

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH
MA 485/2017 in CP 1045/I&BP/2017

Under Section 60(5) and 10 of IBC, 2016

IL & FS Financial Services Ltd. Applicant/Financial Creditor

In the matter of

Vandana Udhyog Ltd. Corporate Applicant.

vs.

Manush Commodities Ltd. & Ors. Respondents.

Order delivered on 20.10.2017

Coram: Hon'ble B.S.V. Prakash Kumar, Member (J)
Hon'ble V. Nallasenapathy, Member (T)

For the Applicant: Mr. Dhananjay Kumar, Ms. Saloni Kapadia, Mr. Anush Mathkar, i/b Cyril Amarchand Mangaldas

For the Respondent: The Advocate for the Respondents present and argued though not marked his appearance.

For the Intervener: Mr. Adesh Kumar Mehta, IRP

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Oral Order dictated in the open court on 20.10.2017

1. One of the Financial Creditors, viz. IL & FS Financial Services Ltd. has filed an application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 on behalf of the applicant/Financial Creditor challenging the constitution of the Committee of Creditors of the Corporate Debtor, seeking reliefs as follows:

- a. That this Hon'ble Tribunal be pleased to direct the Committee of Creditors as set up by the Interim Resolution Professional in meeting held on 27.7.2017 be reconstituted with R1 and R3 excluded from the Committee of Creditors as they are related parties of the Corporate Applicant;



- b. That pending the final disposal of the present Application this Hon'ble Tribunal be pleased to restrain the IRP from issuing notice of the meeting of the Committee of Creditors to R1 to R3.
- c. That pending the final disposal of the present Application, this Hon'ble Tribunal be pleased to direct the IRP to restrain R1 to R3 from attending and/or participating and/or voting at the meeting of Committee of Creditors.
- d. For ad interim reliefs in terms of prayer clause (a) to (c);
- e. For costs;
- f. For such other orders as this Hon'ble Tribunal may deem fit and proper.

2. On perusal of this application moved by the Financial Creditor, it appears that this Financial Creditor filed this application against the corporate debtor represented by Interim Resolution Professional (IRP) and also three Respondents, viz. Manush Commodities Ltd., Diamond Wires Pvt. Ltd and Shivam Galvanised Wires Pvt Ltd., as Respondents stating that since these three respondents being related parties as mentioned under Section 5(24) of the Insolvency and Bankruptcy Code, 2016, they should not be considered as Financial Creditors along with this applicant. Since they have been considered as Financial Creditors, the present applicant who has voting of more than 90% voting value in Committee of Creditors has been brought down to 61% voting value, which will not allow this applicant to take any decision to move any further in respect to Insolvency Resolution Process.

3. The reason for seeking deletion of these three respondents, i.e. Manush Commodities Ltd., Diamond Wires Pvt. Ltd and Shivam Galvanised Wires Pvt Ltd., as Financial Creditors is that the books of accounts of the Corporate Debtor company clearly indicate that all these three respondents debt has been shown as debt raised from the associated companies, the applicant Counsel says that indeed the name of Manush Commodities Ltd has been explicitly mentioned as associated company with the Corporate Debtor. For this IRP having rightly or wrongly ignored the fact of the status of these Respondents as related companies and included these three respondents as financial creditors along with this applicant, despite Section 21(2) of the Insolvency and Bankruptcy Code, 2016 mandates Insolvency Resolution Professional to verify as to whether any of the Financial Creditors falling within the category of the related party or not. This applicant, having felt that this Interim Resolution professional inadvertently included these three Respondents as Financial Creditors, brought it to the notice of IRP on 25.7.2017 writing a letter to the IRP

annexing the documents reflecting that these three respondents fall within the category of related parties. But somehow no decision has been taken yet as to whether they are to be construed as Financial Creditors or not, because of not taking any decision in respect to this aspect, though 120 days have gone by after declaration of moratorium, the Committee of Creditors could not take any decision even to appoint Insolvency Resolution professional in place of this Interim Resolution professional.

4. The Counsel appearing on behalf of this Interim Resolution professional has categorically stated that whatever happened in constitution of this Committee of Creditors, it has happened inadvertently because of lack of proper information from the books of Corporate Debtor. Since all these three respondents have been shown as unsecured creditors in the books of accounts of the company, he was under the impression that they should also be included as financial creditors along with this applicant. He says that the Interim Resolution Professional has no malafide to snub the rights of the applicant herein, however, since this Interim Resolution Professional himself is not interested to continue as IRP and has tendered his resignation letter to this Bench, so as to relieve him from his duties assigned to him as IRP, the same will be considered by this Bench in the following order.

4. The Counsel appearing on behalf of R2 and R3, i.e. Diamond Wires Pvt. Ltd and Shivam Galvanised Wires Pvt Ltd. has stated that they are not the related parties as stated under section 5 (24) of the Code, therefore they shall be given opportunity to continue as members of the Committee of Creditors for further process to take place in the Corporate Debtor company.

5. On hearing the submissions of this applicant, the IRP Counsel and the Counsel for R2 and R3, it appears that it is very much evident in the books of the Corporate Debtor itself that R1 i.e., Manush Commodities Ltd., not represented by anybody, admittedly continuing with the Corporate Debtor having 16laks and odd shares in Manush Commodities Ltd., for this reason alone, Manush should have not been shown as one of the financial Creditors entitled to become member of Committee of Creditors. Therefore, it goes without saying that R1 should not have been taken into count in the Committee of Creditors.

6. As to R2 and R3, i.e. Diamond Wires Pvt. Ltd and Shivam Galvanised Wires Pvt Ltd., the applicant Counsel submits that the unsecured loan of the Corporate Debtor Company as on 31.3.2016 was Rs.82,94,02,803. As against this document, as on 31.03.2016, this applicant filed a copy of Form 'A' filed by this Corporate Debtor before Board for Industrial and Financial Reconstruction (BIFR) to show that

this Corporate Debtor categorically mentioned this unsecured loan of Rs.82,94,02,803, as a loan come from promoters and associates as on 28.6.2016. Since the timing and the amount mentioned as given by the promoters and associates is very much matching with the unsecured loan in the balance sheet of the company, for there being no explanation to this aspect from the IRP Counsel and R2 and R3 counsel as to why this Bench should not construe the unsecured loan shown in the balance sheet of the company as on 31.3.2016 as a loan come from the promoters and associates, as shown in Form 'A' filed before BIFR on 28.6.2016 by the Corporate Debtor, this Bench has to believe that this entire ₹82crores and odd has come from associated companies only, the reason to have such belief is, almost entire loan has been shown as come from these three respondents only.

7. Of course, the Counsel appearing on behalf of R2 and R3 submits that he needs time to give explanation over this aspect, but whereas since already 120 days has alone been consumed in constitution of committee of committee of creditors since the day the petition has been admitted on the facts and figures given by the Corporate Debtor, today, this Bench could not go beyond the records of the Corporate Debtor company to consider R2 and R3 as Financial Creditors as contended by the Counsel appearing on behalf of R2 and R3. The reason is clear that for this case has been being dealt with basing on the record of the Corporate Debtor, and there being material for having reasonable belief that these three are associated companies amounting to related parties, to ensure things start happening from now onwards, committee has to be immediately reconstituted weeding out related parties from the committee of creditors.

8. On top of it, one Mr. Pralhad Agarwal, who is promoter of the Corporate Debtor company, has been permitted to sit in the Committee of creditors to represent R3 in this application. Had R3 being really the Financial Creditor not having any connection with the promoters of this company, what has made this promoter Mr. Pralhad Agarwal to represent R3 in the Committee of Creditors? This IRP permitted this Pralhad Agarwal to sit in the Committee of Creditors representing R3 herein. This R2 and R3 on behalf of which argument has been made that loan has been given to this company and they are not related parties to this company, has already been struck off from the rolls of ROC for the reason of consecutively not filing Annual Returns for the last two years. When the company has not filed Annual Returns consecutively for the last two years, what authenticated records would be there to produce before this Bench to say that this R2 and R3, i.e. Diamond Wires Pvt. Ltd and Shivam Galvanised Wires Pvt Ltd., continue as Financial Creditors to this Corporate Debtor for the last two years.

9. Since this Bench has not found any material to construe that this R2 and R3, Diamond Wires Pvt. Ltd and Shivam Galvanised Wires Pvt Ltd., are not associated companies to the Corporate Debtor, we have not found any material at this juncture to say that they are not associated companies to the Corporate Debtor company herein. The IRP has not collected any information to find out that they are not related parties, especially when this applicant twice reported to the IRP showing material that these three respondents are related parties. The material considered for including them in the CoC as financial creditors is a financial statement, except this nothing else is present to consider these respondents as not associated to the corporate debtor.

10. On further perusal of the records, it appears that the IRP perhaps out of ignorance construed R1 to R3 as Financial Creditors without verifying that they are related parties to the Corporate Debtor. However, once moratorium is declared, it has to remain continuing under the management of either Interim Resolution professional or Insolvency Resolution Professional under the supervision of Committee of Creditors, therefore it could not be reasonable to consider his resignation letter before appointment of Insolvency Resolution Professional on the recommendation come from the Committee of Creditors.

12. In view of the same, the Interim Resolution Professional is hereby directed to reconstitute Committee of Creditors as prescribed under Section 21 specially by looking at proviso to subsection 2 of section 21 of the Code, on such reconstitution, the Committee of creditors shall pass a resolution recommending another Insolvency Resolution Professional name and then file an application before this Bench for referring his name to IBBI.

13. Accordingly, this application is hereby disposed of, directing the Interim Resolution Professional to immediately, preferably within one week hereof, constitute Committee of Creditors in accordance with law.

Sd/-

V. NALLASENAPATHY
Member(Technical)

Sd/-

B. S. V. PRAKASH KUMAR
Member (Judicial)