

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.202
IA 340 of 2020 in CP(IB) 561 of 2018

Order under Section 60(5) IBC,2016

IN THE MATTER OF:

Intec Capital Ltd.

.....Applicant

V/s

Arvind Gaudana IRP of Vrundavan Ceramic Pvt. Ltd.

.....Respondent

Order delivered on: 13/03/2023

Coram:

Dr. Madan B. Gosavi, Hon'ble Member(J)

Mr.Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-SD-
KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

-SD-
DR. MADAN B. GOSAVI
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I**

**IA NO. 340 of 2020 in
CP (IB) NO. 561/7/NCLT/AHM/2018**

IA NO. 340 of 2022

[An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016]

M/s Intec Capital Limited

Having office at:
Manjusha Building,
57, Nehru Place,
New Delhi 110019.

....Applicant

Versus

Mr. Arvind Gaudana

Interim Resolution Professional
For Vrundavan Ceramic Private limited
Having office at:
307, Ashiravad Paras, Nr. Prahladnagar Garden,
Corporate Road, Prahladnagar, Satellite,
Ahmedabad-380015

....Respondent

In the matter of:

CP (IB) 561 of 2018

[An application under section 7 of Insolvency and Bankruptcy Code, 2016]

State Bank of India

....Financial Creditor

Versus

Vrundavan Ceramic Private Limited

....Corporate Debtor

Order pronounced on 13.03.2023

Coram: DR. MADAN B. GOSAVI, MEMBER (J)
KAUSHALENDRA KUMAR SINGH, MEMBER (T)

Appearance:

Mr. Lalit M Patel, Adv. along with Mr. Urvesh Gor, Adv., Mr. Arpit Singhvi, Adv. appeared for the Applicant

Mr. Ravi Pahwa, Adv. along with Ms. Pragati Bansal, Adv. appeared for the Respondent

ORDER

1. This application is filed by the Applicant under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (**IBC, 2016**) for seeking necessary orders and directions to the Respondent who is the Resolution Professional (**RP**) of M/s. Vrundavan Ceramic Private Limited to verify and accept the claim of the Applicant without any further delay and to consider the Applicant as Secured Financial Creditor of the Corporate Debtor
2. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process (**CIRP**) by this Adjudicating Authority vide order dated 21.01.2020 in an application filed by State Bank of India under section 7 of IBC, 2016.
3. The Applicant is a Non-Banking Financial Institution (**NBFC**) duly registered with Reserve Bank of India. The Corporate Debtor, as claimed by the Applicant, provided Corporate Guarantee in favour of the Applicant in relation to finance provided by the Applicant to 2 entities namely M/s. Gokul Ceramics Private Limited and M/s. Umiya Ceramics Private Limited in the year 2013.

4. Previously, IA No. 340 of 2020 in CP (IB) No. 561 of 2018 was reserved for order on 18.01.2021 and dismissed and disposed of vide order dated 05.02.2021 due to lack of demand notice as per Clause 6 of Deed of Guarantee and due to which the guarantee stood un-invoked and consequently, the claim filed by the Applicant was not ascertained and accrued liability. It was also held that time barred claims or contingent claims could not be admitted during CIRP. A time barred debt arising out of a Contract of Guarantee cannot be entertained in CIRP or Liquidation proceedings. Further, the interim order passed vide order dated 11.11.2020 whereby the RP was directed to proceed with CIRP only after disposal of this IA was also vacated and the RP was directed to proceed with CIRP as per rules.

5. Thereafter, Intec Capital Limited filed Company Appeal No. 220 of 2021 before Hon'ble National Company Law Appellate Tribunal (**NCLAT**) against the order passed by the Adjudicating Authority on 05.02.2021. The Hon'ble NCLAT vide order dated 07.02.2022 allowed the appeal based on the fact that arbitration award against the Corporate Debtor was not placed before the Resolution Professional and the Adjudicating Authority had not taken cognizance of the award and rejected the claim filed by the Appellant. Hence, Hon'ble NCLAT remanded the matter for a decision afresh on the claim filed by the Appellant. The Hon'ble NCLAT also directed the Adjudicating Authority to restore IA No. 340 of 2020 in CP (IB) No. 561 of 2018 to its file. Further, the Hon'ble NCLAT also directed the RP to consider the claims of Intec Capital Limited and to proceed further in accordance with law.

6. Thereafter, IA No. 340 of 2020 in CP (IB) No. 561 of 2018 was restored vide order dated 20.09.2022 passed in IA No. 755 of 2022 in CP (IB) No. 561 of 2018.

7. Pursuant to the order dated 07.02.2022 passed by the Hon'ble NCLAT, it is submitted by the Applicant that vide email dated 08.02.2022, intimated the same to RP and further requested the RP to admit the claim of the Applicant which was filed on 13.02.2020. In the said email, the Applicant also requested the RP to conduct the meeting of Committee of Creditors (**CoC**) and to share the relevant documents. The Applicant vide its various emails dated 14.02.2022, 15.02.2022, 22.02.2022, 26.02.2022 and 22.03.2022 requested the RP to call for a CoC meeting. Despite repeated requests, the RP failed to provide the information/documents pertaining to the CIRP and the Corporate Debtor.

8. It is also submitted by the Applicant that the RP conducted the 15th CoC meeting on 23.02.2022 in haste without informing/inviting the Applicant to justify its claim as a Secured Financial Creditor. Thereafter, in 16th CoC meeting was conducted on 22.03.2022, wherein the CoC was reconstituted and the Applicant was the part of CoC in capacity of an Unsecured Financial Creditor. The voting rights were revised after reconstitution as mentioned hereunder:

Reconstituted CoC	Class of Creditor	Claim Amount (Rs.)	Voting Right
State Bank of India	Secured Financial Creditor	30,23,57,068.16/-	75.35%
Intec Capital Limited	Unsecured Financial Creditor	9,89,20,473.25/-	24.65%
Total		40,12,77,541.141/-	100%

9. It is also submitted by the Applicant that RP submitted a statement in 16th CoC meeting dated 22.03.2022 that no charge was created by the Corporate Debtor for the Corporate Guarantee for the loan facilities availed by the Principal Borrower. In this regard, the Applicant submitted an Undertaking dated 25.07.2013 wherein the Corporate Debtor has clearly confirmed the creation of hypothecation/charge on Kerajet Eco K700x/350-

6 Colour-Inkjet Printer with standard accessories as additional collateral to the Applicant in capacity of Corporate Guarantee in the Loan Agreement for the sum of Rs. 1,88,76,480/- with M/s. Gokul Ceramic Private Limited (Borrower).

10. Further, it is submitted by the Applicant that subsequent to the Undertaking dated 25.07.2013 given by the Corporate Debtor, a No Objection Certificate dated 02.09.2013 was also issued by the State Bank of India in favour of the Applicant with respect to the charge created by the Corporate Debtor upon the Corporate Guarantee, with respect to the loan facilities availed by the Principal Borrowers.

11. It is submitted by the Respondent that upon verification of MCA records, it was found that the Corporate Guarantee given by the Applicant is not secured by the Corporate Debtor. Therefore, the Applicant is required to be treated as Unsecured Financial Creditor. It is also submitted that based on the documentary evidence available, it is clear that no charge has been created or has been registered by the Applicant as required under section 125 of the Companies Act, 1956 or under section 77(1) of the Companies Act, 2013.

12. It is also submitted that as per Regulation 21 of IBBI (Liquidation Process) Regulations, 2016, the existence of security interest may be proved by a Secured Creditor on the basis of the records available in an Information Utility, if any, the certificate or registration of charge issued by the Registrar of Companies, proof of registration of charge with the Central Registry of Securitization Asset Reconstruction and Security Interest of India.

13. It is also submitted by the Respondent that after the 15th CoC meeting which was held on 23.02.2022, where the Respondent apprised the CoC about the order dated 07.02.2022 of Hon'ble NCLAT directing the Respondent to verify the claim of the Applicant as a Financial Creditor afresh. The CoC took note of the same. The Respondent also asked Mr.

Kamleshbhai Patel, Suspended Management about any information available with him relating to security interest created against the Guarantee given by Corporate Debtor to the Applicant. However, Mr. Kamleshbhai Patel was not aware about any security interest created by the past management and hence, no such documents were available. Since, no record of security created on the assets of the Corporate Debtor was available and since charge not created in favour of the Applicant as per MCA record, the claim of Applicant was admitted as Unsecured Financial Creditor. Also, no disclosure regarding contingent liability is made in the books of the Corporate Debtor as per the Accounting Standard.

14. We have heard the learned counsels for the Applicant and Respondent and perused the material on record. We have noted that the Corporate Debtor was admitted into CIRP by this Adjudicating Authority vide order dated 21.01.2020 in an application filed by State Bank of India under section 7 of IBC, 2016. Previously, IA No. 340 of 2020 in CP (IB) No. 561 of 2018 dismissed and disposed of vide order dated 05.02.2021 due to lack of demand notice as per Clause 6 of Deed of Guarantee and due to which the guarantee stood un-invoked and consequently, the claim filed by the Applicant was not ascertained and accrued liability. It was also held that time barred claims or contingent claims could not be admitted during CIRP. A time barred debt arising out of a Contract of Guarantee cannot be entertained in CIRP or Liquidation proceedings. Further, the interim order passed vide order dated 11.11.2020 whereby the RP was directed to proceed with CIRP only after disposal of this IA was also vacated and the RP was directed to proceed with CIRP as per rules.

15. Thereafter, Company Appeal No. 220 of 2021 was filed by Intec Capital Limited before Hon'ble National Company Law Appellate Tribunal (NCLAT) against the order passed by the Adjudicating Authority on 05.02.2021. The Hon'ble NCLAT vide order dated 07.02.2022 allowed the appeal based on the fact that arbitration award against the Corporate Debtor was not placed before the Resolution Professional and the

Adjudicating Authority had not taken cognizance of the award and rejected the claim filed by the Appellant. Hence, Hon'ble NCLAT remanded the matter for a decision afresh on the claim filed by the Appellant. The Hon'ble NCLAT also directed the Adjudicating Authority to restore IA No. 340 of 2020 in CP (IB) No. 561 of 2018 to its file. Further, the Hon'ble also directed the RP to consider the claims of Intec Capital Limited and to proceed further in accordance with law. Thereafter, IA No. 340 of 2020 in CP (IB) No. 561 of 2018 was restored vide order dated 20.09.2022 passed in IA No. 755 of 2022 in CP (IB) No. 561 of 2018.

16. It is also noted that it shall be the duty of every company within or outside India to create charge on its property, assets or any of its undertakings whether tangible or otherwise with the Registrar of Companies within 30 days of its creation. But, no charge is created by the Corporate Debtor for the Corporate Guarantee for the loan facilities availed by the Principal Borrower as required under section 125 of the Companies Act, 1956 or under section 77(1) of the Companies Act, 2013. For benevolent reference, section 77(1) of the Companies Act, 2013 is reproduced below:

“77(1) It shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation.”

17. Further, as per Regulation 21 of IBBI (Liquidation Process) Regulations, 2016, the existence of security interest may be proved by a Secured Creditor on the basis of the records available in an information utility, certificate or registration of charge issued by the Registrar of

Companies, proof of charge with the Central Registry of Securitization Asset Reconstruction and Security Interest of India. For benevolent reference, Regulation 21 of IIBI (Liquidation Process) Regulations, 2016 is reproduced below:

“21. The existence of a security interest may be proved by a secured creditor on the basis of-

(a) the records available in an information utility, if any;

(b) certificate of registration of charge issued by the Registrar of Companies; or

(c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India.”

18. The Applicant has not been able to satisfy any of the conditions as enumerated in Regulation 21 of IBBI (Liquidation Process) Regulations, 2016. The Applicant has attached No Objection Certificate dated 02.09.2013 issued by State Bank of India for Kerajet Eco K700x/350-6-Colour-Inkjet Printer where it is stated that, “we have no objection, if Intec Capital Limited takes this machine as an additional collateral and create first and exclusive charge on this machine. However, no such charge has been created by Intec Capital Limited as per the records available on MCA portal.

19. The Hon’ble NCLAT also held in the matter of *Indiabulls Housing Finance Ltd. vs. Mr. Samir Kumar Bhattacharya [Company Appeal (AT) (Insolvency) No. 830 of 2019* that in absence of charge being registered, the Appellant could not be treated as Secured Financial Creditor. For benevolent reference the relevant extract is reproduced below:

“It is thus clear that the CoC had made it clear that in absence of Charge being registered, the Appellant could not be treated as Secured Financial Creditor. Although the transaction is stated to be of 2012, it is clear that the Charge was not got registered either by the Corporate Debtor or the Appellant till now on

03.10.2019 which is after the Resolution Plan was approved on 04.07.2019. Section 77 of the Companies Act, 2013 required the Charge to be registered and the Appellant had an option to resort to even Section 78 of Companies Act, 2013, if there were any grievances. Not having done so, when CIRP started trying to rely on the equitable mortgage without a charge created, we do not find there was any error in the CoC meetings which in its wisdom did not recognize creation of security. The transaction did not even reflect in the books of account of the Corporate Debtor. Appellant should be happy that it has been at least treated as Financial Creditor. Appellant took no actions since 2012 and till late stage of CIRP. Charge registered after Resolution Plan is approved cannot be considered.”

20. As already mentioned, the RP had already considered the claim of the Applicant but treated that in category of unsecured loan. Keeping in view the facts as discussed above, we find no infirmity in the decision of RP in considering the claim of the Applicant as Unsecured Financial Creditor. Accordingly, the prayer of the Applicant to consider its claim as Secured Financial Creditor is not acceptable and rejected. This application is disposed of accordingly.

**-SD-
KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)**

**-SD-
DR. MADAN B. GOSAVI
MEMBER (JUDICIAL)**