

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 1131/KB/2022
In
Company Petition (IB) No. 302/KB/2021

*An Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016
(IBC) read with Rule 11 of the National Company Law Tribunal Rules, 2011.*

IN THE MATTER OF:

YES BANK LIMITED *... Financial Creditor.*
Verses**SARGA HOTELS PVT. LTD.** *... Corporate Debtor.*

And

IN THE MATTER OF:

Rishima SA Investments LLC (Mauritius), having its registered office at first floor,
Wing A, Cyber Tower 1, Ebene Cybercity, Mauritius.

.... Applicant.

Verses

Avishek Gupta, Resolution Professional of Sarga Hotels Pvt. Ltd.

... Respondent.

Date of Hearing: October 11, 2023.

Date of Pronouncement: November 30, 2023.

CORAM:

**SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)
SHRI ARVIND DEVANATHAN, MEMBER (TECHNICAL)**

Appearance:

For Resolution Professional:

1. Ms. Manju Bhuteria, Adv.;
2. Ms. Pooja Mahajan, Adv.;
3. Ms. Mahima Singh, Adv.;
4. Mr. Sourojit Dasgupta, Adv.;
5. Ms. Shreya Mahalwar, Adv. and,
6. Mr. Souvik Mazumdar, Adv.

For Rishima SA Investment LLC (Mauritius):

1. Mr. Debnath Ghosh, Adv.;
2. Mr. Satyaki Mukherjee, Adv. and,
3. Ms. Mini Agarwal, Adv.

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For Successful Resolution Applicant:

1. Mr. D. N. Sharma, Adv.;
2. Mr. Orijit Chatterjee, Adv.;
3. Ms. Swati Dalmia, Adv. and,
4. Ms. Arpita Dey, Adv.

ORDER

Per Arvind Devanathan, Member (Technical)

1. This Court is congregated through hybrid mode.
2. Heard the Learned Counsels for both parties.

Brief Facts of the case:

3. This Application has been filed by **Rishima SA Investments LLC (Mauritius)**, hereinafter referred to as “**Applicant**” under Section 60(5) of IBC challenging the communications dated 01.06.2022 and 16.03.2022 of **Mr. Avishek Gupta, the Resolution Professional (RP) of Sarga Hotel Pvt Ltd (Corporate Debtor)** hereinafter referred to as “**Respondent**” rejecting the claim of the Applicant and the Applicant herein is seeking a direction from this Adjudicating Authority that:
 - a) *Allow the present Application preferred by the Applicant and set aside the impugned communications dated 01.06.2022 and 16.03.2022;*
 - b) *Direct the RP of the Corporate Debtor to allow of its claim of Rs. 1,32,89,75,268.00/- made by the Applicant in Form C dated 25.02.2022 as a ‘financial debt’;*
 - c) *Direct the RP to allow the Applicant to participate in the meeting of the Committee of Creditors in the capacity of a financial creditor;*
 - d) *In the alternative to Prayers (b) and (c), direct the RP to allow its claim of Rs. 1,32,89,75,268.00/- made by the Applicant in Form F dated 16.03.2022 as ‘other debts’*
 - e) *Any other order as may be deemed fit and proper.*
4. The Applicant is a financial investor holding 35% equity shares in Sarga Hotel Pvt Ltd, the Corporate Debtor herein (for brevity “CD”).
5. The Applicant is a decree holder by virtue of final award dated 12.07.2020 read with partial award dated 30.04.2019 both of which are foreign arbitral awards

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(Singapore seated arbitration forums) against Shristi Infrastructure Development Corporation Ltd (hereinafter referred to as SIDCL) and the Corporate Debtor (CD).

6. By virtue of the foreign arbitral awards SIDCL and the Corporate debtor herein are liable to pay Rs. 132,39,33,646/- apart from legal costs amounting to Rs. 50,41,622/- to the Applicant.
7. Based on these awards the Applicant filed Form C dated 25.02.2022 with the resolution professional of the corporate debtor as a financial debt, during the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor.
8. The said claim was rejected by the Resolution professional of the Corporate Debtor vide his E-Mail dated 16.03.2022 on the ground that the claim of the Applicant did not meet the criteria of a “financial debt”, pursuant to which the Applicant filed his claim in Form F dated 21.03.2022 in protest, in the capacity of “Other Creditors”.
9. The need for foreign arbitral awards arose due to the fact that the Applicant acquired 35% shareholding in the corporate debtor by investing Rs. 80 Crore. As per the Share subscription and shareholders agreement (SSHA) made between the parties SIDCL and the CD was obliged to purchase Applicant’s share holding in corporate debtor at a price equivalent to the amount invested plus a return of 25% per annum as IRR.
10. In terms of clause 14(2) of SSHA the SIDCL /Corporate Debtor was obliged to purchase the Applicant shareholding upon reflex of time at fair market value which was to be determined as per the formula provided in SSHA.
11. Since there was a breach of SSHA, the SIDCL and the Corporate debtor failed to purchase the shareholding of the applicant as agreed in the said SSHA, the Applicant initiated dispute for arbitration under the Singapore Arbitration Act 2001 as provided in SSHA, against SIDCL and the corporate debtor.
12. After several rounds of hearing and litigations a final award was made dated 12-07-2020 by the Arbitral Tribunal, directing SIDCL and the Corporate debtor to

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pay the sums indicated above in para 3 of this order. The said foreign awards have become final in the international arbitration forums.

13. The Applicant has filed petition before the Honourable High Court, Delhi for enforcement of these awards in terms of Arbitration and Conciliation Act, 1996. The same is pending for disposal.
14. In the meanwhile, Corporate Insolvency Resolution Process of the Corporate debtor was initiated on 11.02.2022 pursuant to which the Applicant has submitted his claim in Form C as financial debt and then thereafter based on Resolution professional instruction in Form F as other debt but under protest.
15. The Resolution professional relying upon the observation made by the Honourable Supreme Court of India in the case of *Essar Steel Ltd v. Satish Kumar Gupta and others*, reported in (2020) 8 SCC 531: MANU/SC/1577/2019, the resolution professional admitted claim of Applicant as contingent claim for notional value of **Rs. 1/-**.
16. Aggrieved by the action of Resolution professional in admitting the claim of the Applicant as “other debts” and that too at a notional value of Rs.1 /- the Applicant has filed this application seeking direction to the Resolution professional to allow the claim of INR 132,89,75,268/- made by the Applicant in Form C dated 25.02.2022 as a financial debt and direct the resolution professional to allow the Applicant to attend the meeting of committee of creditors (CoC) in the capacity of financial creditor.
17. Alternatively, relief has been sought for directing the Resolution professional to at least allow the claim of INR 132,89,75,268/- made by the applicant in Form F dated 16.03.2022 as “Other Debts”.

Applicant's contention:

18. The Learned Counsel for the applicant submits that being a decree holder of a foreign arbitral award, the sums due on account of such award would be in the nature of financial debt and therefore he is entitled to be treated as a financial

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creditor and consequently he should be allowed to participate in the CoC meetings.

19. Learned counsel further submits that in any event his claim should be admitted at least as other debts and be dealt with the resolution plan in full.
20. The learned counsel submits that the execution of the foreign awards is pending before Honourable Delhi High Court. The Hon'ble Delhi High Court in its interim order dated 30.05.2019 held in Para 11 that "Section 48 of the Arbitration and Conciliation Act gives circumstances where enforcement of a foreign award may be refused at the request of the party against whom it is invoked. *"Unless such grounds are established, the court has to prima-facie assume that the foreign award that has been produced before it is capable of being enforced and therefore interim protection in favour of the petitioner producing such an award and seeking enforcement of the same."*
21. The matter was taken to the Honourable Supreme Court by SIDCL challenging the Jurisdiction of Honourable Delhi HC in entertaining such petition for enforcement under Section 48 & 49 of Arbitration & Conciliation Act.
22. The Honourable Supreme Court vide its order July 19th 2019 disposed it by directing the Delhi High Court to decide on jurisdiction to enforce the award. The Honourable Supreme court also directed that, if the High Court comes to a conclusion that it has jurisdiction, then it has to proceed under Section 48 of the Arbitration and Conciliation Act 1996 for enforcement.
23. Thus, even after taking the matter to Supreme Court there is not an order against the foreign arbitral award till date.
24. The Learned Counsel further submits that no where in the IBC Code or rules or in the regulations made thereunder Resolution professional has been given power to adjudicate a claim and admit it for Rs. 1 as against a claim for Rs. 132.89 Cr.
25. The Learned Counsel submits that reliance placed by resolution professional on the Essar Steels judgement of the honourable supreme court is ill placed as there

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were disputes pending before various authorities in respect of the said amounts in that case.

26. Further it is submitted that the facts and circumstances of the *Essar Steel* judgment is completely different from the facts and circumstances of the case in hand. Therefore, the Resolution Professional's admission of the claim made by the Applicant for a nominal amount of Rs. 1/- against total claim of 132,89,52,568 is arbitrary, illegal and liable to be set aside.

Per contra, Respondent's Submission:

27. The Learned Counsel appearing for the for the respondent Resolution Professional submits that the claim of the Applicant cannot be admitted as a financial debt because of the arbitral awards and the cause for arbitral award arose on account of breach of condition contained in the SSHA. Therefore, the Applicant never lent gave any amount as loan or gave any financial accommodation to the corporate debtor for his claim to be treated as a "financial debt" in terms of Section 5(8) of the IBC 2016.
28. The Learned Counsel further submits that since the Applicant is a decree holder of a foreign arbitral award the claim made by him can be admitted as other debts and accordingly the same was admitted.
29. The Learned Counsel for the RP further refers to the judgment of the Hon'ble Supreme Court of India in *Essar Steel v. Satish Gupta and Others (Supra)*, where the Apex Court held that *the resolution professional was correct in only admitting the claim at a notional value of INR 1 due to the pendency of disputes with regard to these claims.*
30. It is further submitted that since the enforcement petition filed by the Applicant has been challenged by SIDSL as well as Corporate Debtor before the Honourable Delhi High Court, relying upon the Honourable Supreme Court Judgment rendered in the case of *Essar Steel v. Satish Gupta and Others (Supra)*, the claim of the Applicant herein has been admitted for a notional value of Rs. 1/-.

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Analysis and findings of this Adjudicating Authority:

- 31.** For the sake of brevity, we are not reproducing the complete details of the case as what needs to be addressed in this application are:
- a.** Whether the claim made by the Applicant would qualify as “financial debt” or “other debt”.
 - b.** Whether the Resolution professional’s action of admitting only Rs. 1 against claim of Rs. 132,89,52,568/- is legally correct or not.
- 32.** It is not in dispute that the foreign arbitral award was issued by the Singapore seated arbitration forums, pursuant to disputes relating to breach of conditions mentioned in the Subscription and shareholder agreement (SSHA) made between SIDCL, Corporate Debtor and the Applicant. As per SSHA the Applicant shareholding of 35% has to be purchased by SIDCL/ Corporate Debtor for an amount equivalent to the invested amount plus 25% per annum as IRR.
- 33.** Since, this condition was breached, that lead to disputes in the Singapore seated Arbitrary forums leading to arbitral awards in favour of the applicant.
- 34.** At no point in time the applicant has given any loan or made any financial accommodation to be called as financial creditor. In other words, none of the ingredients mentioned in Section 5(8) of IBC which deals with “financial debt” are present in the transactions between the Applicant, SIDCL and Corporate debtor. In this context, we would refer Section 5(8) of the IBC, reproduced verbatim as:

“(8) “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

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(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”

- 35.** Therefore, we are of the view that the Applicant cannot be called as financial creditor, and he is not entitled to participate in the Committee of Creditors (CoC) meeting of the corporate debtor during CIRP process.
- 36.** Since, the Applicant is a “decree holder” of a foreign award which is already stamped as a decree the same will have to be considered as debt. We have already stated that the debt arising out of these foreign awards cannot be considered as financial debt, but the same can be treated as “Other debts”. Therefore, the action of the Resolution professional in treating this debt as “other debt” cannot be faulted.

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37. Now we will deal with the Resolution professional's action of admitting the claim for notional value of only INR 1. In the judgment of *Essar Steels Ltd Vs. Satish Kumar Gupta and Others (Supra)*, the Honourable Apex Court has noted that the resolution professional admitted the claim of the respondent notionally at INR 1 on the ground that there were several disputes pending before various authorities in respect of said amount. In view of the above the Honourable Supreme Court held that the resolution professional was correct at only admitting the claim at notional value of INR 1 due to the pendency of disputes with regard to these claims.
38. Per-contra in the matter in hand, the claim has reached finality as on date in the view of decree of competent foreign arbitral forums and only the execution is pending before the Honourable High Court, Delhi.
39. Considering the prima-facie view of the Delhi High Court as already stated by the Learned Counsel for the Applicant, enforcement can be challenged only on limited grounds mentioned in Section 47 to 49 of Arbitration & Conciliation Act 1996.
40. When that being the case, the Resolution Professional should have admitted the claim in full and provision should have been made out of the Resolution plan value. On similar facts and circumstances, the Ld. NCLT, Bangaluru Bench has decided the case in the same manner as it has been done in the case in hand. The decision of the Bengaluru Bench is in the case of *United Spirits Limited v. Mr. Kondisetty Kumar Dushyantha and others*, being I.A. 307 of 2021 in CP.(IB)No. 147/BB/2018 wherein, it is held that:

“24. ... Therefore, the award by the Arbitral Tribunal is binding on all the parties till is set aside. Accordingly, the Resolution Professional is hereby directed to admit the claim of the Applicant herein, subject to the outcome of the Application pending with the Hon'ble Commercial Court; and place the same before the CoC. It cannot be disposed by providing only notional amount of Re. 1/ as has been done in the case.”

(Emphasis added)

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41. However, the plan could state that the value provided against the Applicant's claim in the plan would be paid subject to the outcome of the execution petition pending before the Hon'ble Delhi High Court and till such time amounts could be held in escrow account.
42. In case the Applicant fails in his execution petition, the amount held in the escrow account can be redistributed as per the Commercial wisdom of CoC. The provision in the plan against the claim made by the Applicant may be made based on the commercial wisdom of CoC but to be made on fair and equitable basis keeping in mind, that one of the objectives of IBC is to balance the interests of all the stakeholders.
43. In view of above this application being **I.A. (IB) 1131/KB/2022** filed by Rishima SA Investments LLC (Mauritius), Applicant herein is partly allowed and disposed of in terms of the directions above.
44. Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

Arvind Devanathan
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 30th Day of November, 2023.

Bose, R. K. [LRA]/ AR_Steno