. The first point raised by the RP/respondent is that the applicant is not a financial creditor, to which it is submitted by the applicant that he fulfils all the ingredients of the 'Financial Creditor' as provided under section 5(8) of IBC, 2016. The applicant referred to the Clause 14.1.2 of the investment agreement which provide

that the applicant entitled to a cumulative dividend of 0.1% per annum, hence, right to payment or a claim is grafted along with the preference share. Reference is also placed on clause 11.1, 11.2, 11.3 and 11.4 of the investment agreement in order to show that the preference share were purchased (or money was disbursed) against time value of money. Furthermore, reliance is placed on recital "c" that states that the investment is only being carried out for the business purpose of YEPME UK.

b. Reliance is placed on **NICCO Corporation Limited v.**

Technology Development Board

MANU/NL/0178/2019, wherein the Hon'ble NCLAT held

that in light of the stipulation in the supplementary

agreement, the preference shares gave rise to a financial

debt in favour of Respondent. The applicant also relied on

paragraph 72-78 of **Pioneer Urban v. Union of India**

2019 (8) SCC 416. The Hon'ble Supreme Court has held

that 5(8)(f) is a catch of all provision that is wide enough

to include any and all transactions that have the

commercial effect of raising money for the use of

business. The applicant also quoted the paragraphs 37,44,53 and 58 of **State Bank of India v. ACCIL CP(IB) No. 50 of 2018**. The Hon'ble NCLT Principal Bench has held that mere non-receipt of disbursed amount is by itself not a reason to disqualify a creditor from the definition of financial creditor.

- c. Second point raised by the Respondent is that Clause 13 of investment agreement is ultra vires of the Articles of Association of the Corporate Debtor. It is submitted by the Applicant that the right of redemption available with the applicant in case of a Holding Company Liquidation event is a contractual obligation undertaken by the Corporate Debtor. The applicant relied on Hon'ble Apex Court judgment para 22 of **Jagdish Mandal vs. State of Orissa and Ors. 2007(14) SCC 517**. It provides:

“Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review.”

d. Another contention of the respondent is that the approval of shareholders and board not taken. It is submitted by the applicant that the Board of Director of CD was consisting of Mr. Sandeep Sharma and Vivek Gaur. Mr. Sharma was nominated by the CD, being the sole shareholder of YEPME UK for the YEPME UK and Mr. Vivek Gaur signed the investment agreement on behalf of CD. Hence, both the directors of the CD have signed the investment agreement. Furthermore, at that time Mr. Sandeep Sharma and Mr. Vivek Gaur held over 78% of the voting stock of CD, therefore, it is a clear indication that there was shareholder consent for the transaction. Moreover, the internal approvals or permissions that the CD ought to have taken, cannot come in the way of a duly executed contract between the CD and the applicant. The applicant is protected by the doctrine of Indoor management, as provided by this Authority in **M/s Anurutan Textiles vs. Sarveshwar Creations Private Limited dated 27.10.2020.**

e. Fourth issue raised by the respondent is that the investment agreement has not been adequately stamped.

It is submitted that mere non-stamping of the investment agreement cannot defeat a substantial right accrued under a contract. It is submitted that reliance on Garware Wall Rope & SMS Tea Estate is misplaced as both have been overruled by the Hon'ble Apex Court in **NN Global Mercentile v. Indo-Unique Flame Limited at page 52.**

It is further submitted that the applicant is willing to make up the deficient stamp duty along with any penalty to bring an end to the present controversy.

7. The Respondent/Resolution Professional also filed the written submission and submitted as follows; -

- a. It is submitted that the YEPME UK is under "Name Strike OFF Process"/Dissolution by Companies House, UK. The sole director of YEPME UK resigned on 20.01.2020 and transfer of fully convertible preference shares (FCPS) of YEPME UK, likely cannot take place and is an attempt to maliciously sell shares which are likely not in existence. The Applicant is vested with several management rights, right to appoint directors on YEPME board/KMPs and veto power in YEPME UK akin to rights of equity shares held by Vas Data in YEPME UK. It further stated that

clauses 4.4, 4.6, 7.2.2., and 7.9 of investment agreement clearly demonstrates that the investment cannot be categorised as a debt in YEPME UK, thus it is at par with equity shares. Furthermore, as per clause 20.7, 20.16 and 20.17 any dispute was subject to Arbitration in UK and jurisdiction of UK Courts and UK Laws. There is no separate guarantee or indemnity agreement between CD and applicant.

- b. It is further submitted that the applicant has invested “Series A Fully Convertible Preference Shares” which are considered as Equity instrument in YEPME UK. It is contended by the applicant that it is entitled to dividend @ 0.1%, however, dividend is only payable or accrues when declared by board of directors. It is further stated that clause 13 of the investment agreement is *ultra vires* the article of association of the CD namely Vas Data and also section 6 and section 43 of the Companies Act. The respondent also raised the issue of Improper stamp duty as required under article 5 of schedule I of Indian Stamp Act (as applicable in Delhi). The applicant also stated that ruling in **Garware Wall Rope Ltd vs Coastal Marine Con**

Ltd MANU/SC/0511/2019 is applicable to the present case as the Hon'ble Supreme Court has only referred the matter to constitutional bench on a limited question of its applicability in Arbitration matters. The Respondent also relied on **Committee of Creditors of Essar Steel India Ltd V. Satish Kumar Civil Appeal No. 8766-67 of 2019**, wherein it was held by Hon'ble Supreme Court that the claim has no merit in view of the failure to produce duly stamped agreement.

- c. It is further averred that Investment agreement terms contrary to provisions of IBC, 2016 as clause 13.1 and 13.2 of the said agreement is contrary to section 53 of IBC, 2016. Furthermore, CD is still under CIR Process and not under liquidation. Moreover, the RP is not required to take control of the subsidiary as per explanation (b) to Section 18 of IBC, 2016. The applicant further raised the issue of approval of Board or Shareholder of VAS Data not obtained. Although, the signatories to the said agreement hold majority of the Equity shares in CD, whereas, no approval of preference shareholders obtained holding paid-up cumulative

preference share capital of Rs. 6,93,74,600/- (face value) who have invested Rs. 525 Crores.

d. As far as cases relied on by the applicant, it is stated that State Bank of India vs ACCIL cannot be relied as time and again the respondent has pointed out the applicant's own default in fulfilling the conditions of the said agreement. It is further submitted that the findings of Pioneer Urban Land vs. Union of India, cannot be applied to the present case as in Pioneer Urban the investment was made in real estate market which is altogether different to the present case. Even, no investment is made by Applicant in VAS Data, hence, cannot be a ground of 'time value of money' concept even. The Respondent also relied on the case of **Raghunath Rai Bareja and Another Vs. Punjab National Bank and Others**. It was held by the Hon'ble Supreme Court that in case of conflict between Law and Equity; the Law will prevail.

8. We have heard the counsels for the applicant and the respondent at length and the contents of IA have been perused. It is an admitted fact that the Applicant has entered into an

Investment Agreement dated 31.5.2017 with M/s YEPME UK Ltd (subsidiary of Corporate Debtor) along with Corporate Debtor for making an investment of GBP 750008 in the Subsidiary of CD and the said amount was paid to YEPME UK Ltd on 8.6.2017. Consequently, the applicant subscribed to 22,577 'series A preference shares' in YEPME UK. The said agreement dated 31.5.2017 has been signed by the CD through S/Shri Vivek Gaur, and by Shri Sandeep Sharma, on behalf of YEPME UK. It is noted that both Shri Vivek Gaur and Sandeep Sharma are also associated with CD as being its Directors. It may be stated that YEPME UK is a body corporate incorporated in the United Kingdom under the UK laws.

9. The counsel for RP has opposed the Application being admitted as Financial Creditor for the CD on the following grounds:-

i) The Applicant is not recorded as Financial Creditor/Lender in the Books of Account of CD, there being no financial debt/loan given to the CD.

ii) Holding company i.e., CD is distinct and separate entity and Applicant is a shareholder in YEPME UK and CD is

not under liquidation. Reliance is placed on the ratio rendered by Hon'ble NCLAT in the case of Ashok B. Jiwarjka, Director of Alok Infrastructure Ltd. Vs. Axis Bank Ltd.

iii) Resolution Plan is already approved by the CoC of the CD on 6.8.2020.

iv) Investment Agreement is inadequately stamped, therefore does not have any legal effect and is inadmissible as evidence in the court of law.

v) The claim made by Applicant is merely an investment in capital of the company i.e., YEPME UK and has risks associated with such investment, the same cannot be considered as "Financial Debt".

vi) The YEPME UK is under "Name Strike Off Process/Dissolution by Companies House, UK. As the sole director of YEPME UK resigned on 20.1.2020, transfer of Fully Convertible Preference Shares (FCPS) of YEPME UK cannot take place and is an attempt to maliciously sell shares which are likely not in existence.

vii) There is no separate Guarantee or Indemnity Agreement between CD and the Applicant.

viii) The CD is still under CIR Process and not under liquidation.

ix) The RP is not required to take control of the Subsidiary as per explanation (b) to Section 18 of IBC, 2016.

10. Moot questions before us to decide the matter involved in present IA are as under:-

- a) Whether the Investment Agreement entered into between the Applicant, YEPME UK and its Indian Holding Company, i.e., the CD places the CD under any Contractual Guarantee/Indemnity towards the Applicant.
- b) Whether the Applicant fulfils all the ingredients of the “Financial Creditor” as stipulated under section 5(8) of the IBC, 2016, particularly when the investment has been done in subsidiary of CD and for furtherance of subsidiary’s business.
- c) Whether there is any flow of money by way of financial debt from the Applicant to the CD and is the same duly reflected in books of account of CD.

- d) Whether the status of the CD at present can be equated with that of it being under liquidation, so as to give benefit of clause relating to “Holding Company Liquidation Event” and consequential benefits in terms of clause 13 of the Agreement.
- e) Whether the Investment Agreement, which admittedly is not adequately stamped, can be taken as evidence under the law.

11. FINDINGS

a) The careful reading of the Investment Agreement indicates that though it is entered into among the Applicant, YEPME UK and the CD (the holding company of YEPME UK) and the same is for business purposes of YEPME UK only. There is no clause or stipulation which can be equated with a Guarantee/Indemnity agreement. The money in question has not flown to the books of account of the CD in any manner in pursuance to the said agreement. Therefore, the ingredients of Financial Creditor as stipulated under Section 5(8) of the Code are not satisfied. Accordingly, the findings in relation to (a) to (c) are in the negative.

b) Further, admittedly the status of Corporate Debtor herein is that being under Corporate Insolvency Resolution Process, which is governed by Chapter II of Part II of the IBC, 2016 and same is very much distinct and separate stage in comparison to “Liquidation Process” as stipulated under Chapter III of the said Code. The Applicant cannot claim the said status with respect to CD to press its claim. Accordingly, the question at (d) above is also answered in the negative.


c) As regards the Investment Agreement, which is admittedly not adequately stamped as per the Indian Stamp Act, cannot be admitted as evidence, as was held by Hon’ble Supreme Court in the matter of Committee of Creditors of Essar ... vs Satish Kumar Gupta on 15 November, 2019 in CIVIL APPEAL NO. 8766-67 of 2019—Para 99 thereof refers. Further, the contention of Applicant that the decision of Hon’ble Supreme Court in the matter of Garware Wall Rope & SMS Tea Estate is misplaced being over-ruled by the Hon’ble Apex Court in NN Global Mercantile v. Indo-Unique Flame Limited at page 52 is not correct, since through the said judgement dated 11.1.2021, the matter has been recommended to be referred to Constitution Bench

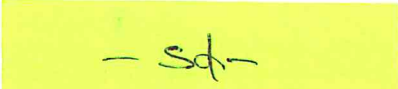
(Para 12 thereof refers). Accordingly, the said question is answered in the negative.

d) In addition to the above, we are in agreement with contention of RP that CD herein is a distinct legal entity separate from YEPME UK, therefore, cannot be made liable for the debt of its Subsidiary. Further, we are also inclined to agree with contention of RP that in terms of explanation (b) to Section 18 of IBC, 2016, he is not obliged to take control of Subsidiary of Corporate Debtor. We have given careful consideration to case law cited by both the parties while formulating our views as above.

12. In view of the above findings, the IA being devoid of merits, is hereby **rejected**.

13. The order is pronounced through video conferencing.


(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)


(CH. MOHD SHARIEF TARIQ)
MEMBER (JUDICIAL)