IN THE NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH
AT HYDERABAD

C.A.No.153/2017
in
CP(IB)No.41/7/HDB/2017

Under Section 60(5) of the IBC, 2016

In the matter of

SREI Infrastructure Finance Limited
"Vishwakarma" 86C, Topsia Road (south)
Kolkata – 700 046. ... Applicant/Financial Creditor

Versus

1. Canara Bank
   TSR Complex, 2nd Floor,
   1-7-1, S.P. Road,
   Secunderabad – 500 003. ... 1st Respondent/Financial Creditor

2. Shri K.K. Rao
   Interim Resolution Professional
   Deccan Chronicle Holdings Limited
   No.36, Sarojini Devi Road,
   Secunderabad – 500 003. ... 2nd Respondent/Corporate Debtor

Order Pronounced on: 16.11.2017

CORAM:

Hon'ble Rajeswara Rao Vittanala, Member (Judicial)

Hon'ble Ravikumar Duraisamy, Member (Technical)

Parties Present:

For the Applicant	:	Shri Rishav Banerjee, Advocate along with ShounakMitra, Zulfiqar Ali, Srikanth Hariharan, Ahishek Das, Advocates.
For the 1st Respondent	:	Shri T. Nagender, Advocate
For the 2nd Respondent	:	Shri K.K. Rao, IRP

Per: **Ravikumar Duraisamy, Member (Technical)**

ORDER

1. The Company Application bearing C.A.No.153/2017 in CP(IB)No.41/7/HDB/2017 is filed by the Applicant/Financial Creditori.e. SREI Infrastructure Finance Limited on 23.08.2017, under Section 60(5)of IBC, 2016, seeking the following reliefs:-

   a) Allow the Applicant to be member of the Committee of Creditors and participate as well as vote in the meetings of the Committee of Creditors of the Corporate Debtor.

   b) The letter/e-mail dated 14.08.2017 and 15.08.2017 both issued by the IRP be set aside.

   c) The meeting held on 17.08.2017 be declared as null and void and/or invalid and any decisions taken in the said meeting held on 17.08.2017 be set aside and/or be declared as null and void., etc.

2. The Applicant herein had earlier filed a C.A.No.155/2017 sought to implead itself as a 2nd Respondent in CP(IB)No.41/7/HDB/2017 and the Bench vide Order dated 31.08.2017 allowed C.A.No.155/2017 by directing the Petitioner i.e. Canara Bank to implead SREI Infrastructure Finance Limited as one of the respondents.

3. The major submissions of the Applicant is that as per Regulation 17 of the CIRP Regulations, 2016, the Interim Resolution Professional shall file a report certifying constitution of the committee of creditors to the Adjudicating Authority on or before the expiry of 30 days from the date of his appointment and the interim resolution professional shall convene the first meeting of the committee within 7 days of filing the report under this regulations. Thus, as is evident from Regulations 17 of the CIRP Regulations, 2016, that the IRP can convene the first meeting of the Committee of creditors only after he had filed a report certifying the constitution of the committee of creditors to the adjudicating authority. It

is important to note that in the instant case, the IRP had initially constituted a committee of creditors which included all the financial creditors including the applicant but has subsequently changed the constitution of the committee of creditors by the addendum dated 14.08.2017. In such a scenario, the IRP had the mandate under IBC as well as under the CIRP Regulations to inform the adjudicating authority about the reconstitution of the committee of creditors and it is only thereafter, that the IRP can convene the first meeting of the Committee of Creditors within seven days of filing the said report under CIRP Regulations. To the best of the knowledge of the applicant and as far as the applicant is aware the IRP had not filed any report before the Adjudicating Authority about the constitution or reconstitution of the Committee of creditors vide the addendum dated 14.08.2017 but has illegally and/or unlawfully conducted and/or held the first meeting of the committee of creditors on 17.08.2017. Further, such first meeting of the committee of creditors held on 17.08.2017 is dehors the provisions of the IBC and the CIRP Regulations, 2016 and such first meeting of the Committee of Creditors is invalid and /or null and void and any decision taken in such invalid meeting held on 17.08.2017 is a nullity. The Applicant thus states and submits that such decisions taken in the first meeting of the Committee of Creditors held on 17.08.2017 should be declared as null and void and any decision of such first meeting should be set aside. The Applicant further submitted that the agenda of the first meeting of the Committee of Creditors was communicated by the IRP to the applicant at the initial stage when the applicant was included in the committee of creditors. As would be evident from such agenda, one of the agenda of the first meeting was regarding appointment of the resolution professional for the corporate debtor. Since, the first meeting held on 17.08.2017 is invalid and/or null and/or void, any decision pertaining to the appointment of the resolution professional should also be declared as and/or void and the same should also be set aside by Adjudicating Authority. The applicant further states and submits that in light of the non-compliance by the IRP under the mandatory provisions of

regulation 17 of the CIRP Regulations, 2016, the reconstitution of the committee of creditors is bad in the eyes of law and should be set aside by the Adjudicating Authority. The applicant further submitted that the purported decision of the IRP that the Applicant is a related party of the Corporate Debtor is completely erroneous and/or bad. The Applicant being a Public Financial Institution is duty bound to protect the public money. Sometime in 2014, the Corporate Debtor was going through lot of financial crisis and was not servicing the debt of the applicant. The Applicant in the interest of the public fund and to secure their credit exposure had decided to convert a small portion of their debt into equity as was contractually agreed under the said Rupee Loan Agreement dated 30.08.2011. The conversion of the loan into equity was recognised by an order dated 24.12.2014 passed by the Hon'ble Debts Recovery Tribunal-I at Kolkata. Such shareholding of a lender cannot be equated with the shareholding of any other person for the simple reason that the shareholding is not an acquisition of shares per se but is in reality a recovery of part of the outstanding of such a lender in view of the inability of the Corporate Debtor to service its borrowings. It was never the intention of the Applicant to invest in the shares of the Corporate Debtor. As such, a logical difference must be made between an ordinary shareholder holding shares for investment purpose or for controlling the Corporate Debtor and a lender who was forced to recover part outstanding by converting the same into shares of the Corporate Debtor.

4. Canara Bank, the 1st Respondent/Financial Creditor in the present CA vide its Counter dated 14.09.2017 submitted that admittedly the representatives of the applicant company were inducted into the Board of Corporate Debtor Company i.e. Deccan Chronicle Holdings Limited in all related matters. Section 5(7) and 5(8) of the Code 2016 deals with definition of Financial Creditor and financial debt and there is no dispute to that extent. Even if the applicant is a Financial Creditor and even if M/s Deccan Chronicle Holdings Limited is a financial debtor, the fact remains that the applicant is a related party as defined in the Insolvency and Bankruptcy Code, 2016. If the applicant is permitted to vote in the meeting of the

Committee of Creditors, they shall cause serious prejudice to other creditor. It is further submitted that in Para 8 of the application the applicant admitted that it is a shareholder of the debtor company holding 6,60,37,735 equity shares of Rs.2/- each at a premium of Rs.1.18 per shares as per Order dated 24.12.2014 passed by the Hon'ble Debtor Recovery Tribunal-I at Kolkata. Further, it is pertinent to mention that even if the applicant has not permitted to vote, the claim of the applicant shall have to be taken into a consideration being a creditor whether as secured or unsecured creditor.

5. The IRP vide his reply Affidavit dated 16.09.2017, filed with the Tribunal on 18.09.2017 submitted that the application is liable to be rejected as the relief claimed is contrary to the provisions of Section 5(24) of the Insolvency and Bankruptcy Code, 2016 because the Applicant squarely falls under the definition as enumerated in the provisions of the Code which categorically bars the applicant from seeking the present relief of allowing the applicant to be a member of the committee of creditors as the applicant holds more than 20% share in the Deccan Chronicle Holdings Limited. It is further stated that the list of the Creditors forming part of the Committee of Creditors was also communicated to the Applicant on 10.08.2017 along with the list of Creditors forming part of the CoC. It is further stated that Applicant Company is the largest financial creditor and being a related party, the CoC was reconstituted on 14.08.2017 by removing the applicant and one more financial creditor by name Dr. V. Shankar, who has declared that he was a relative of Former Director of the respondent Company. The applicant being a related party is not having right to participate in the voting as per Section 5(24)(j) of Insolvency and Bankruptcy Code, 2016, but the Applicant has approached this Hon'ble Tribunal by suppressing the true facts with malafide intention to get right in participating in the CoC which is untenable in law. Further in view of the admitted fact that the applicant holds more than 20 percent shares in the Corporate Debtor Company, the decision of the IRP is in strict compliance with the provisions of the Code, which can't be found fault

with. In view of the above, it is prayed that the present Application be dismissed.

6. The matter was posted for hearing on 21.08.2017, 31.08.2017, 14.09.2017 and 21.09.2017. On 21.09.2017, orders were reserved in C.A.No.153/2017 and C.A.No.156/2017 and interim order passed on 21.08.2017 was extended till disposal of both the CAs.

7. We have carefully perused the records and material papers filed in the present case and the Bench made the following observations:

i) From the facts submitted by the applicant it is noted that the applicant being a public financial institution, in the interest of the public fund and to secure their credit exposure had decided to convert a small portion of their debt into equity as was contractually agreed as per their loan agreement dated 30.08.2011. The applicant further submitted that the aforesaid conversion of loan into equity shares was recognised by the Hon'ble DRT Kolkata vide its order dated 24.12.2014. The Corporate debtor has issued and allotted 6,60,37,735 equity shares of Rs.2 each at a premium of Rs.1.18 per share to the applicant/financial creditor. The applicant further submitted that the conversion was done only for an amount of Rs.20 crores out of the total outstanding comprising out principle sum of Rs.240 crores along with the interest, penal interest and other amount payable under the loan agreement dated 30.08.2011. The aforesaid conversion of the loan was a part of the recovery initiatives and/or proceedings made by the applicant. As per the records submitted by the applicant, the applicant holds 24.5% of equity shares of the corporate debtor.

ii) We have also perused the Report of the IRP dated 14.08.2017, which was submitted to the Adjudicating Authority on 16.08.2017. Upon perusal of the Report, subsequent to inviting claims from Financial Creditor, twenty (20) Financial Creditors submitted their claim and after applying the criteria of related party as per Section 5(24) of the

IBC 2016, the CoC was reconstituted with eighteen (18) Financial Creditors excluding SREI and Mr. V. Shankar

iii) From the records, the Bench also observed that the IRP gave an opportunity of personal hearing on 08.09.2017 in compliance with Principles of Natural Justice and therefore, the applicant cannot have any grievance in this regard and the IRP has acted in accordance with law. The IRP has also observed that the applicant/financial creditor is a major shareholder of the corporate debtor.

iv) From the facts, the Bench observed that the applicant is the major shareholder and the largest financial creditor of the Corporate Debtor viz. Deccan Chronicle Holdings Limited.

v) Section 5(24)(j) of the IBC states that "any person who controls more than twenty percent of voting rights in the corporate debtor on account of ownership or voting agreement".

vi) The Bench vide order dated 21.08.2017 directed that the results of e-voting conducted as per the provisions of section 25(5)(b) of IBBI (IRP for Corporate Persons) Regulations, 2016 is kept in abeyance till the next date of hearing. The above direction was periodically extended in view of the contentions raised by the applicant i.e. SREI Infrastructure Finance Limited

vii) As per the undisputed facts of the case, the applicant holds 24.5% shares of the Corporate Debtor. As discussed supra, the loans of the applicant/financial creditor was converted into equity shares in the year 2011 and thereby the applicant/SREI had become the equity shareholder/major shareholder of the corporate debtor having voting rights on account of ownership of equity shares. The applicant's pleading that it merely has 24.5% equity shares of the Corporate Debtor, but it did not exercise 'control', does not have any consequence and according to us is immaterial, irrelevant since to exercise control or not (by having more than the threshold percentage

of shares) is sole discretion of the applicant. However, the undisputed fact is that the applicant has more than 20% voting rights on account of ownership of the corporate debtor.

viii) Learned Counsel for the financial Creditor harped upon the term "control" with reference to definition given in the Companies Act. The Counsel strongly contended that the intention of the legislature in making the Code more effective was allowing the largest creditor in the CoC and submitted that his rights as lender have been affected and he has been put to maximum loss if it is not representing the CoC.

ix) For the sake of convenience we have also reproduced the term "Control" as defined in Section 2(27) of the Companies Act, 2013 and SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

"2(27) – "control" shall include the right to appoint majority of the director or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or in concert, directly or including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner"

SEBI (Acquisition of shares and takeovers) Regulations, 2011 –

2(e) – 'control' includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

x) Upon perusal of the term control, defined in both the Companies Act, and SEBI Takeovers Regulations, the finer distinction between the two the word "shall" is included in the Companies Act, 2013. The term 'Control' is an inclusive definition which inter-alia gives right

to appoint majority of the director or to control the management or policy decisions etc. According to our considered view, by virtue of shareholding or management rights or shareholders agreements etc. The shareholder gets those rights and exercising those accrued rights is upto the shareholder. Further, from the available facts, it is also worthwhile to record that the last AGM was held on 28.03.2013 and Board Meeting of the Corporate Debtor was held on 30.06.2014. Therefore, even the applicant company wishes to appoint directors, to control the management or policy decisions of Corporate Debtor, according to us, legally it would not have been possible in the absence of AGM/Board Meetings for quite long time.

xi) The above finding of the Bench is also supported from the definition of related party as per Section 5(24) of IBC, 2016 reads as follows:-

5(24) "related party", in relation to a corporate debtor, means –

(a) A director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

(b) A key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;

(c) A limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is partner;

(d) A private company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two percent, of its paid-up share capital etc.

In all the above sub-clauses of Section 5(24) of the IBC, mere presence of a director or partner or a relative of director, key managerial personnel, manager, holding more than 2% share etc., is sufficient to classify as a related party irrespective of whether a particular director or partner or key managerial personnel participates/actively participates in the affairs of the company/corporate debtor.

xii) The Bench is also of the considered view that having voting rights of the corporate debtor is a crucial fact and the mode of obtaining ownership is immaterial i.e. on account of conversion of loan into equity or by way of fresh allotment of shares/rights issue or acquiring the shares through Stock Exchange platform and therefore the pleadings of the applicant to distinguish/differentiate its shareholding with the shareholding of the others is also without any merit.

8. We also concur with the submissions of the Canara Bank that even if the applicant has not permitted to vote, the claim of the applicant shall have to be taken into a consideration being a creditor whether as secured or unsecured creditor.

9. Therefore, we agree with the conclusion arrived at by the IRP and also with the submission of the financial creditor i.e. Canara Bank that the applicant is a related party, therefore, the prayer of the applicant is without any merits, legally not tenable, therefore, all the prayers of the applicant i.e. SREI Infrastructure Finance Limited are deserved to be rejected and the applicant is not entitled to be a member of the Committee of Creditors as prayed for.

10. Accordingly, the C.A.No.153/2017 is dismissed. No order as to costs.

Sd/-
RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

Sd/-
RAJESWARA RAO VITTANALA
MEMBER (JUDICIAL)

CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL

for Dy. Regr./Asst. Regr/Court Officer/
National Company Law Tribunal, Hyderabad Bench

प्रमाणित प्रति
CERTIFIED TRUE COPY
केस संख्या
CASE NUMBER C.A.No.153/2017 in CP(IB)No.41/7/HBD/2017
निर्णय का तारीख
DATE OF JUDGEMENT 16.11.2017
प्रति तैयार किया गया तारीख
COPY MADE READY ON 17.11.2017